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[Weekly Reporter, Oct. 28, 1893.]

THE

WEEKLY REPORTER,

1892-93

(FORTY-FIRST YEAR),

CONTAINING

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE

WITH

APPEALS TO THE HOUSE OF LORDS AND THE PRIVY COUNCIL,

FROM THE 24TH OF OCTOBER, 1892, TO THE 12TH OF AUGUST, 1893.

TOGETHER ALSO WITH SOME CASES DECIDED PREVIOUSLY TO THAT PERIOD.

TO WHICH ARE ADDED

DIGESTED INDEX AND A TABLE OF THE NAMES OF ALL CASES

REPORTED DURING THAT PERIOD,

WITH

REFERENCES TO CONTEMPORANEOUS REPORTS AND PUBLICATIONS,

Prepared by WILLIAM FREDERICK BARRY, Barrister-at-Law.

VOL. XLI.

EDITED BY

MARTIN JOSEPH BLAKE,

OF LINCOLN'S INN, BARRISTER-AT-LAW.

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PREFACE.

In the forty-first volume of the WEEKLY REPORTER the characteristics of the publication will be found unaltered. Every endeavour has been made to render the reports succinct and accurate, and they have been published as soon as possible after the decisions have been pronounced. It is believed that the cases in this volume may be cited with the confidence which the Profession has always placed in the WEEKLY REPORTER.

The Annual Digest contains, as usual, a summary of all the cases published during the past year in the WEEKLY REPORTER and in the Law Reports, the Law Journal Reports, and the Law Times Reports, besides those given in the Irish Law Reports.

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FROM THE 24TH OF OCTOBER, 1892, TO THE 12TH OF AUGUST, 1893.

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LORD MACNAGHTEN,
LORD MORRIS,
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1892—93.

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MARTIN JOSEPH BLAKE,

BARRISTER-AT-LAW.

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COURT OF APPEAL (No. II.)	MARTIN JOSEPH BLAKE, ARTHUR LAWRENCE, WILLIAM ANDREW WOODS, and WILLIAM SHALLCROSS GODDARD, Barristers-at-Law.
CHANCERY DIVISION. *Mr. Justice Chitty*	GILBERT ROWLAND ALSTON and JOHN FELIX WALEY, Barristers-at-Law.
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Mr. Justice Stirling	WILLIAM ANDREW WOODS and WILLIAM SHALLCROSS GODDARD, Barristers-at-Law.
Mr. Justice Kekewich	FRANCIS THEODORE DUKA and CHARLES CARRINGTON HENSLEY, Barristers-at-Law.
Mr. Justice Romer	JAMES WILLIAM GREIG and CHARLES HERBERT BROWN, Barristers-at-Law.
Mr. Justice Vaughan Williams	VILLIERS DE SAUSSURE FOWKE, Barrister-at-Law.
QUEEN'S BENCH DIVISION	Sir SHERSTON BAKER, Bart., and THOMAS REGINALD COLQUHOUN DILL, Barristers-at-Law. CECIL MAURICE CHAPMAN and JAMES EDWARD ALDOUS, Barristers-at-Law. JOHN PAGET MELLOR and FRANCIS OCTAVIUS ROBINSON, Barristers-at-Law.
" (CASES IN BANKRUPTCY)	CHARLES FRANCIS MORRELL, Barrister-at-Law.
PROB., DIV., and ADM. DIVISION	(Prob. & Div.)...JOHN GERARD LAING, Barrister-at-Law. (Adm.) .....CHARLES FUHR. JEMMETT, Barrister-at-Law.
CROWN CASES RESERVED	THOMAS REGINALD COLQUHOUN DILL, Barrister-at-Law.

A TABLE

OF

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WITH REFERENCES TO THE CONTEMPORANEOUS REPORTS.

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Court of Appeal.

From Chan. Div. (Lindley, Lopes, and A. L. Smith, L.JJ.) — July 27, 28; Aug. 10, 1892.

In re SOVEREIGN LIFE ASSURANCE CO. (*a*.)

Company—Winding up—Purchase by company of its own shares—Extinguishment—Contributories.

Reduction of capital is a necessary consequence of a statutory power enabling a company to invest its assets in the purchase of its own shares. Shares so purchased are, by the purchase, ipso facto *extinguished; and, in a winding up of the company, neither can the company be put on the list of its own contributories, nor can any call be made upon the other shareholders in respect of such shares.*

Appeal from a decision of Chitty, J.

The question was whether the purchase, under a statutory power, by a company of certain of its own shares extinguished those shares, thereby effecting a reduction of capital, or whether the shares were kept alive, with the effect of increasing proportionately the liability of the other shareholders.

The facts appear in the judgment of Lindley, L.J.

Chitty, J., held that the shares purchased were extinguished, and that no further call in respect of the amount unpaid-up upon them could be made upon the other shareholders.

The official liquidator appealed.

Farwell, Q.C., *Moulton, Q.C.*, and *Swinfen Eady*, for the official liquidator.—The company had express statutory power to purchase its own shares, and they are not extinguished. To hold that they are is to do an injustice by the merest technicality.

They cited *In re Imperial Credit Association, Chapman and Barker's case*, 15 W. R., at p. 336, L. R. 3 Eq., at p. 366; *Cree* v. *Somervail*, 28 W. R. 34, 4 App. Cas. 648; Lindley on Company Law, 5th ed., 805 (where the cases as to indemnity of trustees for a company are summed up); *Saunder's case*, 12 W. R. 502; *Trevor* v. *Whitworth*, 36 W. R., at p. 149, 12 App. Cas., at p. 424.

Byrne, Q.C., and *Lemon*, for contributories.—There was a merger of the shares by the purchase. A company cannot be a member of itself.

They referred to sections 38, 74, and 196 (sub-section 5) of the Companies Act, 1862, and *In re Dronfield Silkstone Coal Co.*, 29 W. R. 768, 17 Ch. D. 76 (at p. 83).

Farwell, Q.C., in reply.—The Act of Parliament has said that the company may purchase its own shares, but the respondent's argument comes to this, that they must say that that cannot be done.

Cur. adv. vult.

(*a*.) Reported by ARTHUR LAWRENCE, Esq., Barrister-at-Law.

August 10.—LINDLEY, L.J., delivered a written judgment as follows:—The object of this appeal is to obtain an order for a call upon shareholders, who have paid up their own shares in full since the company was ordered to be wound up, but who are said to be liable to make good a large portion of the capital of the company, which ought to be forthcoming for the payment of policies granted by the company. The company was formed in 1845, and was completely registered under the Joint-Stock Companies Regulation Act, 1844 (7 & 8 Vict. c. 110). Being completely registered, it became an incorporated company, but the liability of its shareholders was unlimited. It was governed by a deed of settlement, Its capital was £500,000, divided into 50,000 shares of £10 each, and £2 10s. per share was called up long ago, but no more had been called up by the directors before the company was ordered to be wound up. There was power to increase the capital, but no express power to reduce it. Nor was there any power enabling shareholders to surrender their shares. There was, however, power to forfeit shares, and power to alter the regulations. The directors were required to insert in every policy a declaration that the capital, stock, and funds of the company should alone be liable to answer and make good claims in respect of the policy, and that no director or proprietor should be in any case personally liable or subject to any such claims or demands or be in any wise charged by reason of such policy beyond the amount of his share of such capital stock or funds.

The directors were also required to keep three funds—viz. (1) the proprietors' guarantee fund, which represented paid-up capital; (2) the life assurance fund, which represented premiums on policies on which no advances were due to the company; (3) the general fund, which represented premiums on policies on which advances were due to the company, and other moneys. There were provisions for apportioning the profits accruing on the two last funds between the policy-holders participating in profits and the proprietors. The funds of the company not required to answer immediate claims and demands were to be invested, but the investment clause did not authorize the purchase of shares in the company itself. Life policies on which no advances were due were made payable (1) out of the life assurance fund, and (2) out of the proprietors' guarantee fund, to the exclusion of the general fund; whilst life policies on which advances were due to the company were made payable (1) out of the general fund, and (2) out of the proprietors' guarantee fund, to the exclusion of the life assurance fund. In 1861 a supplemental deed was executed altering the deed of 1845 in some respects, but there is nothing in the supplemental deed which requires notice on the present occasion. Such being the constitution of the company, it issued policies in the forms usually adopted by insurance companies formed under the Act of 1844, limiting the liability of the shareholders to the funds of the company. In 1860 the company obtained a private Act of Parliament (23 & 24 Vict.

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c. cxvii.) enabling it (amongst other things) to invest its own moneys in the purchase of its own shares. The company did, accordingly, at various times between 1860 and 1876, buy up 8,781 of its own shares. At first they were transferred to and were registered in the names of trustees for the company; but in 1881 they were transferred into the name of the company itself, and that is their position at the present time. Only £2 10s. has been paid up upon these shares. In July, 1889, the company was ordered to be wound up. Calls have been made on the shareholders beyond the amount of the shares held by them. But, the policy-holders being still unpaid, they have taken out a summons in the name of the liquidator to have a call of £7 10s. made upon the company in respect of the above-mentioned 8,781 shares, and to compel the members of the company who are on the list of contributories to pay that call, amounting in the whole to £65,857 10s. Chitty, J., dismissed the summons. Hence this appeal.

The appeal raises the following legal questions—viz., (1) What would be the rights of the policy-holders against the funds of the company and against its members if the Act of 1860 had not been passed? (2) How are these rights affected by that Act?

In order to answer the first of these questions it is necessary to read the policies and to ascertain how they have been construed by the courts. The policy was this (leaving out immaterial parts):—"If the assured shall die on or before a particular day or shall survive that day, and he or his assigns shall pay the premiums, then the funds or other property of the company shall be subject and liable, according to the provisions of the deed or deeds of settlement of the company, to pay to the executors, administrators, or assigns of the said assured, within three calendar months after satisfactory proof of the death of the said assured shall have been received at the office of the company, the sum of . . . and such further sum or sums as shall . . . be appropriated as a bonus or as bonuses or as an addition or as additions to this policy: provided also, that the capital stock of the company, or as much thereof as for the time being shall have been subscribed, and other the stocks, funds, securities, and property of the company remaining at the time of any claim or demand made, unapplied and undisposed of, and not absorbed by or required to answer or meet any prior claim or demand, or claims or demands, in pursuance of the trusts, powers, and authorities contained in the said deed or deeds of settlement, shall alone be liable to answer and make good all claims and demands upon the company in respect of this policy and all other policies granted by the company, and that no director or other proprietor of the company, his or her heirs, executors, or administrators, shall, by reason of any policy of assurance or instrument securing annuities . . . which any director has signed or may sign, or upon any other account, be in anywise individually liable or subject to any claim or demand, or claims or demands, against the company beyond the amount of the unpaid part of his particular share or shares in the said capital stock, or in such parts of the said capital stock as for the time being shall have been subscribed."

The true construction and legal effect of policies in this form are no longer open to doubt. They were settled thirty or forty years ago after much litigation both at law and in equity. The settled law upon the subject, so far as it bears on the present case, may be thus expressed—viz., (1) the policy-holders acquire no charge at law or in equity upon the funds of the company; (2) their right (when their policies become payable or provable against the company) is to be paid out of the then existing funds of the company, including its then uncalled-up capital; (3) they have no right to call upon any shareholder to pay more than the full amount of the shares held by him and unpaid up when the demand is made upon him.

These propositions will be found to be the net result of the following well-known decisions—viz., at law, *Halket* v. *Merchant Traders' Loan Association*, 13 Q. B. 960; *Hallett* v. *Dowdall*, 18 Q. B. 2; and *King* v. *Accumulative Assurance Co.*, 6 W. R. 12, 3 C. B. N. S. 151; and in equity, *Lord Talbot's case*, 5 De G. & S. 386; *Law* v. *London Indisputable Life Policy Co.*, 3 W. R. 154, 1 K. & J. 223; *Durham's case*, 4 K. & J. 517, *sub nom. In re Athenæum Assurance Co., Ex parte Prince of Wales Assurance Co.*, 6 W. R. 765; and *In re Albert Life Assurance Co., Bell's case*, 18 W. R. 688, 784, L. R. 9 Eq. 706.

For the purposes of this decision the first proposition is the more important. The non-existence of any charge on the funds of the company was finally determined by *In re State Fire Insurance Co.*, 11 W. R. 746, 1011, 1 Hem. & M. 457, 1 De G. J. & S. 634, and since *Bell's case* has never, I believe, been questioned. In *Bell's case* Lord Hatherley (then Wood, V.C.) said: "It has been settled in these cases that there is no equitable charge upon the assets. It is a mere debt. . . . The words of the policy, no doubt, furnish a very plausible argument, but the rational conclusion is that they did not make the assured the mortgagee of any particular part so as to entitle him to take the assets. It merely indicates a mode by which he is to be paid."

Bearing that in mind I pass on to the second question, viz., the effect of the special Act.

The important section is the 21st, but the 37th has also to be considered.

By section 21, "It shall be lawful for the directors of the company to lay out and invest, in the name of the company or otherwise, all or any part of the money, funds, or property of the company in and upon such real or Government securities, or debentures of any chartered or incorporated companies or bodies, which at the time of making the purchase shall be in course of payment of dividends upon their paid-up capital originally subscribed, or in the purchase of the stock of the Governor and Company of the Bank of England or the shares or policies of the company or the bonuses declared thereon either together with or separately from the sum assured by the policy, or in the purchase of policies of any other assurance society or company, or annuities for years or for the life or lives of any person or persons or for any shorter period, whether depending on a life or lives or not, or in the purchase of all or any of the above stocks, funds, securities, shares, policies, or annuities, and of any reversionary or other interests in any of them respectively, at or for such price or prices and in all respects as the directors of the company shall think fit; and also to lend and advance in the name of the company or otherwise all or any part or parts of the money, funds, or property of the company upon all or any of the securities aforesaid . . ."

It is impossible to read this section without coming to the conclusion that the company was authorized to buy its own shares. But what does that necessarily involve? It involves the purchase of part of the capital for the benefit of the holders of the rest of the capital, *i.e.*, it involves a reduction of capital.

That again alters the relative proportion of profits to be divided, and of the number of shares amongst which they are to be apportioned. It is impossible to read the section in such a way as to increase the liability of those members who were to be benefited by the investment or purchase; and yet this would be the result if the appellant's construction is right. According to that construction, the shares bought

by the company ought to be treated as subsisting and as held by a trustee for the company. But if this were so the trustee would be liable in the event of a winding-up to a call of £7 10s. per share, and the members of the company would be liable to indemnify him, and their liability in that respect would be unlimited. So that the result would be that, instead of benefitting them, a most serious burden would be imposed upon them. Such a construction of section 21 is quite inadmissible. A reduction of capital is a necessary consequence of a statutory power enabling a company to invest its assets in the purchase of its own shares.

But then reliance is placed on section 37, which provides that "nothing in this Act contained shall extend or be construed to extend to incorporate the company, or to relieve or discharge the company, or any of the members thereof, from any responsibility, contract, duty, or obligation whatsoever to which by law they or any of them now are, or at any time hereafter may be, subject or liable as between the company and others; and all contracts, either express or implied, and made or to be made, and all present and future liabilities of any person being, or who shall hereafter be, a member of the company, with or to the company, or any person in trust for the company, or for the use or benefit thereof, shall have such and the same operation and effect, and be attended with such and the same legal consequences in every respect, as if such person had not been such member."

The object of this section is plain enough; it was to preserve the unlimited liability of the shareholders. The section confers no new rights. It saves rights which, but for the Act, would exist, and it is so worded as to apply, not only to the holders of policies issued before the Act passed, but also to the holders of policies issued afterwards. What effect, then, has it on the holders of policies issued by the company? If they had had, independently of the Act, an equitable charge on the uncalled up capital of the company, that charge would, I think, have been preserved, and the appellant would have been right, and machinery would have had to be found for giving effect to their rights. But there was no such charge, and that is the short and conclusive answer to the appellant's case. The policy-holders remain what they always were—viz., unsecured creditors of the company with the funds of the company applicable to their payment. But these funds do not include capital extinguished by statutory authority. The appeal must be dismissed, with costs.

LOPES, L.J.—I have had an opportunity of reading the judgment which has just been delivered, and I entirely agree with it.

A. L. SMITH, L.J.—I also agree.

Appeal dismissed.

Solicitor for the official liquidator, *James Robinson.*

Solicitors for the contributories, *Hepburn, Son, & Cutcliffe.*

From Q. B. Div. (Lord Esher, M.R., and Bowen and Kay, L.JJ.) July 11, 1892.

In re GREY.

Solicitor—Disciplinary jurisdiction—Order for payment of money—Judgment debt.

A solicitor received a sum of money for and on behalf of a client, but claimed to retain the whole, on the ground that his bill of costs amounted to a larger sum. The client sued the solicitor for the balance which he alleged to be due to him after making a proper deduction for costs, and obtained judgment. The judgment being ineffective, the client applied to the court for a summary order on the solicitor to pay over the money.

Held (reversing the decision of Grantham *and* Charles, JJ.), *that the fact of a judgment having been obtained by the client against the solicitor did not prevent the court from exercising its disciplinary jurisdiction.*

In re Corbet Davies, 15 *W. R.* 46, *not followed.*

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Appeal from a decision of a divisional court (Grantham and Charles, JJ.).

H. A. Grey was retained as a solicitor to act for the plaintiff in an action for the price of goods sold and delivered. Judgment was obtained for £268, and that sum was received by the solicitor on behalf of his client. The client applied to the solicitor to pay the money over, but he refused to do so, on the ground that his bill of costs amounted to a larger sum. The client then commenced an action against the solicitor, alleging that there had been a special agreement between them that the solicitor should only charge costs out of pocket and a commission of five per cent., and claiming the sum of £156 as the balance due to him. The client obtained a verdict and judgment for £156, and issued a writ of *fi. fa.* It appeared that the solicitor had given a bill of sale of his goods, and the judgment remained unsatisfied.

The client then applied to the Queen's Bench Division for an order compelling the solicitor to pay the money.

The Divisional Court refused to make an order, on the ground that the client, having obtained a judgment against the solicitor, was precluded from resorting to a disciplinary remedy.

The client appealed.

French, Q.C. (*Avory* with him), for the appellant.—This is a case in which the court ought to exercise its disciplinary jurisdiction by ordering the solicitor to pay the sum which is due from him. The money has not ceased to be due from him as a solicitor, although it is also due from him as a judgment debtor.

They referred to *In re Freston*, 31 W. R. 804, 11 Q. B. D. 545; *In re Dudley*, 32 W. R. 264, 12 Q. B. D. 44; and *In re Corbet Davies*, 15 W. R. 46.

Beddall, for the solicitor.—The original debt has been converted into a judgment debt, and the judgment debt is not due from the solicitor in his capacity as an officer of the court. The court may punish him, but it may not order him to pay this sum of money: *In re Corbet Davies.*

He also cited *In re Ball*, L. R. 8 C. P. 104, 21 W. R. Dig. 243.

Lord ESHER, M.R.—The proper way of dealing with this case is to deal with it on the principle laid down in the case of *In re Freston*, which was recognized and approved of in the case of *In re Dudley.* The principle is this. The court has a peculiar jurisdiction over solicitors, as officers of the court, which it has not over anyone else. It is given because solicitors have great powers and privileges, and the object of it is to enforce honourable conduct towards clients. The power exercised under this jurisdiction is a disciplinary power, not one for the purpose of enforcing legal rights. If a solicitor, as a solicitor, obtains money by process of law for a client, then, quite irrespective of legal liability, he is bound to hand it over to the client; and if he spends it, or refuses to hand it over, he commits an offence against the honour of his profession, and comes within the court's disciplinary jurisdiction. When this solicitor kept

back this money, he must have known he had no right to it. No doubt the client had a legal claim to it. But the breach of duty of which the solicitor was guilty was an entirely separate thing from the legal right of the client. The client brought an action and recovered judgment. The effect of this was that the debt due to him ceased to be a debt for money had and received, and became a judgment debt. But the conduct of the solicitor was not altered. The client's legal remedy is altered; but the disciplinary power of the court over the solicitor is not taken away. We were referred to *In re Corbet Davies*. It certainly looks as if the court there thought that under such circumstances the punitive jurisdiction of the court was taken away. But that was decided before the other cases which have been cited. If it is inconsistent with them, I think it must be taken to be overruled. We were also referred to *In re Ball*. But that case decided that, where there is a judgment, so long as that judgment stands the court will not exercise its disciplinary jurisdiction, if there is nothing to show that execution will not be effective. But it was not held that the court would hold their hands where judgment is ineffective. I am, therefore, of opinion that the court had jurisdiction to make an order against this solicitor. The court having jurisdiction, it is a matter of discretion how it should be exercised. In determining this question, the fact of a judgment having been obtained may well be taken into consideration as one of the circumstances of the case; for the court will not allow a solicitor to be oppressed. I am of opinion that the proper order to make is that the solicitor do pay the money within a month, but that the client in the meantime shall not proceed on his judgment without further order.

BOWEN and KAY, L.JJ., concurred.

Appeal allowed.

Solicitors for the appellant, *Leggatt, Rubinstein, & Co.*

From Q. B. Div. (Lord Esher, M.R., and Bowen and Kay, L.JJ.) — July 6, 1892.

SOVEREIGN LIFE ASSURANCE CO. *v.* DODD. (*a.*)

Company — Winding-up — Set-off — Mutual credits or dealings—Life insurance company—Action for money lent—Release—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 38—*Joint-Stock Companies Arrangement Act*, 1870 (33 & 34 *Vict. c.* 104), *s.* 2.

In August, 1887, *a petition was presented for the winding up of the plaintiff company. In May*, 1888, *two policies held by the defendant in the plaintiff company matured, and the amount insured thereby became payable by the plaintiff company to the defendant. These policies had been previously assigned by the defendant to the plaintiff company as security for loans to him, which loans had not been repaid. In July*, 1889, *a winding-up order was made, and in April*, 1890, *a deed of arrangement was entered into, under the Joint-Stock Companies Act*, 1870, *between the plaintiff company and the Sun Life Assurance Co., whereby it was provided that the policies of the plaintiff company should be transferred to the Sun Co., and that the holders of policies in the plaintiff company should, in full satisfaction of all claims upon the plaintiffs, accept certain reduced payments from the Sun Co. This deed of arrangement was agreed to by a statutory majority of policy-holders; but the defendant, whose policies had matured before the date of the deed of arrangement, did not assent to it. The plaintiff company, by its liquidator, in December*, 1890, *sued the defendant for the sums lent to him.*

Held (*affirming the decision of* Charles, J., 40 *W. R.* 443), *that the defendant was entitled, by way of defence to the action, to set off the amount due on his policies against the debt owing by him to the company; that the defendant did not belong to the class of creditors who agreed to the deed of arrangement, and that he was not bound by it, and that, therefore, it did not operate as a release of his claim against the company.*

Ex parte Price, In re Lankester, 23 *W. R.* 844, *L. R.* 10 *Ch. App.* 648, *distinguished.*

Appeal of the plaintiff company from the judgment of Charles, J., 40 W. R. 443, at the trial without a jury.

The action was brought to recover the amount of two loans of £570 and £600, with interest. The facts, which were not in dispute, were as follows:—On the 5th of February, 1879, the defendant effected with the plaintiffs, who were a life insurance company, two policies of £1,000 each upon his own life, whereby the amount insured was to be payable to him if he was living on the 7th of May, 1888, or to his executors if he died before that date. In 1880 and 1887 he obtained from the plaintiff company loans amounting altogether to £1,170, and, by way of security, he mortgaged to the plaintiff's secretary his two policies of insurance.

On the 5th of August, 1887, a petition to wind up the plaintiff company was presented, and on the 2nd of September, 1887, a provisional liquidator was appointed. The defendant continued to pay his premiums, and on the 7th of May, 1888, the money insured by his two policies became due to him.

On the 30th of July, 1889, a winding-up order was made, and in September of that year a liquidator was appointed.

On the 11th of April, 1890, a deed of arrangement was made under the Joint-Stock Companies Arrangement Act, 1870, and sanctioned by the court. The defendant did not assent to the arrangement. The deed of arrangement provided that the policies in the plaintiff company on the 4th of August, 1887, were to be transferred on agreed terms to the Sun Life Assurance Co. Clause 1 provided that the Sun Co. should issue new policies to holders of policies which, if subsisting, would not have matured by the 4th of August, 1890, guaranteeing, first, the payment on death or other time specified in the policy of the reduced sum set against the policy-holder's name in the second schedule to the deed; and, secondly, the payment at such times as aforesaid of a certain dividend payable out of the assets of the plaintiff company. Clause 2 provided that, "as to the policies of the Sovereign Co. which, but for the said winding-up order, would have matured between the 4th of August, 1887, and the 4th of August, 1890, the Sun Co. will, within one month after proof of death and of title, make the said reduced payments to the representatives of such policy-holders or their assigns, and on the same terms and conditions as if such policy had been a subsisting policy, and had matured after the 4th of August, 1890." By clause 7 it was provided that the liquidator would from time to time pay over or transfer to the Sun Co. all such parts of the assets of the plaintiff company as would be properly applicable to meet the claims of the policy-holders of the plaintiff company who were such on the 4th of August, 1887, and by clause 11 it was provided that all such last-mentioned policy-holders should accept the provisions of this deed of arrangement in full satisfaction of all claims on the plaintiff company and the assets

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

thereof. The deed further provided that the winding up should be continued so far as might be necessary to settle the rights of all parties.

In December, 1890, the plaintiff company, by the liquidator, brought this action to recover the sum of £1,345 19s. 5d., being the amount of the above-mentioned loans and interest thereon.

The defendant pleaded a set-off of the money which was payable to him by the plaintiff company in respect of his two policies.

Charles, J., gave judgment for the defendant, and the plaintiffs appealed.

Buckley, Q.C., and *Hull* (*H. Tindal Atkinson* with them), for the plaintiffs, contended that the deed of arrangement, which was binding on the defendant, having been sanctioned by the court, released the plaintiffs from all liability on the defendant's policies, and that, therefore, the defendant had no right of set-off; secondly, that the defendant could not prove on his policies until he had redeemed them by the payment of the loans.

They cited *Ex parte Price, In re Lankester*, 23 W. R. 844, L. R. 10 Ch. App. 648; *In re Asphaltic Wood Pavement Co., Lee and Chapman's case*, 33 W. R. 513, 30 Ch. D. 216; *Ex parte Caldicott, In re Hart*, 32 W. R. 396, 25 Ch. D. 716; *In re South Kensington Co-operative Society*, 29 W. R. 662, 17 Ch. D. 161.

Crump, Q.C., and *Morton Smith*, for the defendant, were not called on.

Lord ESHER, M.R.—In this case an insurance company which is in liquidation has brought an action by its liquidator for money lent to the defendant before the company went into liquidation. The defendant sets up as a defence that he has a right of set-off against the company, or against the liquidator, or against both. On that defence it has been contended for the company, first, that the defendant has no right of set-off; and, secondly, that his claim against the company has been released.

The first point to consider is, what will destroy the right of set-off; when an action is brought for a debt, will the fact that the plaintiff is in liquidation, and that the action is brought by the trustee in bankruptcy, destroy the right of set-off and compel the defendant to prove his debt in the bankruptcy? What would have been the rights of the parties under the old law in such a case? A trustee brings an action to recover a debt due; a set-off is pleaded, and it is suggested that it would have been a good replication that the bankrupt could only pay one shilling in the pound, thus wiping out the set-off or reducing it to one shilling in the pound. It is enough to say that such a thing was never heard of. The right of set-off, being the right of a defendant, can only arise when an action has been brought, and is the right of a defendant to set off a debt due to him from the plaintiff, and it, therefore, assumes the existence of a debt from the plaintiff to the defendant. The fact of the plaintiff's bankruptcy cannot do away with a debt due to the defendant; the defendant proves in the bankruptcy for the whole debt though he is prevented from getting more than a certain share of the assets. Therefore, when the trustee in bankruptcy brings an action against the bankrupt's creditor, the latter is within the very terms of the rule as to set-off. The right of set-off is a plea in bar, and although it may be true that the defendant is indebted to the plaintiff. yet as the plaintiff is also the debtor of the defendant to the same or a larger amount, that bars the plaintiff's right of action. Bankruptcy, therefore, does not affect the right of set-off.

Formerly the kinds of debts which could be set off were limited, but section 38 of the Bankruptcy Act, 1883, has enlarged the subject-matter of the plea, although it has not altered the incidents of the right. In the present case we have to consider whether the defendant had a right of set-off when this action was brought. The company are suing for money lent by them to the defendant. The defendant admits that the money was lent, but says that at the time when the action was brought the company were indebted to him in an amount greater than his debt to the company, and that, therefore, he has a right of set-off. Were the company indebted to the defendant at that moment? Under the defendant's policy of insurance the company agreed to pay the defendant a sum of money at a date which had arrived at the time the action was brought, therefore the company were indebted to the defendant. His was not a future claim, but was a claim at that time for a definite ascertained amount. The company and the defendant were mutually indebted to one another. The bankruptcy of the company would prevent the defendant from getting the whole £2,000 due on his policies, but it does not affect the defendant's right of set-off. It is said that our decision is contrary to the case of *Ex parte Price, In re Lankester*, but the distinguishing feature of that case, as was pointed out in *In re Asphaltic Wood Pavement Co.*, is that there was no action at all, and the only rights considered were the rights of proof in bankruptcy. It is not necessary to consider what this defendant's rights would have been if there had been no action, and if the proceedings had been in bankruptcy; but we have to consider what are his rights in this action only, and, in my opinion, he has a right of set-off, which is a bar to the plaintiff's claim. That is in accordance with the case of *In re Asphaltic Wood Pavement Co.*, and is not in conflict with *Ex parte Price, In re Lankester*.

The defendant is, therefore, entitled to the benefit of his set-off unless the plaintiffs can show that the debt which the defendant wishes to set up has been released as against them. That depends on what happened at the meeting of the policy-holders, and on whether it can be said that that binds the defendant and prevents him from saying that he has released the plaintiff company. With regard to the meeting we must consider the persons who are to be summoned to it and who are to be dealt with as different classes, and we must consider the state of affairs at the date of the meeting. The Act of 1870 says that the persons to be summoned to the meeting are creditors, and are persons who can be divided into different classes, though the Act itself does not define the classes. But the reason of this division into classes is because the different classes of creditors have different interests, and therefore, if a different state of facts exists amongst different creditors, which difference may affect their minds and judgment, they must be divided into different classes. In the present case the persons who were summoned to the meeting were policy-holders whose policies were to be dealt with, no money was at that time due to them on their policies and they had no cause of action against the company. But the defendant was not then a policy-holder, because his policy had been fulfilled, and he was a creditor of the company for the amount of the policy; he had a vested cause of action, and the policy-holders had none, and it is obvious, therefore, that his interest was different from that of persons whose policies were still unfulfilled, and he cannot be said to have been in the same class as those who were summoned to the meeting. Consequently he is not bound by what took place at that meeting.

The judgment of Charles, J., must be affirmed. I think that he was right in holding that section 38 of

the Bankruptcy Act, 1883, does enlarge the subject-matter of the right of set-off. I think that in this case there might possibly have been a set-off apart from the statute, but if the right depends upon the statute, I agree with the judgment of Charles, J., that the defence is available to the defendant, and is a bar to the action.

BOWEN, L.J.—I am of the same opinion. This is an action for money lent. The defendant, by way of defence, says that he is entitled as against the plaintiff company to treat as a set-off money due from the company to him on his policies, which policies accrued due on the 7th of May, 1888. At that date there had already been a petition to wind up the company. The defendant had paid all the premiums on the policies, both before and after the date of the presentation of the winding-up petition, and on the day when the policies matured there was a large sum of money owing to him by the company. What was the defendant's position on that day? The company was being wound up, for the winding-up order, though subsequently made, dated back to the time of the presentation of the petition. The defendant was in the position of a person who on the one hand had effected a policy with the company and had assigned it to the company as security for a loan; on the other hand, he was entitled to say that the sum of £2,000 was due to him from the company on his policies. It is true that the winding up prevented his bringing an action against the company for the £2,000, but he was entitled to prove against the company for the value of his claim. His case is distinguished from that of the other policy-holders, whose rights had not matured; he had gone on paying his premiums after the winding up until his policies became due, and his claim had, therefore, a fixed and ascertained value.

The case closely resembles *Macfarlane's claim, In re Northern Counties of England Fire Insurance Co.*, 17 Ch. D. 337, 29 W. R. Dig. 47, and *In re Bridges, Hill* v. *Bridges*, 17 Ch. D. 342, 29 W. R. Dig. 7. The defendant was also in this position, that he had the company's money in his pocket, and was entitled to make use of a counter-claim or set-off against any action which the company might bring against him; he could not sue the company or counter-claim against them in the strict sense of the term because of the liquidation, but he could say that the transactions had resulted in mutual debts, and that he had a right to set off the debt of the company due to him against his own debt to the company. That was his position when his policies matured, and he could be in no worse position when the company brought their action. He was entitled to set up his defence of set-off, which is so large in amount as to be a bar to the company's claim. The winding up, which has not altered the rights of the parties in this respect, cannot prevent the defendant's right of set-off. I think this is a good set-off at law, but if it were not a good set-off at law, by reason of the assignment of the policies to the secretary of the company, it would at all events be a good set-off in equity. The effect of section 38 of the Bankruptcy Act, 1883, has been to enlarge, not the effect of a set-off, but the meaning of the term. That is clear from the decision in *In re Asphaltic Wood Pavement Co.* I do not agree with the contention that *Ex parte Price, In re Lankester* is inconsistent with that case and governs the present one. *Ex parte Price, In re Lankester*, only dealt with the question of the right of set-off in a winding up, and does not affect the question of set-off or mutual dealings when action has been brought. Further, in that case, the court was dealing with policies which were still subsisting at the time the right of set-off accrued, but in this case the policy has matured. There is, therefore, in the present case, either a mutual debt or a mutual dealing, and unless there has been a release of the defendant's claim against the plaintiffs, the latter are out of court. The question of release depends on the construction of the deed of arrangement, and the effect of the Joint-Stock Companies Arrangement Act, 1870. I doubt whether the term "policy-holders" includes those who have been policy-holders, but whose policies have matured by the happening of the stipulated event. It is, however, unnecessary to decide that unless we think that the deed binds the dissentient creditors.

The Act of 1870 enables the majority of the creditors or of a class of creditors to bind the minority. It is legistation of a most compulsory character, and must therefore be construed carefully. If we are to construe the Act as was suggested on behalf of the plaintiffs, we should be holding that a class of creditors composed of policy-holders whose interests are uncertain may overrule the interests of those who have nothing to do with futurity and whose rights have already been ascertained.

It is obvious that the interests of the two classes are inconsistent, and that those whose policies are still subsisting are deeply interested in sacrificing the interests of those whose policies have matured. Ought we to construe the Act so as to include these persons in one class? In order to ascertain what is meant by "class" we must look at the scope of the section, which is a section enabling the court to order a meeting of a class of creditors to be called. It seems plain that the word "class" must have such a meaning as will prevent the section being so worked as to cause injustice, and that it must be confined to those whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. If that be so, then, for the purpose of considering the deed of arrangement made with the company which took over the business of the plaintiff company, it was surely necessary, in order to constitute a class, not to group together those whose policies had already matured and those whose policies were still subsisting. The position of persons like the defendant, who had an ascertained sum of £2,000 due to him from the company, was entirely different from that of those policy-holders whose future was uncertain.

It was, therefore, not right to summon as members of the same class those who had an absolute bar against any claim of the company and those who had not. There was, in my opinion, no release of the defendant's claim against the plaintiffs, and the appeal must be dismissed.

I am not sorry to have had the opportunity of considering section 2 of the Act of 1870, which is often utilized, and sometimes in such a manner as to be liable to cause injustice.

KAY, L.J.—I am of the same opinion. My judgment depends upon the facts, which are very peculiar and may possibly not occur again. [His lordship stated the facts.] The company has brought this action to recover the moneys lent, and the defendant claims to be entitled to a set-off for the moneys due on the policies, basing his claim chiefly upon the fact of the transaction amounting to a mutual credit or dealing within section 38 of the Bankruptcy Act, 1883. It is not denied that when the policies matured the company had sufficient funds to pay them. They were therefore then indebted to the defendant in the full amount of these policies. The only case which has been cited to us as throwing any difficulty in the way of the defendant's set-off is *Ex parte Price, In re*

Lankester; but there is a very broad distinction between the two cases. In that case a proof was tendered by the company in the bankruptcy of the assured, and the trustee in the bankruptcy attempted to avail himself of the mutual credit clause because at the date of the bankruptcy the bankrupt was entitled to a current policy which had not matured. But in the present case the claim which the defendant seeks to set off had already accrued due; it was a sum ascertained and liquidated. I do not dissent from *Ex parte Price, In re Lankester*, but for the reasons I have given it is distinguishable from the present case, which more nearly approaches the case of *In re Asphaltic Wood Pavement Co.* There was a clear debt due upon these policies when the present action was brought; and I think we may discard the argument founded upon the assignment of the policies to the company, because there will be a right of set-off in equity in cases where, but for some such circumstances as this assignment, there would have been a legal set-off. But I think that in this case the defendant probably had a set-off apart from the section, and even if he had not, there was clearly a mutual dealing between the company and the defendant, which entitled the defendant to have an account stated between them, and to bring in his claim under the mutual credit clause. As to the deed of arangement, I agree that the defendant is not bound by it; I do not think that clause 11 of that deed operates to deprive a man of an existing right of set-off, such as the defendant had, and I also think it doubtful whether the deed relates at all to policy-holders in the position of defendant, who belonged to quite a different class from those whose policies had not matured. I think, therefore, that the deed of arrangement cannot be treated as a release by the defendant of the debt due from the company.

Appeal dismissed.

Solicitor for the plaintiffs, *J. Robinson.*

Solicitor for the defendant, *N. Jourdain.*

From Q. B. Div.
(Lord Esher, M.R., and Fry and Lopes, L.JJ.) June 2, 1892.

DOBBS *v.* BRAIN AND ANOTHER. (*a.*)

Probate — Administration bond — Legacy to infant— Failure to provide for payment—Condition to well and truly administer—Breach—Sureties—Court of Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 81.

An administration bond was executed by administratrixes with the will annexed, and by two sureties, by which the administratrixes were to "well and truly administer" the personal estate of the deceased—"(that is to say) do pay the debts of the deceased which he did owe at his decease, and then the legacies contained in the said will annexed to the said letters of administration so to them committed, as far as the personal estate and effects will thereto extend, and the law charge them." The testator left a legacy of £50 to a person who was then, and at the time the action was brought, an infant. The administratrixes paid the debts and legacies, except this legacy of £50, and distributed the residue to those entitled under the will, at the same time handing over £50 to their brother-in-law to pay the legacy to the infant. The brother-in-law did not pay the £50, and had disappeared. In an action against the sureties by an assignee of the bond, suing on behalf of the infant, to recover the legacy of £50,

Held, that there had been a breach of the bond on the part of the administratrixes in distributing the whole of the estate without retaining sufficient to pay the legacy to the infant upon its attaining twenty-one, and that the sureties were, therefore, liable.

Appeal from the judgment of Pollock, B., at the trial of the action without a jury.

The action was brought against the defendants, as sureties, upon an administration bond, to recover a legacy of £50, or to have the £50 paid into the Bank of England, under 36 Geo. 3, c. 52, s. 32.

Jacob Curtis by his will bequeathed a legacy of £50 to Florence Emily Propert, a minor. No executors were appointed by the will, and letters of administration with the will annexed were granted to his daughters, Lucina Wellington and Hannah Maria Tingle, the residuary legatees, who executed an administration bond with the defendants as sureties. The condition of the bond was that if Lucina Wellington and Hannah Maria Tingle "do, when lawfully called on in that behalf, make or cause to be made, a true and perfect inventory of the personal estate and effects of the said deceased which have or shall have come to their hands, possession, or knowledge . . . and the same personal estate and effects do well and truly administer—(that is to say) do pay the debts of the deceased which he did owe at his decease, and then the legacies contained in the said will annexed to the said letters of administration, so to them committed, as far as the personal estate and effects will thereto extend, and the law charge them; and, further, do make, or cause to be made, a true and just account of their said administration when they shall be thereunto lawfully required, and all the rest and residue of the said personal estate and effects shall deliver and pay unto such person or persons as shall be by law entitled thereto, then this obligation to be void and of none effect, or else to remain in full force and virtue."

The administratrixes paid the money belonging to the estate into an account in their joint names at a bank, and after paying the debts and legacies, with the exception of the legacy now sued for, paid a sum of £50 to their brother-in-law, John Allen, who undertook to pay the legacy to Florence Emily Propert, and distributed the residue of the estate to those entitled to it under the will. Allen did not pay the £50 to the infant, nor was there any evidence where Allen was, or what he had done with the money. By order of the Probate Court the bond was assigned to the plaintiff under section 83 of the Court of Probate Act, 1857, for the purpose of recovering the legacy of £50, the legatee being still an infant at the time the action was brought.

Pollock, B., held that, as the legacy was not payable until the infant came of age, there had been no breach of the bond, and gave judgment for the defendants. The plaintiff appealed.

Danckwerts and *W. E. Hume Williams* for the plaintiff.—First, the administratrixes could have paid the legacy to the infant. The only difficulty is that they could not have got a good discharge from the infant, and so the administratrixes might, instead of paying the infant, have paid the sum of £50 into the Bank of England, under 36 Geo. 3, c. 52, s. 32. [*Bilson* v. *Saunders*, Bunb. 240; *Dagley* v. *Tolferry*, 1 P. Wms. 285; *Cooper* v. *Thornton*, 3 Bro. Ch. 96 and 186, were referred to.] Secondly, the administratrixes did not well and truly administer the estate, or make a true and just account of their administration. They ought to have retained in their hands, or in some way secured out of the testator's estate, sufficient to pay the legacy. To pay the legacy out of other moneys would not satisfy the bond. The

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

account must show that the money is safe. A wrongful paying away of the money is a wasting of the estate and a breach of the bond: *Sandrey* v. *Michell*, 11 W. R. 363, 3 B. & S. 405; *Archbishop of Canterbury* v. *Robertson*, 1 Cr. & M. 690; *Archbishop of Canterbury* v. *Tappen*, 8 B. & C. 151. The words "that is to say" do not cut down the obligation to well and truly administer.

They also referred to Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 81.

Bosanquet, Q.C., and *J. A. Foote*, for the defendants.—There has been no breach of the bond, as the administratrixes were not bound in law to pay the legacy to the infant. Payment before the legatee attains twenty-one would be null and void. The obligation to well and truly administer is explained by the following words, "that is to say," to mean payment of debts and legacies "so far as the law charge them," and rendering an account. The law only charges them to pay when the legatee comes of age, and there can be no breach until that time arrives. Payment of the legacy at that time out of any moneys would satisfy the bond.

They referred to *Bolton* v. *Powell*, 2 De G. M. & G. 1.

Danckwerts replied.

Lord ESHER, M.R.—This is an action upon an administration bond against the sureties, the ground of action being that the administratrixes have committed a breach of the bond, and that consequently the sureties are liable. The administratrixes did what was only natural, they intrusted the administration of the estate to their brother-in-law, Allen, though by doing so they may render themselves liable at law. Allen received £50 for the infant legatee, and the evidence is clear that he has not paid it over. Allen went to America with the money, and it is not known where he is. Therefore these administratrixes have intrusted their agent with a part of the estate, and he has gone away with it. This money is lost to the estate. All the rest of the estate has been distributed, and none of it is left in the hands of the administratrixes. The bond having been assigned to the present plaintiff under section 83 of the Court of Probate Act, 1857, for the purpose of suing upon it, the question is whether the action is maintainable. That depends upon the true construction of the bond. The bond is in common form settled under the provisions of section 81 of the Court of Probate Act, 1857. The bond so drawn up is intended to carry out the provisions of that section—that is to say, the bond is to be "conditioned for duly collecting, getting in, and administering the personal estate of the deceased." Taking those words alone, it seems to me that they include the duty of keeping the estate, after it has been collected and got in, until it is duly administered. Therefore section 81 recognizes the duty of the administrator to keep the estate until it is duly administered, and the intention of the bond is to enforce that duty upon the administrator, and by means of sureties to compel that duty to be performed. When we come to the bond we ought to construe it as far as possible so as to carry out the objects of the statute.

The first condition of the bond is that the administratrixes shall, when lawfully called on in that behalf, make or cause to be made a true and perfect inventory of the personal estate and effects of the deceased. If that condition were broken the administratrixes would commit a breach of the bond, and the sureties would be liable. The bond then proceeds:—"And the same personal estate and effects do well and truly administer." That assumes that the estate has been collected and got in. I apprehend that those words include the duty of keeping the estate until it has been duly administered. "That is to say, do pay the debts of the deceased which he did owe at his decease, and then the legacies contained in the said will annexed to the said letters of administration so to them committed, as far as the personal estate and effects will thereto extend, and the law charge them." That seems to indicate the order in which the estate is to be administered, and the necessary meaning is that the administratrixes do pay out of the personal estate of the deceased the debts and legacies in the order there set out. The words are not intended to limit the duty of well and truly administering the estate, but merely to show the order in which it is to be done. If it is true to say that part of the duty of well and truly administering is to keep the personal estate until it is duly administered, then the true meaning is that the administratrixes are to keep the personal estate so as to be in a position to pay the debts and legacies. If the administratrixes have paid away the personal estate without keeping sufficient to pay the debts and legacies, then they have committed a breach of the obligation to well and truly administer. That seems to me to be the true construction of the bond when read so as to carry out the intention of the statute. Is there any authority dealing with this matter? The case of the *Archbishop of Canterbury* v. *Robertson*, 1 Cr. & M. 690, is an authority for the proposition that paying away the personal estate without retaining sufficient to pay the debts and legacies is a breach of the bond. It is true that in that case there is a statement of fact that after paying away the estate the administrator became bankrupt. That fact, however, is merely stated as evidence to show that the estate was entirely gone. In the present case the whole estate has been distributed, and nothing has been retained wherewith to pay the legacy when it becomes payable. *Robertson's case* is an authority for saying that when the estate is paid away so as to leave nothing wherewith to pay the legacies that become payable in the future, a breach of the bond has been committed, and the assignee of the bond may immediately sue the administrators and sureties. Any other decision would place persons having interests under a will in the greatest danger. It cannot be the law that an executor or administrator may speculate on the Stock Exchange or elsewhere with the deceased's personal estate, and lose the money, and then say that no breach of the bond has been committed because the legacy was not payable until the end of the year or until the legatee came of age. There has, therefore, been a breach of this bond on the part of the administratrixes, and the sureties are liable. The appeal must be allowed, and judgment entered for the plaintiff.

FRY, L.J.—This bond is conditioned for the carrying out of four things. The first is the making a true and perfect inventory of the personal estate of the deceased. The second is the due administration of the estate. The third is the making a true and just account of the administration when lawfully required. The fourth is the paying over the residue to those entitled thereto. Now it is only with the second that we are concerned. The words of the bond are: "And the same personal estate do well and truly administer—(that is to say) do pay the debts of the deceased . . . and the legacies, &c., as far as the personal estate and effects will thereto extend, and the law charge them." The meaning seems to me to be that the administratrixes will pay the debts and legacies out of the personal estate in due course of administration. I come to this conclusion because payment of legacies is part of the due administration of the personal estate and effects, and consequently it

follows that they must be paid out of the personal estate. The facts in the present case are that the two daughters of the deceased were appointed administratrixes, and as such they collected and got in the whole personal estate. They set aside £50 to meet the legacy of this infant, and handed it to Allen. They paid the debts and the other legacies, and distributed the residue. The whole of the estate is therefore gone, and the legacy to the infant has not been secured. There is no fund forthcoming out of which the legacy can be paid upon the infant coming of age. Can that be called a due course of administration of the estate? Is it the due course of administration to distribute the whole estate without first securing the payment of the legacy? Certainly not. Would payment of this sum of £50 by the administratrixes out of their own money be a due administration? Again I answer—No. Therefore there has been a breach of the administration bond. It is said that the law knows no distinction between the estate of the deceased and the private property of the administratrixes. That is not so. Both classes of property belong equally to the administratrixes, but they hold the deceased's estate *in autre droit*, and if they convert it they commit a legal wrong. The case of the *Archbishop of Canterbury* v. *Robertson* strongly confirms this view, for Lord Lyndhurst, C.B., says:—"When the administrator applies and converts to his own use the effects of the intestate, so that those effects are entirely lost to the estate of the intestate, that is such a breach of the condition of the bond by which the administrator undertakes 'well and truly to administer according to law,' as will entitle the next of kin to have the bond put in suit at their instance." The administratrixes here have applied the deceased's estate so that a part of that estate is entirely lost. That gives a right of action on the bond. It may be said that this reasoning is defective, because the infant may die before she attains it, and therefore the legacy may not become payable. The answer to any such argument is that the legacy vests at once, though it is not payable until the infant attains twenty-one. But even if the legacy were contingent the right to have the bond carried out would vest in the infant's next of kin, and their interests must be protected.

LOPES, L.J.—The question turns upon the meaning of the words in the administration bond, "well and truly administer" the personal estate of the deceased. The facts are that the administratrixes handed over the £50 to Allen, who has not paid it to the infant. This £50 is lost to the testator's estate. It was placed out of the control of the administratrixes. The whole of the estate has been distributed. There has, therefore, been a misapplication of the assets of the testator. That being so, there has been a breach of the condition to well and truly administer the estate, and out of that estate to pay this legacy. The decision in *Archbishop of Canterbury* v. *Robertson* is applicable here. The bond in that case was not in the same form as this, but the language of Lord Lyndhurst, C.B., is in point. He says: "The main question under these circumstances is this: Was the conduct of the administrator a breach of that part of the condition of the bond by which he undertook 'well and truly to administer the effects of the intestate'? Now, looking at the language of the bond, nothing can be more distinct and precise than those terms of the condition. . . . It would be difficult to entertain any doubt upon the natural construction of these words, and nothing would be a more direct infringement of the terms of the condition than the application of the effects of the intestate to his own use, and the converting them to his own purposes, so that they should be entirely lost to the estate of the intestate." In that case the administrator became bankrupt, but that fact was not material to the decision. It was said that no breach of the bond could be committed until this legacy was payable. That contention cannot be supported, because, under the condition to well and truly administer, it was the duty of the administratrixes to keep the amount of the legacy until the time of payment arrived. It was then said that the words "that is to say," &c., cut down the preceding general words. In my opinion that is not so. Those words and the following words are merely illustrations of what a due administration should be. It was further contended that, if the administratrixes provided money *aliunde* to satisfy this legacy when the time of payment arrived, that would be a compliance with the condition in the bond. In my opinion that would not be so. That would not be a payment out of the personal estate of the testator. For these reasons I think that the appeal should be allowed.

Appeal allowed.

Solicitors for the plaintiff, *Wilkins, Blyth, Dutton, & Hartley*, for *M. F. Carter*, Newnham.

Solicitors for the defendants, *Prior, Church, & Adams*, for *Champney & Long*, Gloucester.

From Q. B. Div. (Lindley, Bowen, and Kay, L.JJ.) May 16; June 1, 1892.

HARRIS v. JUDGE. (a.)

County court — Practice — Costs — Action commenced in High Court — Transfer before trial to county court—Jurisdiction of High Court—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *Part III., s.* 65; *Part IV., s.* 116.

In an action commenced in the High Court, and transferred to the county court before trial, there is no jurisdiction in the High Court to make any order after the transfer. Every proceeding in the action must be taken in the county court, as if the action had been originally commenced therein.

Decision of the Divisional Court (Day *and* Charles, JJ., *reported* 40 *W. R.* 461) *affirmed.*

This was an appeal of the plaintiff from an order of a divisional court, consisting of Day and Charles, JJ., reversing an order made by Pollock, B., in chambers (reported 40 W. R. 461).

The facts of the case sufficiently appear from the judgments and from the report in the court below.

Sills, for the plaintiff, and

Ernest Pollock, for the defendant, used the same arguments as in the court below.

They cited *Bazett* v. *Morgan*, 38 W. R. 108, 24 Q. B. D. 48; *Wilson* v. *Statham*, 39 W. R. 686, [1891] 2 Q. B. 261; *Moody* v. *Steward*, 19 W. R. 161, L. R. 6 Ex. 35; *Bowles* v. *Drake*, 30 W. R. 333, 8 Q. B. D. 325; *Barker* v. *Hempstead*, 37 W. R. 685, 23 Q. B. D. 8.

Cur. adv. vult.

June 1.—LINDLEY, L.J.—This is an appeal by the plaintiff from an order of the Divisional Court, reversing an order made by Pollock, B., in chambers, and dated the 1st of April, 1892. By that order the plaintiff was to be at liberty to tax his costs of the action on the High Court scale. This order was

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

reversed upon the ground that Pollock, B., had no jurisdiction to make it. The action was commenced in the Queen's Bench Division of the High Court. It was for work and labour and materials. The amount claimed by the writ was less than £50—viz., £34 5s. 4d. The defendant pleaded (1) as to £7 14s., that the work was done for a society, and had been paid for since the writ was issued; (2) as to £1 11s. 9d., that the work was not done for the defendant; (3) as to £24 19s. 7d.—*i.e.*, the residue—that the plaintiff's charges were unreasonable, and that £15 was enough to satisfy his claim, and the defendant paid this sum into court.

By an order dated the 16th of January, 1892, the action was transferred to the county court. It was tried there, and the result was that the plaintiff recovered more than £20, but less than £50. After the trial in the county court the plaintiff applied, by summons, in the High Court for, and obtained, the order of the 1st of April, which entitled him to the whole costs of the action on the High Court scale. The power of the learned judge to make this order is the question which this court has now to decide. The question is not whether the plaintiff is entitled to his costs of the action, nor whether, if he is, those costs ought to be taxed on the county court scale or on the High Court scale. The question is whether a judge of the High Court has any jurisdiction to make any order in an action commenced in the High Court which has been transferred to the county court before the matter comes before him. This question depends entirely on the County Courts Act, 1888. That Act is divided into parts, and Part III. relates to jurisdiction. Amongst the sections grouped under this head are some relating to actions commenced in the High Court, but remitted by a judge of that court to the county court. These sections are 65, 66, and 69. Section 65 is the section applicable to this case. [His lordship then read the section and proceeded:—] This section expressly says that after the action has been transferred to the county court "the action and all proceedings therein shall be tried and taken in such court as if the action had been originally commenced therein." I cannot myself read these words in any sense which leaves any jurisdiction in the High Court. Every application which can properly be regarded as a proceeding in the action must be taken in the county court, as if the action had been originally commenced therein. An application for the costs of the action, or for an order to tax them, is in my opinion a "proceeding in the action," and must, therefore, be made to the county court, and not to the High Court. This was the view taken by the Divisional Court, and this, in my opinion, is the correct view. This was the course of procedure before 1888, and I see no indication of any intention on the part of the Legislature to alter the practice: *Moody* v. *Steward*; *Bowles* v. *Drake*.

But then it is contended that this view, though warranted by section 65, is not in conformity with section 116. This section is in Part IV., which is headed "Procedure and Trial," and runs as follows:—[His lordship having read the section proceeded:—] This section is addressed to costs, and to costs only, and does not relate to jurisdiction, which has been dealt with in Part III. of the Act. Nor can I find in section 116 any language which qualifies that part of section 65 to which I have already alluded as deciding the question of jurisdiction after a transfer. I cannot read the words "unless," &c., in section 116 as applicable to an action tried in the county court, and the merits of which a judge of the High Court must master before he can properly make any certificate or order respecting the costs of it. In a transferred action the rules contained in section 116 must, in my opinion, be applied by the judge of the county court to which the action has been transferred and not by the judge of the High Court, out of which the action has been removed. In an action not transferred the rules laid down in section 116 will of course have to be applied by the High Court. This construction appears to me to give full effect to both sections, and to be in conformity with the general scheme of the Act.

Upon the question of costs the two sections certainly create a difficulty. Section 65 says that the plaintiff's costs of a transferred action are to bear the High Court scale. Section 116 does not in terms refer to transferred actions, but is so worded as possibly to include them, and the section makes the plaintiff's costs depend on the amount he recovers. It is not necessary on the present occasion to decide the joint effect of these two sections, and I say no more about them.

My decision is based solely on the point of jurisdiction, and upon this point the Divisional Court was, in my opinion, right, and the appeal ought, therefore, to be dismissed, with costs.

BOWEN, L.J.—I have come to the same conclusion after much reflection. The first view that I took during the argument was in favour of the opposite contention, and if I give a judgment of my own it is only to point out where I think the opposite view fails, and why I came to the same conclusion as my brothers. This action was brought in the High Court and was transferred to a county court. Section 65 is the section which deals with the question of jurisdiction. It provides that where an action has been transferred to a county court the action and all proceedings therein shall be tried and taken in such court as if the action had been originally commenced therein. All proceedings in the High Court are to cease after the transfer, and the action must be taken to be a county court action. As to the costs down to the time of the transfer, the section is imperative. They are to be allowed according to the scale of costs for the time being in use in the Supreme Court. After the transfer they are to be allowed according to the scale of costs in the county court. That is not quite clear. It leaves open the question, what jurisdiction the county court judge has. It may be that the construction must be put on it that it gives the county court judge jurisdiction as to some costs, though the greater part are to be according to a scale. I do not, however, give any decision upon that point as it was not gone into in argument and is not necessary for the determination of the case. The plaintiff has come to the High Court for a certificate under section 116, sub-section 2. Has the judge of the High Court jurisdiction to make it? Section 116 does not deal with that. It seems to me to apply to all actions including those transferred to a county court, and sub-section 1, in the case of certain actions commenced in the High Court, deprives the parties of their costs in certain events. Then can the plaintiff come to a judge of the High Court for a certificate under sub-section 2? If such a judge has any jurisdiction under the sub-section at all, it must be under the words introducing the exception "unless in any such action . . . a judge of the High Court certifies that there was sufficient reason for bringing the action in that court, or unless the High Court or a judge thereof at chambers shall, by order, allow costs." It seems to me that those words do not add to the jurisdiction of the judge of the High Court where he has not already got jurisdiction. They receive an adequate meaning if they are held not to cover so much ground as the section itself. There may be cases in which the judge cannot bring the case within his beneficial jurisdiction. In certain

cases the plaintiff is not to have any costs at all, and in certain others he is only to have them on the county court scale unless the judge otherwise orders; that is when he has power to do it: when he has not, it does not apply. The words of the exception do not operate to increase the jurisdiction, and I decide the case on the short ground that the words of the exception do not confer any jurisdiction, but simply provide for the making of an order by a judge of the High Court in a case in which he had jurisdiction, which he would have in an action which remained in the High Court.

I may add that it is a misfortune that Acts of Parliament should be printed in the way this Act is. The words of the exception to which I have referred must obviously apply, and were intended to apply, to sub-section 1 of section 116 as well as to sub-section 2, and yet these are printed as part of sub-section 2. As the section is printed it is misleading, and it is only by reason of the necessary form of the words that they must be construed as applying to both sub-sections. It might be worth while to refer to the Parliament roll to see whether as originally passed there was a break to separate the clause from the 2nd sub-section.

I think the judgment appealed against, is right. The judge in chambers had no jurisdiction, and the appeal must be dismissed. Our judgment does, I am aware, interfere with the practice hitherto accepted at chambers. I have made inquiries as to that and have ascertained that Pollock, B., in making his order, only followed the usual course. It is, however, satisfactory to find that this court does not by itself reverse the practice, but is affirming the judgment of the Divisional Court consisting of two experienced judges.

KAY, L.J.—The plaintiff in this case brought his action in the High Court on the 16th of December, 1891. The action was founded on contract. By an order dated the 16th of January, 1892, at his own instance it was transferred to the county court. The amount recovered in it was more than £20 but less than £50.

Pollock, B., by an order in chambers dated the 1st of April, 1892, directed that the costs of the action should be taxed on the High Court scale, including the costs of that application. On the 30th of April, 1892, the Divisional Court set aside that order and directed the plaintiff to pay the costs before them and in chambers. The present appeal is from this order of the Divisional Court.

By section 116 of the County Courts Act, 1888, if a plaintiff in an action founded on contract brought in the High Court which could have been commenced in a county court recovers less than £20 he shall not be entitled to any costs, and if £20 or upwards but less than £50, "he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county court."

I particularly observe that this section only applies to actions which could have been commenced in a county court.

The provision is absolute so far, and applies whether the action has been tranferred to the county court or not, but it continues: "Unless . . . a judge of the High Court certifies that there was sufficient reason for bringing the action in that court, or unless the High Court or a judge thereof at chambers shall by order allow costs." That clearly applies to the case where the action remains in the High Court and is tried there. The certificate would be given at or after the trial; and so, I presume, would the order for costs which that section contemplates. Then comes a proviso, that if the plaintiff obtained judgment under order 14 for £20 or upwards he is to have costs on the High Court scale; that is because in the county court there is no power of making a summary order for judgment such as may be made in the High Court under order 14.

Does this section empower a judge of the High Court to give such a certificate or make such an order for costs after the whole action has been tranferred to a county court? In my opinion it does not. I think that after the transfer the High Court can make no order in the action except in case of an appeal under Part V. of the Act, and that the words are completely satisfied by reading them as applicable only when the action is tried out, in the High Court, and not after it has been transferred.

Section 65 empowers a judge at chambers to transfer any action, in which not more than £100 is claimed, to a county court; and provides that when the order is made "the action and all proceedings therein shall be tried and taken in such court as if the action had been originally commenced therein," the costs subsequent to the transfer to be on the county court scale, "and the costs of the order and all proceedings previously thereto shall be allowed" on the High Court scale.

After such transfer, therefore, the judge of the High Court has no further jurisdiction in the action.

And as to costs, if less than £50 is recovered, in my opinion section 116 applies, and not section 65; and only county court costs can be given as to any part of the action.

I for these reasons think, with deference, that the order of Pollock, B., was without jurisdiction, and that the Divisional Court was right in setting it aside.

Appeal dismissed, with costs.

Solicitors for the appellant, *Dod, Longstaffe, Son, & Fenwick.*

Solicitors for the respondent, *Griffinhoofe & Brewster.*

High Court of Justice.

Chan. Div. Chitty, J. } July 7, 1892.

TULLIS v. JACSON. (a.)

Contract—Validity—Arbitration clause—Award not to be impeached for fraud—Public policy.

A contract provided that an arbitrator's certificates, orders, or awards should not be impeached for fraud.

Held, in the absence of fraud of the contracting parties, a valid contract, and not void as against public policy.

Printing and Numerical Registering Co. *v.* Sampson, 23 *W. R.* 463, *L. R.* 19 *Eq.* 462, *approved.*

Action.

The plaintiffs were contractors for the erection of the Free Public Library, Preston. The principal defendants were a committee duly appointed to carry out this scheme, for which a certain fund had been bequeathed, the architect and a subsequent contractor for special parts of the work being also joined.

The contract between the plaintiffs and the committee provided in effect that no payment should be due until the amount was certified by the architect, that all disputes should be referred to him as sole arbitrator, and that his certificate, orders, or awards "should be final and binding upon the committee and

(a.) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

the contractors respectively, and should not be set aside or attempted to be set aside by reason or on account of any informality, omission, or delay, or error of proceeding in or about the same, or any of them, or in relation thereto, or on any other ground, or for any other reason, or for any pretence, suggestion, charge, or insinuation of fraud, collusion, or confederacy."

The architect having made a certificate for a smaller amount than the plaintiffs considered themselves entitled to, they brought this action against the committee for the larger amount, alleging that the architect had not *bonâ fide* certified the amount due to them, but had knowingly certified for a smaller sum in order to leave a larger sum for payment of his own claims. The fund was in fact insufficient to satisfy all the claims in full.

All imputations of fraud or complicity against the committee were fully withdrawn at the bar.

The committee relied on the architect's certificate and the above clause.

Levett, Q.C., and *T. R. Hughes*, for the plaintiffs.—The above clause is against public policy, and cannot stand in our way; *Kemp* v. *Rose*, 1 Giff. 258, 7 W. R. Ch. Dig. 12; *Kimberley* v. *Dick*, 20 W. R. 49, L. R. 13 Eq. 1; *Stevenson* v. *Watson*, 27 W. R. 682, 4 C. P. D. 148.

Whitehorne, Q.C., and *Church*, for the committee.—No fraud is now charged against us. The rules avoiding contracts on the ground of public policy will not be arbitrarily extended.

Farwell, Q.C., and *Geo. Henderson*, for the architect.

T. B. Napier, for the subsequent contractor.

CHITTY, J., read the above clause and continued: Whenever public policy is mentioned it is the duty of the court to look carefully into the matter, and not arbitrarily extend the rules upon which certain decisions have turned in regard thereto. It is said that the clause in question is void as being against public policy, because in substance it is an agreement on the part of the plaintiffs and the committee not to set up fraud, and the argument proceeds in this way, "The court will not listen to any such stipulation to be found in any contract, however solemn." To some portion of this argument I accede. If a contract were obtained by fraud, and in the contract itself there were the term inserted that neither party should impeach the contract on the ground of fraud, it may be that such a term would not stand. The reason is obvious. The court would probably set aside that contract because it was obtained by fraud, and in so doing it would set aside the stipulation. That would be a case of fraud in the inception of the contract. It may be also that if there were a stipulation in an executory contract pointing to future fraud on the part of either of the contracting parties such a clause as that would not hold. But the case I have to deal with is an entirely different one. Those who frame clauses in building contracts have by degrees kept on making them more and more stringent by reason of the consequences that follow from opening a certificate and the enormous cost and litigation that arises when the work is a large work, like a railway or a large public building, from any court of justice endeavouring to take the account. A litigation of that kind it is almost impossible to bring to a conclusion in a court of justice, and it appears to me that those who deal in matters of this kind are wise in making the clauses more and more stringent. It is, of course, for the contractor, when he enters into a contract of this kind, to consider whether he will accept it or not. I have no doubt contractors do accept clauses which to the lawyer look terrific, but they do it as business men: they do it for better or worse, and they think on the whole it is very unlikely that any arbitrator selected would act unjustly towards them, and they are content to take him as the person whose award is to be final on the subject. The policy of the law does not require that I should hold in the case I am now dealing with a clause like the present to be void. To put an illustration—suppose a gentleman who is going to have a house built for him, on entering into a complex agreement with the contractor, in the performance of which innumerable questions may arise, says, "Will you agree with me that nothing on earth shall upset the certificate that is given?" Why is that unfair? I can see no reason why grown-up men should not be allowed to contract in these terms, saying, "Neither of us will ever raise the charge of fraud."

I fully adopt the judgment of Jessel, M.R., in *Printing and Numerical Registering Co.* v. *Sampson*, 23 W. R. 463, L. R. 19 Eq. 462, where he says (p. 465): "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider: that you are not lightly to interfere with this freedom of contract."

Persons will often shrink from having charges of fraud made against them, and those who are persistent will, by making such charges, induce persons to come to terms of compromise. The clause is intended to obviate this evil, and therefore stands thus: "Both of us agree that every certificate given by the gentleman named shall stand firm and good, and shall not be questioned, even for fraud." That that is the meaning of the clause I have no doubt. Mr. Levett argued that the word "charge" must mean unfounded charge, because he found it in company with the words "pretence" (which, he says, means something not done), "suggestion" (something that you dare not state openly), and "insinuation" (something else that you dare not state, and will not state, and have not the courage to state), and he said the word "charge" is coloured by the other three words. But the answer, I think, is plain. "Charge" is a word which has been inserted here deliberately, because to read it as meaning an unfounded charge is almost to make nonsense of it. Any man who makes an unfounded charge of fraud fails in it, and no protection is required. Consequently, if that were the meaning of the clause, it would have no operation whatever. The parties say, "We will have no question of this kind raised as against the certificate." If the case had been that the committee themselves had been party in any way to the fraud it would have been very different, and it may be that Mr. Levett's argument (and as at present advised I think it would have been so) would have succeeded.

That disposes of the main point in the action, and it shows that the action is not justified as against the committee, and, as no relief is claimed against the architect, the charge of fraud cannot be entered upon as against him.

Action dismissed, with costs.

Solicitors, *Burton, Yeates, Hart, & Burton*, for *Tyrer, Kenyon, Tyrer, & Simpson*, Liverpool; *Church*, for *W. Banks & Co.*, Preston; *J. Percy Chadwick*, for *Buck, Dicksons, & Cockshott*, Preston; *R. P. Walton*.

Chan. Div. North, J. June 30, 1892.

In re DAVIES.
DAVIES *v.* DAVIES. (*a.*)

Insurance—Policy of life insurance—Power of nomination—Disposition or charge—Will—Residuary bequest.

Testator effected a policy of insurance upon his life. The rules of the insurance society provided that, in default of any nomination by the assurer, the sum insured should be paid to his assigns under any disposition or charge made by the assurer specifically affecting the said sum, either by express reference thereto or by reference generally to sums due upon assurance, and, in default of any nomination or disposition, the sum should be paid to the assurer's widow if she survived him, and, if not, to his children living at his death. Testator, by his will, gave three-fourths of his residue to his three daughters, and the remaining one-fourth to the widow and children of his deceased son. Testator made no nomination or disposition of the sum unless by the above residuary bequest. Testator's wife predeceased him. Three daughters were living at his death.

Held, that testator had not by his will disposed of the policy-money, and that the contract was legal by which, in the events which happened, the policy-moneys should go to his three daughters.

This was a special case to determine whether certain moneys received under a policy of insurance taken out in the Clergy Mutual Insurance Society on March 9, 1847, by the testator, the Rev. E. Davies, on his own life, constituted part of the residuary estate of the testator, or whether the plaintiffs, his three daughters, were alone entitled.

Rule 20 of the society provided as follows:—"In case there shall not be any nomination duly registered existing in respect of the sum assured when due, or so far as no such nomination shall extend, such sum shall be paid to the assigns (if any) of the assurer so far as the claims of such assigns shall extend in every case where such claims shall have arisen under any disposition or charge made by the assurer specifically affecting such sum or any part thereof, either by express reference thereto or by reference generally to sums due upon assurances, whether such disposition or charge shall have been made by deed, will, or codicil, or by any other instrument in writing." "And in case there shall not be any nomination duly registered, nor any such disposition or charge as aforesaid existing in respect of the sum assured when due, or so far as no such nomination and no such disposition or charge shall extend, such sum shall be paid to the widow of the assurer, the assurer being a male . . . or if he shall not leave a widow, then to the child or children of the assurer living at his death, if more than one in equal shares, and if only one the whole to such one; and if there shall be no such child . . . then to the executors, administrators, or assigns of the assurer."

By his will, dated October 4, 1889, the testator, under certain powers contained in his marriage settlements, appointed all the funds subject thereto, and devised and bequeathed all his residuary real and personal estate upon trust, as to one-fourth part for each of his three daughters, and as to the remaining fourth part, except so much thereof as should form part of the property subject to the said marriage settlements, for the widow and children of his deceased son as therein mentioned; and as to the remaining unappointed fourth share of the property subject to the marriage settlements, for the children of his deceased son as therein mentioned.

The testator survived his wife, and died in July, 1890, having never made any nomination, disposition, or charge affecting the said policy, unless the disposition of his residuary estate by his will, as above set out, was such a disposition.

The plaintiffs were the testator's three daughters, who were the only children who survived him, and who were the trustees and executors of his will. The defendants were the widow and children of the testator's deceased son.

A sum of £982 had been paid to the plaintiffs as representing the policy-moneys.

Eve, for the plaintiffs, cited *Phillips* v. *Cayley*, 38 W. R. 241, 43 Ch. D. 222, and referred to the Wills Act, 1837, s. 27.

Bardswell, for the widow and children of the deceased son.—The provision that the policy-moneys shall be paid to the widow and children of the assurer is illegal, as tending to defeat creditors. The testator had a general power of appointment by will which he intended to, and did, exercise.

He cited *Ashby* v. *Costin*, 37 W. R. 140, 21 Q. B. D. 401; *Murray* v. *Favell*, 32 W. R. 102, 25 Ch. D. 89; *In re Marsh, Mason* v. *Thorne*, 38 Ch. D. 630, 36 W. R. Dig. 151.

NORTH, J.—No doubt this case is covered by authority, were authority necessary. If the assured had left no widow or child then the policy-moneys would have been his own and would have belonged to his executors, and so far as he had not disposed of it himself would have belonged to his estate. But here it is clear he has made a legal contract that it should belong to his widow, or in default to his children, if he did not resort to modes of disposition to which he has not resorted. It is said that the contract is illegal, that it is against public policy as tending to defeat creditors, but it does not do so. He might have charged it with the payment of his debts in his lifetime, or by will have given it to his executors, or made a residuary bequest, adding words referring to the policy or words having a general reference to sums due upon assurances. But even if the contract were illegal the present claim is not made by creditors, but by persons who derive title under the will. *Phillips* v. *Cayley* is a clear authority that the will does not operate as a disposition of the policy-moneys. *Murray* v. *Flavell* and *Ashby* v. *Costin* are also authorities to the same effect. The contract is, therefore, effective to make the three daughters entitled to the policy-moneys.

Solicitors, *Shaw, Tremellen, & Kirkwood*, for *S. Ward*, Dudley; *Bourne & Belfield*.

(*a.*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

Chan. Div. North, J. June 3, 1892.

In re CARTER MEDICINE CO.'S TRADE-MARK. (*a.*)

Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 103—*Patents, Designs, and Trade-Marks (Amendment) Act*, 1885 (48 & 49 *Vict. c.* 63), *s.* 6—*Foreign trade-mark—Registration.*

Under sub-section 3 *of section* 103 *of the Patents, &c., Act*, 1883, *a trade-mark which has been applied for in the country of origin, whether capable of being registered in that country or not, may be applied for here, but it*

(*a.*) Reported by G. B. M. COORE, Esq., Barrister-at-Law.

will not be registered here unless it is a mark otherwise capable of registration under the law of this country.

This was a motion on the part of a company incorporated under the law of the State of New York for an order directing the Comptroller-General to proceed with the registration of a trade-mark that had been refused.

The applicants were manufacturers of pills. The trade-mark sought to be registered consisted of the words "Carter's Little Liver Pills" in three lines, surrounded by upright and horizontal lines. The application to register contained the following disclaimer:—"The essential particulars are the following, the words 'Little Liver,' and the applicants disclaim any right to the exclusive use of the word 'pills.'" The applicants had registered their trade-mark in New York. The application in that country contained the following:—"The said words 'Carter's' and 'Pills' do not, however, form an essential part of our trade-mark, the essential feature of which resides in the fanciful title or designation 'Little Liver,' which term indicates to the public the origin and ownership of goods of our manufacture."

The present application was made under section 103 of the Patents, Designs, and Trade-Marks Act, 1883. The material parts of that section, as corrected by the amending Act of 1885, are as follows:—

"(1) If her Majesty is pleased to make any arrangement with the Government or Governments of any foreign State or States for mutual protection of any inventions, designs, or trade-marks, or any of them, then any person who has applied for protection for any invention, design, or trade-mark in any such State shall be entitled to a patent for his invention or to registration of his design or trade-mark (as the case may be) under this Act, in priority to other applicants; and such patent or registration shall have the same date as the date of the protection obtained in such foreign State.

"Provided that his application is made, in the case of a patent within seven months, and in the case of a design or trade-mark within four months, from his applying for protection in the foreign State with which the arrangement is in force.

"Provided that nothing in this section contained shall entitle the patentee or proprietor of the design or trade-mark to recover damages for infringements happening prior to the date of the actual acceptance of his complete specification, or the actual registration of his design or trade-mark in this country, as the case may be.

"(3) The application for the grant of a patent, or the registration of a design, or the registration of a trade-mark under this section must be made in the same manner as an ordinary application under this Act.

"Provided that in the case of trade-marks, any trade-mark the registration of which has been duly applied for in the country of origin may be registered under this Act.

"(4) The provisions of this section shall apply only in the case of those foreign States with respect to which her Majesty shall from time to time by Order in Council declare them to be applicable, and so long only in the case of each State as the Order in Council shall continue in force with respect to that State."

The treaty rights under which the application was made were an Industrial Convention for the Protection of Industrial Property and a protocol. The convention was signed in March, 1883, at Paris, on behalf of France and other States, neither Great Britain nor the United States being original parties. It contained a provision that other States should be permitted to adhere to the convention at their request.

The convention also contained, among others, the following provisions:—

"II. The subjects or citizens of each of the contracting States shall, in all other States of the Union, as regards patents, industrial designs or models, trade-marks and trade-names, enjoy the advantages that their respective laws now grant or shall hereafter grant to their own subjects or citizens. Consequently they shall have the same protection as the latter, and the same legal recourse on any infringement of their rights, provided they observe the formalities and conditions imposed on subjects or citizens by the internal legislation of each State.

"IV. Any person who has duly registered an application for a patent, industrial design or model, or trade-mark, in one of the contracting States shall enjoy, as regards registration in the other States, and reserving the rights of third parties, a right of priority during the periods hereinafter stated. Consequently subsequent registration in any of the other States of the Union before the expiration of these periods shall not be invalidated through any acts accomplished in the interval, either, for instance, by registration, by publication of the invention, or by the working of it by a third party. The above-mentioned terms of priority shall be six months for patents and three months for designs, models, and trade-marks. A month longer is allowed for countries beyond the sea.

"VI. Every trade-mark duly registered in the country of origin shall be admitted for registration and protected in the form originally registered in all the other countries of the Union. That country shall be deemed the country of origin where the applicant has his chief seat of business. If this chief seat of business is not situated in one of the countries of the Union, the country to which the applicant belongs shall be deemed the country of origin. Registration may be refused if the object for which it is solicited is contrary to morality or public order."

The plenipotentiaries of the contracting States signed also a protocol, which, it was declared, should have the same force and validity as the convention itself. The fourth paragraph of the protocol contains the following:—

"Paragraph I. of Article VI. is to be understood as meaning that no trade-mark shall be excluded from protection in any State of the Union, because it does not satisfy, in regard to the signs composing it, the conditions of the legislation of that State, provided that on this point it comply with the legal requirements of the country of origin and that it has been properly registered in the said country of origin. With this exception, which relates only to the form of the mark, and otherwise reserving the clauses of the other articles of the convention, the internal legislation of each State remains in force."

On the 17th of March, 1884, the convention was acceded to by the Government of Great Britain. By an Order in Council, dated the 12th of July, 1887, it was declared that the provisions of section 103 of the Patents, Designs, and Trade-Marks Act, 1883, should be applicable to the United States of America. On the 30th of July, 1887, the convention was acceded to by the Government of the United States.

Aston, Q.C., Fletcher Moulton, Q.C., and *Fothergill*, for the motion.—The court ought to look at the convention and protocol as surrounding circumstances to assist it in construing the Act. Sub-section 3 of section 103 of the Act renders compulsory the registration of a trade-mark that has been registered in one of the countries included in the convention, whether such trade-mark complies with the requirements of the law of this country or not.

Sir R. E. Webster, A.G., and *Ingle Joyce*, for the Board of Trade.—In construing the Act the court cannot look beyond the Act. The Act only protects trade-marks that are capable of registration according to the law of this country. This is not a trade-mark within the definition contained in section 64 of the Act. The applicants have no right to the exclusive use of the words "Little Liver," but the Board of Trade have no objection to register the trade-mark as a combination, if the applicants will disclaim any right to the exclusive use of those words.

NORTH, J.—In my opinion the application is not well founded. The difficulty arises from the provisions at the end of sub-section 3 of section 103 of the Act of 1883. This Act was passed at a time when certain proceedings were going on with a view to mutual relations between foreign countries. I do not think it wrong as a matter of history to refer to the position in which the parties stood to one another. But in my opinion it would be entirely wrong to refer to those matters for the purpose of construing the Act. In 1883 there were negotiations in process, and a convention was arrived at for the mutual protection of trade-marks between certain countries, of which Great Britain was not one. [His lordship then shortly referred to the provisions of the convention.] In 1884 the Government of Great Britain acceded to this convention, and in 1887 the United States did so. It was in anticipation of this that section 103 was inserted in the Act. It was not intended to be applicable to all possible arrangements that might be made, but to the difficulty arising from the circumstance that a person might formerly obtain a patent for an invention in this country and some other countries, without being the inventor at all. Section 103 as corrected by the Act of 1885 provides that if such an arrangement be made, any person who has applied for protection in the foreign country shall be entitled to the registration of his mark in priority to other applicants. It does not say that he shall be entitled to the mark out and out, but only in priority to other applicants. Then sub-section 3 says that the application for the grant or registration must be made in the ordinary way under the Act. All that is clear, dealing with the application. Then we come to this: "Any trade-mark the registration of which has been duly applied for in the country of origin may be registered under this Act." Now that may mean one of three things—(1) that where registration has been applied for in the country of origin, it may be applied for in this country; or (2) that registration in the country of origin justifies registration here; or (3) that application for registration, even if it cannot be granted in the foreign country, justifies and necessitates registration here: which is an absurd result.

I read that this refers not to registration but to application for registration, a construction which is borne out by the words "duly applied for." But then Mr. Aston says that what you have to find out is whether there has been a due application for registration in the foreign country, for which purpose you would have to find out what the law requires in the foreign country. But in my opinion the true meaning is that application is justified here, where there has simply been an application there. Then there is the question in what form the order should be made. The Attorney-General is willing not to object to the trade-mark being registered with a larger disclaimer so as to protect the public, as he considers, sufficiently. But I think the best course is to refuse the application altogether, and not to consent to such a registration as the Attorney-General was prepared to make.

Solicitors, *Paddison & Fullilove; Solicitor to the Board of Trade.*

Chan. Div. Stirling, J. } July 30, 1892.

In re DALISON'S SETTLED ESTATES. (*a.*)

Settled land—Improvements—Rent-charges—Redemption—Capital moneys—Right of tenant for life to repayment—Improvement of Land Act, 1864 (27 & 28 *Vict. c.* 114), *s.* 49—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 21, *sub-sections* 2, 3—*Settled Land Act*, 1887 (50 & 51 *Vict. c.* 30), *s.* 1—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 15.

A tenant for life had paid certain instalments of rent-charges which had, between 1885 *and* 1890, *been created under the Improvement of Land Act*, 1864, *to secure money borrowed by him for improvements on the settled estates. On an application to the court to authorize, under section* 15 *of the Settled Land Act*, 1890, *the repayment to him by the trustees, out of capital moneys in their hands, of the instalments paid by him before March*, 1892, *when he first called upon the trustees to provide for the instalments,*

Held, that the case did not come within section 15 *of the Act of* 1890, *but within section* 1 *of the Act of* 1887, *and that the application must be refused.*

Adjourned summons.

A tenant for life under a settlement dated the 31st of August, 1874, had between the years 1885 and 1890 borrowed from the Lands Improvement Co. various sums of money, amounting to £3,279, for the purpose of carrying out improvements on the settled estates, and had created rent-charges under the Improvement of Land Act, 1864, to secure the repayment of the same. The rent-charges as they became due were paid by the tenant for life until the 10th of March, 1892, when he formally requisitioned the trustees of the settlement to provide for the future payments of the rent-charges and demanded repayment out of capital moneys in their hands of the sums already paid by him. The trustees refused to act without the sanction of the court, and the tenant for life then took out this summons, asking for a declaration that any moneys in the hands of the trustees being capital moneys under the Settled Land Acts, 1882 to 1890, or applicable as such, might properly be applied by the trustees (*a*) in payment of all future instalments, whether consisting of principal or interest of the several rent-charges, or (*b*) in payment of any sums required for the redemption of the said rent-charges respectively, including therein any sum payable by way of bonus for redemption, and in either case (*c*) in payment to the applicant of all instalments, whether consisting of interest or principal already paid by him in respect of such rent-charges respectively.

The summons came before Stirling, J., in chambers, on the 26th of May, 1892, when he made a declaration allowing the payments under heads (*a*) and (*b*), and adjourned the rest of the summons into court.

Crawley, for the applicant.—The improvements in this case were such as were authorized by the Settled Land Acts, and the court can therefore, under section 15 of the Settled Land Act, 1890, direct the application of capital moneys for their payment. Although that section was passed to obviate the difficulty occasioned by the decision in *In re Hotchkin's Settled Estates*, 35 W. R. 463, 35 Ch. D. 41, it gives the court a discretionary power to relieve tenants for life from payments for improvements authorized by the statutes. *In re Knatchbull's Settled Estates*, 33 W. R. 10, 569, 27 Ch. D. 349, 29 Ch. D. 588, decided

(*a.*) Reported by W. A. G. WOODS, Esq., Barrister-at-Law.

that rent-charges such as the ones in this case were not incumbrances affecting the inheritance within the Act of 1882; but it was held, under the Act of 1887, that capital moneys might be applied in redemption of such rent-charges: *In re Lord Egmont's Settled Estates*, 38 W. R. 762, 45 Ch. D. 395. Your lordship's decision in the case of *In re Howard's Settled Estates*, 40 W. R. 360, [1892] 2 Ch. 233, was on the 1st section of the Act of 1887, and more extensive powers are conferred on the court by the Act of 1890.

He also referred to *In re Lord Sudeley's Settled Estates*, 36 W. R. 162, 37 Ch. D. 123.

W. C. Druce, for the trustees, did not oppose the application.

STIRLING, J.—The numerous enactments which have been passed for the purpose of amending the Settled Land Act, 1882, make it somewhat difficult to ascertain the meaning and intention of the Legislature with reference to the various applications which are from time to time made under those Acts, but I think the present application must fail.

The Act of 1882 authorized the application of capital money arising thereunder in various ways. One way is mentioned in section 21 (ii.) of the original Act—viz., "In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land tax, rent-charge in lieu of tithe, crown rent, chief rent, or quit rent charged on or payable out of the settled land." Another way is mentioned in sub-section (iii.) of the same section—viz., "In payment for any improvement authorized by this Act."

After the passing of the original Act the question arose which was decided in the case of *In re Knatchbull's Settled Estates*. In that case improvements had been effected under the Land Drainage Act, 1849, and the Land Improvement Act, 1864, and had been paid for by money raised upon rent-charges created under those Acts, and the application was that capital money arising under the Settled Land Act, 1882, might be applied in discharge of the incumbrances. It was held by the Court of Appeal that the rent-charges so created were not "incumbrances affecting the inheritance of the settled land" within the meaning of section 21 (ii.) which the tenant for life was entitled to have paid out of capital money, so as to relieve him from the payment of the instalments. Thereupon the Legislature altered the law by passing the Settled Land Act, 1887, section 1 of which provides that "where any improvement of a kind authorized by the Act of 1882 has been made or may be made either before or after the passing of this Act, and a rent-charge, whether temporary or perpetual, has been or may be created in pursuance of any Act of Parliament, with the object of paying off any moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rent-charge or otherwise providing for the payment thereof shall be deemed to be applied in payment for an improvement authorized by the Act of 1882." It is to be observed that the Legislature did not enact that these rent-charges should be deemed to be "incumbrances affecting the inheritance" within the meaning of section 21 (ii.) of the Act of 1882, but that capital money expended in redeeming such rent-charges should be deemed to be applied in payment for improvements authorized by the Act of 1882. Accordingly it was held by the Court of Appeal in *In re Lord Egmont's Settled Estates* that by section 1 of the Act of 1887 capital money might be applied in payment of instalments of terminable rent-charges for which the tenant for life was liable.

But I have held in *In re Howard's Settled Estates* that that section is not retrospective in its operation. My decision in that case was given upon the Act of 1887 alone, and of course I adhere to it. It is now submitted that I ought to make the order asked for in this case, on the ground that it is sanctioned by section 15 of the Act of 1890. In order to understand the meaning of that section it is necessary to refer to the case of *In re Hotchkin's Settled Estates*, in which it was held that capital money could not be applied in recouping to a tenant for life money paid for improvements executed by him without first submitting a scheme to the trustees and obtaining their approval. That being the state of the law the Legislature passed the amending Act of 1890, by section 15 of which it is provided that "the court may, in any case where it appears proper, make an order directing or authorizing capital money to be applied in or towards payment for any improvement authorized by the Settled Land Act, 1882, notwithstanding that a scheme was not, before the execution of the improvement, submitted for approval, as required by the Act of 1882, to the trustees of the settlement or to the court. Now all that was intended by the Legislature there was simply to remove the blot revealed by *In re Hotchkin's Settled Estates*; but is is said that I ought to hold that sums already paid by a tenant for life in respect of instalments of these rent-charges should be treated as payments for improvements authorized by the Settled Land Acts. Now, by section 1 of the Act of 1890, that Act is to be construed as one with the Acts of 1882 to 1887, and I must therefore read it as if it stood in one Act comprising the whole of the Acts, and in particular section 1 of the Act of 1887. That being so, I have now to say whether sums already paid by the tenant for life in respect of instalments of improvement rent-charges can be treated as payments for improvements authorized by the Acts, and therefore payable out of capital money, and it seems to me that that is not the true construction of section 15. The Act of 1887 draws a distinction between moneys paid in redemption of such rent-charges and payments for improvements. They are only to be deemed to be applied in payment for improvements. They are not payments for improvements in fact. It seems to me, therefore, that I should be unduly straining the words of section 15 if I were to hold that the present application is justified by it. I do not think the case comes within that section, but within section 1 of the Act of 1887. The third part of the summons therefore fails, and must be dismissed.

Solicitors, *Markby, Wilde, & Johnson.*

Chan. Div. (Vaughan Williams, J.) June 25; July 2, 5, 1892.

In re NEW ORIENTAL BANK CORPORATION. (*a.*)

Company—Winding up—Practice—Petition for compulsory winding up—Supervision order—Readvertisement of petition—Wishes of creditors—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63).

Since the Companies (Winding-up) Act, 1890, *the making of a supervision order on a petition for a compulsory order, where the petitioners and the creditors and contributories are all, so far as is known, desirous of a supervision order, is not so much a matter of course as it was before the Act.*

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

Where two petitions as presented and advertised prayed for the compulsory winding up of an important banking company, but a supervision order only was asked for at the hearing,

Held, that the petitions must stand over for the issue of fresh advertisements stating that at the hearing a supervision order would be asked for.

Petition.

Two petitions were presented for the winding up of this company, one by the company and the other by creditors. Subsequently, resolutions were duly passed by the company for a voluntary winding up, and that a Mr. Welton should be appointed liquidator; and he was authorized to appear and consent to an order that the voluntary winding up should be continued under the supervision of the court. A supervision order was now asked for on behalf of the company at the hearing before Vaughan Williams, J., sitting as an additional judge of the Chancery Division.

It appeared that the company was incorporated in 1884, its objects being generally to carry on a banking business in London or in the East, such objects being more particularly defined by a special Act of Parliament passed in 1889. The nominal capital was £2,000,000, divided into £10 shares, but only 59,800 of the shares had been issued, on which, however, everything was paid up. The company's petition was supported by holders of 550 shares and by creditors for a large amount. It was said that all persons interested seemed desirous of a supervision order.

Robinson, Q.C., and *Ingle Joyce*, for the company.

Phipson Beale, Q.C., and *Ashworth James*, for the petitioning creditor.

Vernon R. Smith, for shareholders supporting the application.

George Lawrence and *Harman*, for creditors supporting the application.

VAUGHAN WILLIAMS, J., said he was aware that it had been the practice of the Chancery Division, where the petitioners and the creditors and contributories desired a supervision order, to make such an order. But that practice was mainly founded on decisions pronounced prior to the Companies (Winding-up) Act, 1890. Since then, having regard to the fact that the object of the Legislature was that creditors and contributories should have a special protection under a compulsory winding-up order which they had not enjoyed before, the making of a supervision order was not now, under such circumstances, so much a matter of course as formerly. The petitions, as presented and advertised, asked for a compulsory order, and there might be many people who thought that the order which would be made would be the order that was asked for. As they did not know that at the hearing a mere supervision order would be asked for, his lordship thought the proper course was to adjourn the matter for a week. The protection of the Board of Trade was only present when a compulsory order had been made, and creditors and contributories should have an opportunity of coming forward if they desired such an order. His lordship did not say this with a view to encouraging creditors or shareholders to come and ask for compulsory orders, but he thought it right not to make the order at once, so that the persons interested might have the benefit of the protection given them by the Legislature if they wished for it, a protection which they could only have when a compulsory order was made. The petitions must both stand over for a week, and in the meantime advertisements must be issued stating that at the hearing a supervision order would be asked for.

At the further hearing of the case only one creditor, a depositor in the bank, opposed a supervision order. He appeared in person, and asked that a compulsory order might be made, alleging mismanagement and other grounds, and attempting to support his case by statements which his lordship declined to hear without affidavits. His lordship made the usual supervision order on both petitions, pointing out that the applicant would not be prevented thereby from presenting a petition for a compulsory order.

Solicitors, *Hollams, Son, Coward, & Hawksley; Day, Russell, & Co.; Badham & Williams; Sutton, Ommaney, & Rendall.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Kay, L.JJ.) — Oct. 25, 26.

KIMBER v. PRESS ASSOCIATION. (a.)

Libel—Privilege—Report of judicial proceeding—Application to justices for summons—Open court—Fairness of report—Burden of proof—Province of judge.

Where justices specially summoned for the purpose sit in their council chamber to hear an application for the issue of a summons on a criminal charge, a fair report of what takes place on such proceeding is privileged, although no evidence is given on oath, and although such proceeding does not result in a final decision, but leads to a further inquiry.

The burden of showing that an alleged libel is a fair report of a judicial proceeding lies on the defendant; but it is sufficient if this clearly appears from the plaintiff's evidence. Where the plaintiff's contention is that the report is rendered unfair by certain omissions, if the judge thinks such omissions to be immaterial he may decline to leave the case to the jury, and order verdict and judgment to be entered for the defendant.

Application by the plaintiff for a new trial of an action of libel, or for judgment.

The action was brought by the plaintiff in respect of the following paragraph, which was furnished by the defendants to several newspapers:—"Alleged perjury by a solicitor.—Mr. W. M. Thompson, barrister, applied at the Guildhall, Canterbury, to-day, for a summons against Edmund Kimber, solicitor, of Alpine-villas, Shooter's-hill, and 15, Walbrook, for perjury alleged to have been committed in the Canterbury Bankruptcy Court in connection with some bankruptcy proceedings. The bench acceded to the application." The defence was that the words complained of were a fair and accurate report of a judicial proceeding published *bonâ fide* and without malice.

At the trial, which took place before Hawkins, J., and a jury, it was contended for the plaintiff that there were certain omissions in the paragraph which rendered it an unfair report of the proceedings in question; and that the application for the summons being an *ex parte* application, made to magistrates sitting in private, and not in open court, the report of such proceedings was not privileged. The clerk to the Canterbury magistrates was called as a witness for the plaintiff, and said that the application was made at the Guildhall Council Chamber to three magistrates who had been summoned by himself to hear the case. There was only one other person

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

present besides those actually engaged in the case. He did not know whether anyone was in charge of the door. Counsel said he applied on behalf of a Mr. Hasker for a summons for perjury alleged to have been committed by Kimber in certain bankruptcy proceedings in which Kimber had acted as a solicitor. No evidence was given on oath. The summons was granted, but when it subsequently came on to be heard, the case was dismissed. The plaintiff was also called and gave evidence.

The learned judge, after hearing argument, held that the publication was privileged, being a *bonâ fide* report of a matter heard in a court of law; and being of opinion that there was no evidence of unfairness, he declined to leave the case to the jury, and ordered verdict and judgment to be entered for the defendants.

The plaintiff appealed.

Candy, Q.C., and *J. E. Fox* (*A. Macpherson* with them), for the plaintiff.—This publication is not privileged. The right to publish reports of judicial proceedings depends on the right of the public to be present. The public have no right to be present at an *ex parte* application for a summons. Section 19 of Jervis's Act (11 & 12 Vict. c. 42) says that the room in which the examination of an accused person takes place is not to be deemed an open court. *A fortiori*, when an application is made *ex parte* for the issue of a summons the room where the justices sit is not an open court. This case is different from *Lewis* v. *Levy*, 6 W. R. 629, E. B. & E. 537. That was the case of the hearing of a summons which had been already granted, and evidence was taken on oath. The court refrained from holding that the publication of preliminary inquiries before magistrates was universally lawful. The effect of *Usill* v. *Hales*, 26 W. R. 371, 3 C. P. D. 319, is that a preliminary inquiry, which does not result in a final decision, but merely leads to a further investigation, does not come within the rule of privilege. Next, this report is rendered unfair by two omissions. The first is that of the name of the applicant, which is a very important matter in such a case. If Mr. Hasker's name had been given in the report it might be that the publication would not have done the plaintiff any injury. The other omission is that of the name of the person in whose bankruptcy proceedings the perjury was alleged to have been committed. The effect of this is that the words convey the impression that the plaintiff himself was a bankrupt. The burden was on the defendants to prove that the report was fair. They ought to have been required to establish their plea: see *Stevens* v. *Sampson*, 28 W. R. 87, 5 Ex. D. 53. And the question whether they succeeded in doing so ought to have been submitted to the jury.

Blake Odgers (*Murphy, Q.C.*, and *H. Fraser* with him), for the defendants.—It is true the burden was on the defendants to show the report was fair. But the plaintiff's evidence showed clearly that it was so, unless the omissions were material. And the question whether they were material was a question which the judge was entitled to decide: *Capital and Counties Bank* v. *Henty*, 31 W. R. 157, 7 App. Cas. 741.

Lord ESHER, M.R.—I am of opinion that this appeal must be dismissed. The question is whether what was done by the defendants is privileged by the law of England. The rule is that where there are judicial proceedings before a properly constituted judicial tribunal, which is exercising its jurisdiction in open court, then an account of what there took place, if published fairly and accurately without malice, is privileged. Under certain circumstances that publication may be hard on individuals. But public policy requires that that hardship should be borne rather than that judicial proceedings should be secret. Does this case come within that rule?

An application was made before magistrates for a summons against the plaintiff on a charge of perjury. Magistrates have jurisdiction to hear such an application; they are a properly constituted body, having jurisdiction to determine whether such a summons should be issued. This, then, was a judicial proceeding before a properly constituted judicial tribunal. So far the case comes within the rule.

But it is said that though they were a properly constituted body, and though they were exercising a judicial consideration, they were not acting in open court. It is argued that the effect of section 19 of Jervis's Act (11 & 12 Vict. c. 42) is that these proceedings must be deemed not to have taken place in open court. This section does not in its terms apply to the case of an application for a summons. The section itself, therefore, cannot be relied on. But the argument is this: The section says that at a later stage of the proceedings—viz., when the summons is being heard—the room where the justices sit is not an open court, and, therefore, it is ridiculous to suppose it can be an open court at an earlier stage. I cannot see that that is necessarily so. But in truth, the proposition which the plaintiff relies on is not made out. What the section enacts is that the magistrates may order that no persons are to have access to the room where they are sitting; they have a discretion as to whether the court shall be closed or not. Here the magistrates did not make any order for closing the court. And it seems to me clear that if the court is not in fact closed, it is open. However that may be, this was an application for a summons, to which section 19 does not apply. The only section that can apply is section 1, and I think, in the absence of any enactment to the contrary, that these proceedings took place in open court.

It is then said you must not publish a report of the proceedings, however correct it may be, unless the magistrates give a final decision. I do not understand that to be the true rule. The cases seem to me to show that if the result of the proceedings before the magistrates will lead to a final decision, you may publish a fair account of such preliminary proceedings, although a final decision of the whole subject-matter is not arrived at at that stage: *Lewis* v. *Levy*, *Usill* v. *Hales*. Now, if the summons is refused, that is a final decision; if it is allowed, the granting of it must ultimately result, either in one way or another, in a final decision being arrived at. Therefore, so far as the nature of these proceedings is concerned, the present case comes within the rule.

It is now necessary to consider whether the plea of privilege is made out otherwise. Speaking for myself, I am of opinion that in order to justify an alleged libel as being the publication of a report of judicial proceedings, the burden lies on the defendant to show that the report is fair and accurate and published without malice. But it does not necessarily follow that the defendant must prove this by witnesses called by himself. He may vouch what is proved in his favour by the plaintiff's witnesses. Now what was proved in this case by the plaintiff's witnesses? There was no suggestion of malice. The plaintiff simply put in the libel and called evidence as to what happened at the proceedings before the magistrates. This evidence showed that the libel was, so far as it went, an account of what took place, but the plaintiff contended that there were certain omissions in it which made it unfair. The first omission was the failure to state the name of the applicant. But no evidence was given of any such peculiarity in that person as would make

the omission of his name of any importance. The other was the failure to state in whose bankruptcy the alleged perjury was supposed to have been committed. The suggestion was that the words naturally conveyed the meaning that it was in Kimber's own bankruptcy. I do not see why any reasonable man should draw such an inference. The learned judge held, as he was entitled to do, that these omissions were immaterial, and he declined to leave to the jury the question whether they rendered the report unfair. I think that the learned judge was right. I am of opinion that the effect of the evidence of the plaintiff's witness was that the alleged libel was a fair account of what took place, and that the jury would not have been justified in saying that the report was unfair. The appeal must, therefore, be dismissed.

LOPES and KAY, L.JJ., concurred.

Application refused.

Solicitor for the plaintiff, *Frank Kimber Bull.*

Solicitor for the defendants, *A. M. Bradley.*

From Q. B. Div. (Lord Esher, M.R., and Bowen and A. L. Smith, L.JJ.) June 29, 30, 1892.

MAYOR, &c., OF KINGSTON-UPON-HULL *v.* HARDING. (*a.*)

Principal and surety—Fraud of principal—Liability of surety—Building contract—Certificate obtained by fraud of contractor.

An alteration in the position of a surety brought about by the act of an employer does not discharge the surety, if the act of the employer has been caused by the fraud of an employé whose honesty the surety has guaranteed.

The plaintiffs entered into a contract with a firm of contractors for the construction of certain works. The defendants were parties to the contract as sureties for the contractors. The contract provided that the liability of the sureties should continue until the engineer of the plaintiffs should have given his final certificate of completion. A certain sum of money was to be retained by the plaintiffs, and not paid over to the contractors until six months after the granting of the final certificate of completion. The certificate was obtained by fraud on the part of the contractors, and the retention money was paid over to the contractors.

Held (affirming the decision of Grantham, J.), *that the certificate, having been obtained by the fraud of the contractors, whose honesty the defendants had guaranteed, did not operate as a discharge of the defendants' liability under their contract of suretyship; that the payment over of the retention money, even if it had not been brought about by the contractors' fraud, would not have discharged the defendants, there being no evidence that the payment of the retention money had caused any alteration in the position of the defendants.*

Appeal of two of the defendants from the judgment of Grantham, J., on further consideration, after trial with a special jury.

The action was brought by the Corporation of Hull against a firm of contractors for breach of contract and for moneys received to the use of the plaintiffs, and against the defendants Harding and Thacker on their contract with the plaintiffs as sureties for the firm of contractors.

On the 25th of June, 1888, a contract was entered into between the plaintiffs and the defendants, under which the contractors agreed to execute, well and truly, certain works described in the specification, which included the construction and maintenance of certain sewers, and other works connected therewith, for the drainage of a portion of Kingston-upon-Hull. The defendants Harding and Thacker, as sureties, covenanted with the corporation that the contractors should well and truly execute the works referred to, and in the event of failure on the part of the contractors to perform their part of the contract the sureties agreed to pay to the corporation all such loss as the corporation should sustain.

It was provided by the specification that the contractors and their sureties should not be released from their liabilities and obligations under the contract until after the expiration of six months from the date of the certificate of completion, which was to be given by the engineer of the corporation, and not then, unless all the conditions of the contract should have been fulfilled to the satisfaction of the engineer, of which satisfaction the final certificate of the engineer was to be the only evidence binding on the corporation. Advances of money at the rate of 90 per cent. of the value of the work executed, as certified by the engineer, were to be made to the contractor as the work proceeded. It was also provided that the final certificate for the balance of 10 per cent. should be furnished six calendar months after the date of the engineer's certificate of completion, provided the works had been properly maintained by the contractor and were executed to the satisfaction of the engineer, and that the contractor had complied with the whole of the stipulations of the specifications. It was further agreed between the parties that the works generally and every part thereof should be conducted and completed under the superintendence and to the satisfaction of the engineer of the corporation.

The works were completed on the 18th of April, 1889, and the engineer gave his certificate of completion more than six months before the 7th of February, 1890, on which date the engineer gave his final certificate, and the balance of the contract price was then paid to the contractors. It was subsequently ascertained that the works had been improperly and imperfectly constructed, and were incomplete and not in accordance with the conditions of the contract, and were wholly useless for drainage purposes. The corporation then brought this action against the contractors and their sureties.

The action was tried at the Leeds Assizes before Grantham, J., and a special jury. The jury found, as a result of the evidence, on the questions put to them by the learned judge, that the work had been scamped and fraudulently done; that the corporation had been cheated by the way the work had been done; that the certificate for the work done had been obtained by the fraud of the contractors; that the corporation had omitted to properly superintend the work, and that this omission led to the scamping of the work; that there was no evidence of any wilful default or connivance on the part of the engineer of the corporation. On these findings the learned judge at once entered judgment for the plaintiffs against the contractors, leaving the amount of the damages to be settled by a referee. After further consideration the learned judge entered judgment against the sureties, who appealed. The contractors did not appeal.

Channell, Q.C., Montague Lush, and *Hindmarsh,* for the defendants, the sureties.—The sureties were innocent parties, and are entitled to set up the final certificate as releasing them from their suretyship, even though that certificate was obtained by the

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

fraud of the contractors, because if the corporation had not been negligent in the performance of their duty of superintendence that fraud would have been discovered at the time. In *Phillips* v. *Foxall*, 20 W. R. 900, L. R. 7 Q. B. 666, it was held that where an employer on discovering his servant's dishonesty did not discharge him, the surety was released from liability. In this case the corporation ought to have discovered the contractors' fraud before the work was finished. [Lord ESHER, M.R., referred to *Black* v. *The Ottoman Bank*, 10 W. R. 871, 15 Moore P. C. 472.] The position of the sureties has also been altered by the fact of the corporation having given up the "retention money."

Forbes, Q.C., Tindal Atkinson, Q.C., and *Manisty*, for the plaintiffs.—The final certificate, having been obtained by fraud, is void and of no effect, and cannot operate as a discharge of the sureties. The sureties were in effect sureties for the honesty of the contractors, and cannot set up their fraud as a defence: *Petty* v. *Cooke*, 19 W. R. 1112, L. R. 6 Q. B. 790. Negligence of the employer does not discharge the surety unless it amounts to a connivance: *Mayor, &c., of Durham* v. *Fowler*, 22 Q. B. D. 394, 37 W. R. Dig. 149.

Channell, Q.C., replied.

The following cases were also referred to in the course of the arguments: *Knights* v. *Wiffen*, 19 W. R. 244, L. R. 5 Q. B. 660; *Simm* v. *Anglo-American Electric Telegraph Co.*, 28 W. R. 290, 5 Q. B. D. 188; *Phillips* v. *Clagett*, 11 M. & W. 84; *Wulff* v. *Jay*, 20 W. R. 1030, L. R. 7 Q. B. 756; *Law* v. *East India Co.*, 4 Ves. 824.

Lord ESHER, M.R.—In this case the Corporation of Hull are suing two sureties upon a contract of suretyship. The sureties insured the corporation against something which was to be done or not to be done by a firm of contractors for works. The contract in terms was that the contractors should do the work well and truly, according to plans and specifications. The work has not been done "well"; therefore, by the terms of the contract of suretyship, the sureties are *primâ facie* liable. The contract contained another term to the effect that the liability of the sureties should continue until a final certificate had been given by the engineer of the corporation, and that certificate was to be the only evidence of the work having been done to the satisfaction of the corporation. The engineer gave his final certificate, but it cannot have been the intention of the contract with the sureties that their liability should cease when the certificate was given, however it might have been procured, but that it should only cease when such a certificate was given to the contractors as would by implication release the contractors. We must, therefore, see whether the certificate was such a one as would by implication release the contractors. The jury have found that the certificate was procured by the fraud of the contractors, and that finding has not been challenged. Under those circumstances it may be that some act was necessary on the part of the corporation to enforce their rights against the contractors. The contractors, having procured the certificate by fraud, could not plead it as a release, and if the contract of suretyship is as above stated, it follows the sureties cannot escape liability by means of the certificate, and therefore they have no defence on the contract alone.

It has been said, however, that there are certain doctrines of law which will release the sureties. In the first place it was said that the corporation had imposed on them by the contract the duty of superintending the contractors' work, and that it was their failure to fulfil that duty which caused the work of the contractors to be badly done. What is the meaning of the expression "superintend"? It was contended that it meant that the corporation were to direct the work. When you consider the positions of the corporation and the contractors it is clear that that is not the meaning. The contractors never submitted to have the work directed by the corporation. Superintendence merely means that the corporation had a right to see how the work was being done, not to direct how it should be done. That is to say, the corporation had an option given to them whether they should superintend or not, and the omission by the corporation to exercise this option does not relieve the contractors from the obligation of doing the work properly, nor does it release the sureties from their liability. I have already said that the giving of the final certificate by the engineer did not, by reason of the terms of the contract, release the sureties. But it was argued that the giving of the certificate does release the sureties by virtue of the law of suretyship. This argument also fails, because the mere fact of giving the certificate, even though it may have induced a certain belief on the part of the sureties, did not alter their position; it did them no damage at all.

The next point was that the corporation were induced to give up to the contractors the retention money, which, if it had been retained in the hands of the corporation, would have been a fund to which the sureties might have had recourse. If that would have reduced the amount of the sureties' liability, then the giving up of the fund would have released the sureties altogether. Did the giving up of that money, brought about as it was by the contractors' fraud, release the sureties? The sureties contracted that the work should be well and truly done—that means well and honestly done. It has been proved that the contractors did not do the work well and honestly, they did it badly, and then fraudulently concealed the bad work from the persons authorized by the corporation to see how the work was being done. This fraudulent concealment was a breach by the contractors of a part of the contract, the due performance of which the sureties had guaranteed to the corporation. Therefore the retention money was paid over by reason of a fraud against which the sureties had insured the corporation. It is impossible to say, according to any doctrines of law, that the sureties are to be relieved from liability by a fraudulent breach of the contract the due performance of which they had guaranteed. The paying over by the corporation of this retention money is, therefore, a fact on which the sureties cannot rely. For these reasons I am of opinion that this appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion. The broad principle of law which is at the root of our decision is that a surety cannot say that he is discharged from his suretyship, on the ground that his position has been altered by the act of the employer, when that act has been caused by fraud, against which the surety, by his very act of suretyship, contracted. The present case presents several matters of interest, and the first question to be considered is the effect of the final certificate of the engineer of the corporation. The certificate was obtained by fraud, and the corporation, as against the contractors, were entitled, on the discovery of that fraud, to elect within a reasonable time to avoid that certificate. As soon as they did so, it was gone as against the contractors and all other persons who had not acted *bonâ fide* on the faith of it. If the corporation had taken no steps to repudiate the certificate, it would have been good, but it has been

impugned in such a way as to make it clear that the corporation are entitled to treat it as not binding. Therefore, unless something happened after the giving of the certificate to alter the position of the sureties, it will not avail them. That is where the argument for the defendants breaks down. There is no proof that since the giving of the certificate the position of the sureties has been so altered as to render it inequitable to enforce it against them. It was suggested that the certificate raised an estoppel. That is quite true, if the sureties had acted on the certificate, but as they did not do so, there is no estoppel. Mr. Channell cited *Knights* v. *Wiffen* as an authority for the proposition that the mere statement in the certificate itself, by inducing the sureties to take no steps against the contractors, must amount in law to an alteration of the sureties' position. It is sufficient to point out that the question whether the sureties' position has been altered is one of fact, not of law. There may, no doubt, be some facts which are such that it is impossible not to say that in law they are an alteration of position, but that is not the case here. For example, if the sureties, acting on the faith of the certificate, had settled an account with the contractors, it would have been different. If the decision in *Knights* v. *Wiffen* was intended to go further than I have said, then I should not be disposed to agree with it, and it is not binding on this court. There may be some doubt, as was suggested in Smith's Leading Cases, whether the inference of fact in that case was correctly drawn. Even if the certificate had altered the position of the sureties, there would still remain the question whether or no the certificate had not been obtained by an act of the contractors, against which the sureties in the contract of suretyship had contracted. If so, it is clear that an answer would have arisen under the principle of law stated at the beginning of my judgment.

Apart, however, from the giving of the certificate, an argument has been based on the payment over of the retention money which, under the contract, ought to have been retained until the work was completed. I cannot doubt but that the retention money was a fund to the benefit of which the sureties were entitled to look, and by reason of the payment this benefit was destroyed. The argument on this head might be reduced to a dilemma as against the corporation—either the certificate was given or it was not; if it was, then the sureties were discharged; if it was not, why did the corporation pay over the retention money and so deprive the sureties of their security? The answer is that no certificate was given—that is, no certificate binding on the corporation. It is true that the retention money was paid over before it was due, and to that extent the position of the sureties was altered; but that came about by the fraudulent execution of work, the honest execution of which the sureties had guaranteed. The answer, therefore, is to be found in the contract of suretyship itself, which provides that in such a case the sureties are not to be discharged. They cannot be discharged by an act against which they had themselves guaranteed the corporation.

A further point in the case is that by the contract between the corporation and the contractors the work was to be done under the superintendence of the corporation. The corporation did not superintend, and therefore the position of the sureties is altered in that respect. It is an obvious remark that there was no contract between the corporation and the sureties that the former should superintend the work. The effect of the proviso is merely to give the corporation an option of interfering in the progress of the work. The non-exercise of that option does not fall within those cases in which the neglect of an employer to enforce a right against a contractor deprives the surety of the advantage of the existence of that right. There are cases where the omission of the employer would destroy the surety's rights under the contract of suretyship and alter the position of the surety, and so avoid the relation of suretyship. But that is not the case here. There was no right in the surety that the corporation should superintend the work, and the corporation did not abandon the option by not superintending. They only failed to exercise it.

What is the law on this point? Ever since, and probably before, the case of *MacTaggart* v. *Watson*, 3 Cl. & Fin. 525, as expounded by subsequent authorities, notably *Dawson* v. *Lawes*, 2 W. R. 213, Kay, 280, and the cases cited in the *Mayor of Durham* v. *Fowler*, the law has been this: The mere omission on the part of an employer, mere passive acquiescence in acts improper on the part of the employee, will not of itself relieve the surety. If the omission is an omission to do an act which the employer has contracted should be done, that is different. If there was an omission to preserve the security to which the surety was entitled, in such a case the omission would be inconsistent with the principle of suretyship, it would be an omission to do an act which the employer had contracted to do. Another instance of an omission which would fall under the branches of the law of suretyship which I have mentioned, occurs in *Phillips* v. *Foxall*, where an employer omitted to discharge a servant who had been found to be dishonest. That case can only be explained on one of two principles: one, that it is part of an understanding of the contract of suretyship that the surety should be informed of subsequent acts of dishonesty on the part of the person guaranteed, so that he may determine his guarantee or demand the dismissal of the servant. That is the view that was taken by Quain, J., and Cockburn, C.J. The other principle, expressed by Blackburn, J., was that the surety, upon a default by the person guaranteed, is entitled to the benefit of all the rights of the employer against the employed, and if the employer did not discharge the defaulting employee, the right of the surety would be destroyed. It is a different explanation, but it comes to the same thing. An omission which destroys the right of the surety comes to the same thing as a positive act destroying the right; for if the right is one which ought to be preserved, the omission to preserve it is a wrong. There is no case showing that the non-exercise by the corporation of their right of superintendence was an act of negligence or omission which altered the rights of the sureties and placed them in a worse position than before.

A. L. SMITH, L.J.—I am of the same opinion, and have but little to add. The great question to be determined in this case is, against what did the sureties guarantee the corporation. That depends on the true construction of the contract, by which it was contracted that the contractors' work should be well and truly executed. I think truly means honestly. In other words, the sureties guaranteed that the contractors should not fraudulently scamp or hide the work as it went on. It is said that although that may be so, clause 4 of the specification must be read together with the contract, and if that is done the sureties must be released. In my opinion that is not so. The contractors broke the contract by scamping the work and so obtained the certificate by fraud. As against them therefore the certificate might be set aside. I think that the true reading of clause 4 is that the effect of it is to be the same as regards the contractors and the sureties—namely, that when a valid certificate

has been given both are discharged, but until it is given they are not. On the question of release by the doctrine of law applicable to suretyship I have nothing to add to what has already been said. As to the payment of the retention money, that depends on the true construction of the contract, which I have already dealt with. The sureties having guaranteed the performance of the contractors, cannot say they are released by the payment of money which was brought about by the very acts against which they insured. That is the salient point which distinguishes this case from those which were cited, especially *Law* v. *East India Co.*

Appeal dismissed.

Solicitors for the plaintiffs, *Cunliffes & Davenport*, for *R. Hill Dawe*, Town Clerk, Hull.

Solicitors for the defendants, *Bell, Brodrick, & Gray*, for *J. T. & H. Woodhouse*, Hull; *E. C. Rawlins*, for *Sykes*, Hull.

From Chan. Div. (Lindley, Bowen, and Kay, L.JJ.) May 18, 1892.

BARING v. ABINGDON. (a.)

Deed—Construction—Manor—Right of common—Common appurtenant—Grant in fee to third person of part of tenant's occupation—"Together with all commons belonging."

By a deed dated in 1859 *the lord of the manor of B., granted to M. in fee simple "all that piece or parcel of land situate at B., containing fifty-three acres, now or late in the occupation of S. as tenant thereof, together with all ways, waters, watercourses, trees, woods, underwoods, hedges, ditches, commons, and all other rights, members, and appurtenances whatsoever to the said piece or parcel of land and hereditaments, or any part thereof, belonging." The parcel of land was a portion of a large farm held by S. under a lease dated in* 1856, *and which was unexpired. Under a succession of leases from* 1809, *S. and those who had held the farm before him, and the lord of the manor, had enjoyed rights of common of pasture and of estovers in respect of the whole farm over all the wastes of the manor. M. arranged with S. that the latter should give up to him possession of the piece of land granted by the deed, and paid S. a valuation accordingly. The plaintiff, who derived his title from M., claimed under the deed of* 1859 *a right of common over a particular one of the wastes in respect of the parcel of land granted by the deed. There was evidence that throughout the period, from* 1824 *to* 1859, *the particular waste over which the right was claimed by the plaintiff was not used, but another of the wastes was, for turning out thereupon the flock when folded upon that particular portion of the farm; and since that period up to the time of the action there had been no user of the alleged right.*

Held, that the right of common did not pass.

Per Lindley, L.J.—*The general words in the deed were not sufficient to pass or to create a right of common in respect of the parcel of land granted, in the absence of special circumstances as between the grantee in fee and the tenant under the lease; and the state of things and the position of the parties did not warrant the inference that it must have been intended that any such right should be given, but the contrary.*

Per Bowen, L.J.—*The language of the deed, though vague, obscure, and ambiguous, might possibly have passed such a right if (which was not shown to be the case) it was the intention of the parties that it should.*

Decision of Stirling, J., *affirmed.*

Doidge *v.* Carpenter, 6 *M. & S.* 47, *distinguished.*

Appeal from a decision of Stirling, J.

The question was whether under a deed, dated in 1859, of grant in fee simple by the lord of a manor to a stranger of certain lands of the manor, part of a farm then in the occupation of a tenant under a lease, a right of common of pasture over one of the wastes of the manor, which right existed as to the whole farm, passed in respect of the part granted under the words in the conveyance, "together with all commons and all other rights, members, and appurtenances whatsoever to the said piece or parcel of land and hereditaments hereinbefore described or referred to, or any part thereof, belonging."

The facts and arguments sufficiently appear from the headnote and the judgments of the Lords Justices.

Stirling, J., held that the right of common did not pass.

The plaintiff appealed.

Hopkinson, Q.C., and *R. P. Blennerhassett* (*Sillem* with them), for the appellant, cited *Hall* v. *Byron*, 25 W. R. 317, 4 Ch. D. 667, 672; *Thomas* v. *Owen*, 36 W. R. 440, 20 Q. B. D. 225; *Hill* v. *Grange*, 1 Plow. 170; *Ewart* v. *Cochrane*, 10 W. R. 3, 4 Macq. 117; *Musgrave* v. *Enclosure Commissioners*, 22 W. R. 295, L. R. 9 Q. B. 162; Williams on Commons, 150; *Sacheverell* v. *Porter*, Sir William Jones' Rep. 396.

Graham Hastings, Q.C., and *J. G. Butcher*, for the respondents, cited *Saunders* v. *Oliffe*, Moore, 467, referred to in *Clements* v. *Lambert*, 1 Taunt. 205, at p. 207; *Cowlam* v. *Slack*, 15 East, 108; *Thomas* v. *Owen*; *Davison* v. *Gent*, 5 W. R. 229, 1 H. & N. 744; *Nickells* v. *Atherstone*, 10 Q. B. 944.

Hopkinson, Q.C., replied.

LINDLEY, L.J.—We have had an opportunity of considering this case, and I think nothing would be gained by reserving our judgment. Before I proceed to remark upon the facts I wish to express our acknowledgments to Mr. Hopkinson for the very clear and able way in which he has dealt with an extremely difficult case. And that observation is not affected whether the decision is for him or against him.

Now the question which we have to consider in this case is really what are the rights of the plaintiff, who claims under a deed of grant of the 27th of January, 1859, which I will comment on in the first instance. The parties to that deed were persons who were the lords of the manor—I forget whether there was one or more at this moment—of Banstead. The wastes of the manor of Banstead consisted at the date of this grant of three or four commons. There was Banstead Heath, Banstead Downs, Park Downs, and Burgh Heath. Those commons did not adjoin; they were scattered in various parts of the manor, as was shown by the map which was handed up. Now the grantors were the lord of the manor (Mr. Alcock) and his trustee. The grantee was Mr. Maudslay. The property granted by the grantors to the grantee is described in this way. I pass over the recitals, not forgetting the observations which have been made on them, but I do not think that much turns upon them. The recitals show what is tolerably obvious, that the deed was carefully prepared by a conveyancer, and, beyond that, I do not think the recitals throw much light upon the points which we have to consider.

The grant is of "all that piece or parcel of land formerly divided into several closes situate at Banstead containing by recent survey fifty-three acres."

(a.) Reported by ARTHUR LAWRENCE, Esq., Barrister-at-Law.

Then the boundaries are put in, which I need not allude to. Then there is a reference to the plan, which only shows a triangular piece of land marked "fifty-three acres." Then it goes on "all which said premises are now or late were in the occupation of Steer as tenant thereof . . . together with all ways, waters, watercourses, trees, woods, underwoods, hedges, ditches, commons, and all other rights, members, and appurtenances whatsoever to the said piece or parcel of land and hereditaments hereinbefore described or referred to, or any part thereof, belonging."

Now, bearing in mind who the grantor was, and who the grantee was, we have to consider what passed under these general words. I do not understand that the introduction of general words in a grant amounts to a warranty by the grantor that there is anything to answer them. I understand them to be put in for a different object altogether—to cover anything which may not have been specifically mentioned; to sweep in anything which may have been overlooked; but in no sense as a warranty; I take it that in this grant, as in all others, you may, if not in all cases, certainly in the great majority of cases, read general words as if they said "if any." There is no warranty that there are any ways, commons, or other things belonging or appertaining. There may or may not have been. If there were, you (the grantee) were to have them.

When we look and see what the position of affairs as regards this property was, we find that there is nothing accurately answering this description. The grantor is the lord of the manor. He is granting what he has got to grant, and he has not got, although he has power to create, any right of common belonging to the particular parcel of land, which he purports to grant. That particular piece of land was a portion of a large farm held by a gentleman of the name of Steer under a lease dated in 1856, and which was unexpired. The real position of affairs, as I understand it, is this, that under a succession of leases from 1809 down to 1856 Mr. Steer, and those who had held this farm before him, and the lord of the manor had enjoyed certain rights of common in respect of the whole farm over all the wastes of the manor. Whether that enjoyment began as of right under the lease of 1809, which is the first of which we have any knowledge, or whether there was a right of common attached to this land by some previous grant or lease by more apt words than we find in the lease of 1809, I do not know. But the evidence shows (and I will read what Stirling, J., finds in respect of it presently) that from 1809 down to the time of this grant to Maudslay, at all events down to the end of the year 1858, the lessee of this larger farm had exercised rights of common over all these wastes. Now the exact state of the evidence upon that part of the case cannot, I think, be put better than it is in a passage I will read from Stirling, J.'s judgment. After describing who Steer was, he says that "he remembered his father coming in 1818 to the Manor Farm; that his father, directly he came there, began to keep sheep, which were regularly turned out on the wastes of the manor every year from May until November. He remembered his father taking in 1824 some further land consisting of 'The Hooks' to the extent of thirty-one acres and twenty acres of common fields towards Banstead Downs, and these were used in the same way as the other parts of the farm. He said that when he got these further lands his father increased his flock from 150 to 200 or 220, and went on turning out on the wastes in the same way, only in larger numbers. One flock of sheep was kept on the farm, which was cultivated on the four-course system, and the flock was folded from year to year on various parts of the farm, as the state of the cultivation required. When the flock was folded on a part of the farm near Banstead Downs, it was turned out there; when on a part of the farm near Park Downs" (that is another of these wastes) "the flock was turned out there, and when the flock was folded on 'The Hooks' it was always turned out on Park Downs, not on Banstead Downs. This state of things appears to have continued throughout the period from 1824 to 1829. The witness stated that when in 1858 Maudslay bought, he paid the witness his valuation and took possession."

Now pausing there for a moment, and disregarding a circumstance which is natural and which I will consider presently I mean the negotiation which took place between Maudslay and Steer—and looking at Maudslay as a purchaser unconnected with Steer, the first question I will ask myself is, What passed to Maudslay under the terms of this grant? Now bearing in mind what the state of things was, and bearing in mind the language used, it appears to me that there is not one decision, but a series of decisions which show, and show conclusively, that, but for the peculiar position in which Maudslay stood to Steer, these words would not be sufficient either to pass or to create a right of common in respect of this particular tenement. The cases to which I refer are very numerous. They have been alluded to. I will mention *Whalley* v. *Tompson*, 1 Bos. & Pull. 371; *Clements* v. *Lambert*; *Barlow* v. *Rhodes*, 1 Cr. & M. 439; and *Hall* v. *Byron*. The law upon the subject is expressed shortly, but I believe very accurately, in the edition of Gale on Easements by the late Mr. Justice Willes, in a short passage which I will read. It is at p. 77 of the 3rd edition: "General words such as 'appertaining belonging,' &c., have been held in numerous instances, both with regard to rights of common and of way, to be insufficient to pass the right upon a severance of the tenement; but a conveyance containing the words 'used, occupied, and enjoyed,' has been held to be sufficient." He cites a great number of cases, including those to which I have referred and a great number of others, some of which I have looked at and some I have not. As regards rights of way, I would merely observe in passing that the passage in that book has been somewhat modified by more recent decisions, beginning with *Kay* v. *Oxley*, L. R. 10 Q. B. 360, 23 W. R. Dig. 251, and coming down to the present time, to the effect that, if a person grants a house and there is a road which is seen and obviously used by the grantor for the enjoyment of the house granted. the right of road may pass although the right did not exist as a right distinguished from ownership before the date of the grant. It is impossible to invoke that class of cases here, because of the existence of these several wastes. It cannot be said that, by looking or by an inspection of the parcel, there is anything here which answers the description of a particular road without which the property cannot be enjoyed. The mere fact that there are here several parcels of waste puts an end to any arguments of that kind. If it is said that it is necessary to enjoy pasture over one piece of the waste, the question immediately arises, Why that piece rather than any other piece? I need not trouble, therefore, with such cases as *Thomas* v. *Owen* and one or two others.

Pausing there and looking only at the state of the property, and disregarding, as I say, the peculiar position of Maudslay and Steer, supposing that Maudslay was a mere purchaser of this land without having any arrangements with Steer, it appears to me that we should be forcing and running counter to

the authorities if we were to hold that there was sufficient in this language to create or to pass the right which is claimed by the present plaintiff. Nor is there, that I know of, any single case which is contrary to that view. And I doubt very much whether Mr. Hopkinson himself would have contended for it, but for the peculiar position of Maudslay. Now, Maudslay's position was this: We do not know exactly what the facts were, but approximately we do. He evidently wanted possession from Steer of this particular portion of Steer's larger farm. Steer had a larger farm. This was not much more than one-fifth of the whole, and some arrangement had been made by Maudslay with Steer to the effect that Steer should go out of possession and let Maudslay in. There was not, so far as we know, any assignment by Steer of his lease to Maudslay in respect of this particular property, nor was there anything more than an arrangement by which, in consideration of so much money paid by Maudslay to Steer, Steer went out and let Maudslay in. That being the case, it appears to me that there is great difficulty in pressing the case of *Doidge* v. *Carpenter* to the extent to which Mr. Hopkinson desires it to be pressed. *Doidge* v. *Carpenter* is the case which is most in favour of the appellant's argument. It was a case of this description. There had been a lease of the farm, and there was a right of common enjoyed by that lessee over the property of the person who ultimately conveyed the reversion to him, and the conveyance of the reversion was couched in these words. The lessor granted the reversion of the whole property in lease to the tenant with the words "common belonging or in anywise appertaining." It was urged that there was no common belonging or in anywise appertaining. In strictness, and apart from the peculiar position of the grantee in that case, I doubt whether the decision or the observations made by Lord Ellenborough would have been made. But what Lord Ellenborough said was this. He said: "Although there is nothing to pass in the shape of transferring, the intention of the parties, as is obvious from their position, must have been to create and confer upon the grantee that right of common, which in fact he has been enjoying, and which would come to an end by the merger of his lease in the reversion if he did not construe the words 'belonging or in anywise appertaining' as equivalent to 'actually used and enjoyed.'" It is quite obvious that this intention would have been defeated by the purest technicality, and that the man would have lost that common which he had previously enjoyed if the court had not construed the deed in the way which it did, the object being, not to destroy his rights, but to continue them for ever. The court was asked to take a strained and technical view, and to say: "No; although the intention was to continue for ever what you had, you are to be deprived of it." That was too much. The circumstances and the position of the parties showed that it could not have been so, and that the real intention of the parties would have been completely frustrated if the court had construed the deed in the way in which the grantor was driven to contend. The position of the parties here and the state of things is such as, to my mind, by no means to force us to the same inference of fact as in *Doidge* v. *Carpenter*, and the distinction is obvious and very important. The grantee in this case is not the tenant. I doubt whether he stood in the position of tenant except to this extent, and to this extent only, that he made an arrangement with the tenant to go out, and that he was to get possession. I doubt whether it goes further than that. In addition to that, the property in respect of which this right is assumed to be created is not the whole, but a comparatively small portion, of the property held by the tenant, which is a distinction of considerable importance where the court draws inferences of fact and regards the intention of the parties. And then you have this, which is, to my mind, very striking, that although Steer, who went out in favour of Maudslay, certainly did enjoy rights of common over all the wastes in respect of his whole property, when you come to look at exactly what he did you find this, that as to all the sheep which were folded upon the particular property he was to give up to Maudslay he depastured those sheep, not on the common on which the plaintiff now claims pasture, —viz., Banstead Heath or Banstead Downs—but upon another common altogether—viz., Park Downs. Bearing that in mind, and bearing in mind the very strong evidence of user before the grant, and bearing in mind what is most important, I think, in construing ambiguous general words—the usage from 1859 downwards, usage which goes to show that the right now claimed has never been enjoyed—it does strike me as a very strong inference to draw, to infer that Alcock and Maudslay when they executed this deed really intended that Maudslay should have the right which is now claimed. I confess the inference I draw is diametrically the opposite; that it never entered the mind of any of them that Maudslay was bargaining for, or that Alcock was granting, any such right. Usage is against it, and the usage beforehand is not so much in its favour as to overcome the very strong impression which the other usage leaves. And if we were to put upon these words the construction which is contended for by Mr. Hopkinson, instead of being satisfied, as in *Doidge* v. *Carpenter* the court was, that we were giving effect to the intention of the parties, I am convinced that we should be doing just the contrary, and that the real truth of the matter is this—that the particular right of common which is claimed was never dreamt of in 1859 when the deed was executed.

Under these circumstances it appears to me that I am not driven by *Doidge* v. *Carpenter* or any other case, or by any principle of law, or by the facts, to do that which I think was contrary to the intention of the parties. In my opinion the appeal fails, and must be dismissed.

BOWEN, L.J.—I am of the same opinion. The case really turns upon the deed of 1859 as read by the light of surrounding circumstances, including the entire absence of any subsequent user which would support the view put forward by the appellant. The general words in the deed are words of the merest generality. They are words which are not apt words to describe such a right as is claimed. Although, if the right existed already, the words might be effectual to pass it, it seems to me that with regard to such ambiguous words as these the true meaning becomes plain when you see that for thirty-four years subsequently the deed has been interpreted in a sense different from that for which the appellant contends.

Now, that being the short ground upon which the case seems to me to turn, out of respect to the extremely brilliant argument of Mr. Hopkinson I will say a few words in expansion of that view. In order to make good the case of the appellant I think it is necessary to construe this deed, and in particular to construe the words which accompany the conveyance of this small piece or parcel of land, which is only a piece or parcel of land of what was the Manor Farm, which conveys it to Maudslay, under whom the appellant claims, "together with all ways, waters, watercourses, woods, underwoods, hedges, ditches, fences, commons, and all other rights, members, and appur-

tenances whatsoever to the said piece or parcel of land and hereditaments described or referred to, or any part thereof." Now, can any student of law at this time of day maintain for a moment that general words like these imply the existence of some antecedent right? They are spread broadcast over all conveyances. Would anyone like to maintain at his own expense a wager to the effect that there were rights of watercourses attached to this farm or land because "watercourses" are used as general words? It is clear, although these general words may be efficacious enough to pass what did exist, the use of them, considering their generality, does not import that there was such a right existing. Mr. Hopkinson's argument must, therefore, in order to succeed, make good one of two positions, either that there was a previously existing right, which these words aptly describe, so as either to continue or, to use the most accurate expression, to recreate or to create it *de novo* by reference to the past; or, secondly, that if there was no such previous existing right which these words could accurately describe, there was such a state of circumstances that a grant of this parcel of land must necessarily either involve in itself a grant of right of common upon this particular waste, Banstead Downs, or, at all events, that it must be accompanied by the implication of a grant to that extent and to that effect, which comes to the same thing.

Now, first of all, was there any previously existing right which these words aptly describe so as to recreate it? If there was an existing right, what was it? It was a right, if any existed, between the landlord—the lord of the manor in 1809 and in the subsequent years—and his tenant, a right created by the deed of lease which was executed, the general words of which would receive that interpretation when read by the light of the user. There is ample user to justify the view, I think, that, under those leases, a right of common as appurtenant to the farm (in the limited sense of the term appurtenant) was granted to the tenant to enure for his benefit and for the convenient enjoyment of the demised farm during the period of the demise, not a right created as appurtenant to the lands at common law in the hands of anyone to whom they might pass, but a conventional right as between the landlord and the tenant to obtain during the demise. That was the right which the user at that time would lead one to think might have been created. The tenant had, in fact, under his lease, as against his landlord, the absolute power of putting his sheep upon the wastes of the manor and obtaining estovers for the comfortable enjoyment of his premises.

Now did that right exist at the time of this grant in the first place, or had it been extinguished? If it had been extinguished, then these words could not refer to it. They would not be apt words to refer to an extinct right, though they might be words, perhaps, which would cover an existing right. If it had been extinguished they would not be apt words to cover it. If the question whether it was extinguished or not at the time of the grant depends upon the evidence in this case, I should think it was left in great obscurity, and I for one shall not attempt to decide this case on the ground that, at the date of this grant of 1859, the right had been clearly extinguished. I cannot go the length of saying that I am satisfied of that, but I remark that it was only a right which existed as between landlord and tenant. Do these words aptly describe such a right? Certainly not. They may be wide enough to cover it, but they are not the proper words. The right is between the landlord and tenant. It was, moreover, a right which belonged to the whole farm. It is here spoken of as a right which belonged to the severed portion if it is spoken of at all. Such language, therefore, is not apt to describe that particular right. I do not say that it might not pass it. It is sought by Mr. Hopkinson to justify the use of the language by the application of the doctrine of apportionment, and he says, with perfect truth, that in the case of alienation to a stranger common appurtenant will pass with the parcel of the entire estate to the enjoyment of which the common was originally attached, both in the case of common appendant and common appurtenant. That law was a law which was necessary, in the interests of the commonwealth, as it was said by Lord Coke, to be laid down, otherwise common appurtenant would have been extinguished all over the country by the alienation of land. The case of *Sacheverell* v. *Porter* shows that that is so, and *Wyat Wild's case*, 8 Co. 78b, but there is a manifest fallacy in applying this doctrine of apportionment so as to force the construction of this deed, as to which there is no question of alienation of a parcel of the premises by the person in whose hands the whole is. It is not a question of severance; nor a case of a tenant who had a farm with common attached to it in the nature of common appurtenant, alienating a parcel of the farm, in which case, under general words such as these, the common appurtenant which was necessary for the reasonable enjoyment of the parcel would pass according to the case of *Sacheverell* v. *Porter* and *Wyat Wild's case*. This is an instance of a lord who by an outstanding lease had bound himself to a particular tenant to give that tenant during his lease the right to pasture his sheep upon a particular common, granting to a stranger with general words a parcel of the land of which he at the moment was reversioner. It is clear that it is not at all strictly a case of apportionment.

Mr. Hopkinson endeavoured to support the view for which he was arguing by referring to the case of *Doidge* v. *Carpenter*. I will state shortly what that case was. There was a tenant of the lord of the manor who had had created by his lease in his own favour a right of common appurtenant with the reasonable enjoyment of his demised premises. During his tenancy, and whilst he was enjoying this right as against his landlord, he took a conveyance in fee from the landlord of the entire property of which he was the tenant. The words of the conveyance were words which granted the premises with all commons belonging or in anywise appertaining, or words to that effect. The tenant under that deed claimed, and the court ultimately allowed him, the right to go on possessing, under those general words of grant, the right of common which he had enjoyed before under the lease. It was sought to defeat his claim upon the ground that there was a merger, and that there was no existing right, because the right was destroyed by the conveyance, and the words of the conveyance were not words which would create a new right. If effect had been given to that argument, it is obvious that upon a mere technicality the grossest injustice would have been done. The tenant who had got the lease under which he has a right of common buys the reversion of the lease, and it was suggested that by that conveyance, although there are words which purport to convey the rights of common which existed, he was not to have as much in fee as he had originally under his lease as regards the common. It would be a most outrageous injustice if it were true. But the law of England, which is generally goodsense, found its way out of that technicality, and rightly decided upon the ground of reason. I think that, having regard to the relation of the parties and to the circumstances of the case at the time, no other construction ought to have been put upon the words contained in the

grant than that the parties intended that there should be created in favour of the tenant, who was thenceforward to be the owner in fee, the same right of common with the enjoyment of his premises as he enjoyed before, there being words in the deed which were sufficient to point to the intention of the parties that the right of common which already existed should go on existing. It was a question in *Doidge* v. *Carpenter* of the construction of the deed, which had to be read by the light of the surrounding circumstances, these surrounding circumstances making it clear to demonstration what the intention of the parties was, and the surrounding circumstances throwing such light upon the general words as to enable the court to see, beyond a doubt, what those general words meant. That is what *Doidge* v. *Carpenter* is.

But now, take the present case. It is a totally different affair. It is not a case of a grant in fee to the tenant, with apt words to describe or which would import that he was to go on enjoying what he had already. It is a commonplace grant to a stranger of a parcel of a farm. That is the broad distinction. It is not doubted that the doctrine of apportionment of common appurtenant will apply when the case requires it. No one doubts that. In looking at what the true intention of the parties was, as exemplified in their language, you must observe, first of all, that it is a grant to a stranger; and, secondly, a grant, not of the entire farm, but of a bit carved out of the farm. Can any human being say that, from the relations of the parties or the justice of the case, there is anything that makes it necessary that you should consider that they must have intended that the right of common should go on existing, and existing not in its old shape, because the right of common in its old shape, was appurtenant to the entire farm, but as re-apportioned to the parcel of land which was the sole subject-matter of this conveyance. I do not say that the language of this grant might not have passed the right of common under a different state of circumstances, but I do say that there is nothing in the circumstances of the case which show that this language must pass it. It leaves the language still obscure, vague, and ambiguous. With regard to the vague, obscure, and ambiguous language, which possibly might have passed such a right if it was the intention of the parties that it should, what additional facts have we beyond those I have mentioned which throw any light upon the question? Why is it that from that moment, for thirty-four years the grantee of this land never ventured to use this right which is now dug up after thirty-four years' delay? That shows that the circumstances at the time were not such that the parties themselves could be supposed to have intended these words to have any specific application at all. If, indeed, they were words so specific that you could not account for their existence in the deed except upon the supposition that there must have been some subject-matter to which they applied, the court would search round about and find what would be the natural subject-matter and what would be the most reasonable subject-matter to which to apply them. But the words are not such as to justify the supposition that there must have been something to which they correspond. On the contrary, as has been pointed out, they are words of the greatest obscurity and vagueness; and having regard to the non-user for thirty-four years it appears to me, when once you find they are not apt words—that they are words which you would have to strain, and words which are not exact and precise, and which no conveyancer who knew his business would desire to use in order to convey such a right—that the true construction is not that put by Mr. Hopkinson, but by the respondents.

I add one more fact which seems to me to justify that conclusion, and that is, that although the words which Mr. Hopkinson seeks to rely on refer to rights belonging to the piece or parcel of land to which the right can only be (in the very secondary sense which he claims for) considered to apply, yet if you are to measure it by the user of that date, the user, strictly speaking, was not the user of this particular piece of the waste as connected with the enjoyment of this particular portion of the farm. I do not lay too much stress upon that, because I entirely agree with Mr. Hopkinson that, if this right did exist as regards the whole farm, and it was a question, strictly speaking, of apportionment, these words would be sufficient to carry a portion of the common with them, for the purpose of the enjoyment of the grant of the alienated parcel. So much, therefore, for the first branch of Mr. Hopkinson's argument. I have taken a long time to express myself because it is a little obscure in the subject-matter.

I should like to say something with regard to Mr. Hopkinson's second argument, which is this: He says if you look at the surrounding circumstances you ought to infer that the deed with these words—*à fortiori* even without these words—created a right of common over this waste on Banstead Downs as being reasonably necessary for the enjoyment of the alienated parcel of land. If such a right exists it arises either from the words of the deed, expressly created, or from implication to be derived from the words of the deed, or it may arise, as it seems to me, by implication from the surrounding circumstances, having regard to the fact that the deed has been executed. Whichever way you look at it (though in the one case it would be an express grant, and in the other implied), if you find, either in the deed or from the surrounding circumstances and the deed together, a clear intention of the parties that the right of common should go with the land, then Mr. Hopkinson might succeed. But surely he is pressing too far the principle upon which the class of cases to which I am about to refer rests, that the grantor must not derogate from his own grant, and that the surrounding circumstances may show when a grant has been executed, that it must have been the intention of the parties that a particular licence or concession should accompany the express grant which has been made. Surely he is pressing that doctrine too far to apply it to a case of this kind. In the case of continuous easements we know what the law is. There has been what is sometimes called an exception to the law, but I doubt whether it is strictly an exception. It seems to me to be only an illustration of the principle in the case of formed roads. Where you find a formed road which is obviously and visibly laid out for the purpose of rendering the enjoyment of a particular house or land more feasible, the right to enjoy the formed road passes by implication, certainly when there are words capable of passing it, and I see no reason to think that it would not pass in a similar case without any words at all. I am not at all certain that it is the right which arises upon the deed itself, and that it does not arise from the circumstances outside the deed and the deed together. But to go further and to say that it is obvious that the grantor of the deed of 1859 must be taken to have granted this common because this common on Banstead Downs was reasonably necessary for the complete enjoyment of the granted parcel seems to me to be applying the doctrine to a case in which the reason of the thing does not admit of its application. If you could show in any particular case—I want to know whether any case can be brought up so high on any

state of facts—but if you could show it was necessary for the reasonable enjoyment of the grant of land that some right of common should be treated as attached to it, then the principle of law would apply. That is all. I doubt whether you could find it easy to make such a case. Certainly this is not the case. In this particular instance, so far from its being true that the reasonable enjoyment of common on Banstead Downs is necessary for the complete enjoyment of the granted premises, the contrary is clear. Never were sheep turned out on Banstead Downs from these premises. There is a bit of waste close by which might be utilized for the purpose, either by right if such a right existed, or by convention with the persons to whom the waste belonged if there is no such right. The case, therefore, cannot be brought upon its facts within any of those classes of cases where the principle that the grantor cannot derogate from his own grant has been held to apply.

For these reasons—reasons slightly different from those given in the court below—it appears to me that the appeal fails, with the usual result.

KAY, L.J.—I agree with the other members of the court in thinking that this appeal must be dismissed. The claim is not of an easement. It is a claim to a right of common on certain detached pieces of waste belonging to the manor of Banstead. That is a very different kind of right from a mere easement. It is a claim to a profit *à prendre* upon this waste of the manor of Banstead, which waste it is admitted was not part of the thing granted in any sense. The land that was granted is some fifty-three acres of what it is said was originally part of the demesne lands of the manor. To that land, speaking now of the estate in fee simple of that land, there never was any right of common attached at all. The lord as owner of the manor had of course a right to depasture on his own waste, and his right could only be called a right of common because in the exercise of it he would not be allowed to overstock the common so that those who had rights of common properly so called upon it would be deprived of those rights. But except in that sense the lord had no right of common on these parts of the waste, and certainly such right as he had was not attached to the demesne lands. He would have had that right if he had had no demesne lands whatever. Therefore, as I say, to this land, speaking now of the fee simple interest in the land, there never was at any time previously to the deed of 1859, which we have to construe, any right of common attached to the land at all.

Then we have to construe, and I think the whole question turns on the construction of that deed of 1859. At that time, and for many years previously, the lord of the manor had been accustomed to let this land as part of a much larger farm—Lindley, L.J., has calculated it to have been five times as large—and to permit his tenants of this part of the demesne lands to pasture the cattle which were levant and couchant upon their farms on the different portions of the wastes of the manor. That is the only sense in which there ever was any common of pasture attached to this land at all, and that was by a distinct grant and permission of the lord of the manor when he let this land to his own tenants. It was in lease with the rest of the farm at the time of the deed of 1859 which granted it to Maudslay, the predecessor in title of the present claimant.

Now we approach the deed with these facts, and what strikes me as extraordinary is, that if it was the intention of the parties to that deed to attach to the fee simple which was conveyed by that deed, not to the tenant but to a stranger, a right of common, why did they not say so in express, clear, explicit, and unmistakable words? There is nothing whatever in the deed to pass the right of common except the mention of common among the general words which are used in that deed, as they are ordinarily used in all deeds of conveyance; and the word which is used in connection with commons is commons "belonging" to this land. I have said that in no sense was there any common belonging to this land, except that, as between the lord and his tenants, he had been accustomed to give to his tenants permission to exercise rights of common such as he had himself in respect of this land when he let it. Now is that enough, when you find a grant not to the tenant—not a grant of the reversion to a tenant like *Doidge* v. *Carpenter*—but a grant to a third person who has no kind of connection with the tenant, a grant which contains no recital of any intention to give rights of common, no express and explicit grant of the particular right of common, which is not even of the whole of that farm, but only of about one-fifth part of it, I mean the whole of the farm in respect of which rights of common had been conceded to the tenants who accepted the farm? Is the necessary construction of this deed such that the purchaser of these fifty-three acres is to have a similar right of common in respect of the fifty-three acres which the tenant of the whole farm had in respect of that farm under the special grant contained in the deed? I am not able, I confess, to come to that conclusion. It seems to me that the case of *Doidge* v. *Carpenter* differs widely. It has been pointed out already, and I will not repeat at any length what has been said, that in *Doidge* v. *Carpenter* there was an express lease of a right of common to the lessee, and there the landlord, dealing with the lessee who was at that moment under the lease enjoying by the express terms of the lease a right of common, releases in fact the reversion to him, conveys to him the fee simple, together with all commons and common of pasture thereunto belonging or in anywise appertaining—that is, the landlord conveys to the tenant the thing he was enjoying with the common, and the right of common thereto appertaining—and Lord Ellenborough says that under the circumstances, "thereunto belonging or in anywise appertaining," which are the words of the conveyance in fee, seem as if they were studiously selected in order to constitute a grant *de novo* to subsist in enjoyment as before. It might have been worded otherwise, it might have been said—and it would have been to my mind equally cogent if it had been expressed thus—that there is a landlord conveying the reversion in fee to his tenant with all commons and rights of common appurtenant, which as between the landlord and tenant might very well be construed to include those rights of common which by grant of the landlord the tenant is enjoying at the moment of the conveyance to him. I think that the case is very widely different in that respect from the case which is before us now. This is not a grant to a tenant or anyone who was in possession or enjoyment of any rights of common at the time. It is a grant to a man who at the moment was an entire stranger to this property.

Then I cannot leave out of sight this circumstance also: If the tenant himself had been granting away part of the thing let to him there might, according to the case of *Sacheverell* v. *Porter*, have been in law an implied apportionment of the right of common which he enjoyed in respect of the whole farm. The grant was not by the tenant, but by the lord of the manor, and the doctrine of the case of *Sacheverell* v. *Porter* does not by any means necessarily apply to a grant like this. I daresay if the grant did very clearly express, or if the necessary construction, or the proper construction, of the grant was that a right of common was granted, then the doctrine of that case might

apply to show that it was a portion of that right of common which could be ascribed to this particular piece of land which was then being conveyed; but, of course, you first of all have to arrive at the conclusion that there was by this deed a right of common.

I agree that in this case it is absolutely necessary, in order to come to the conclusion that any right of common passed, to hold that the deed of itself created a right of common, because, as between the grantor and the grantee of the fee simple, or as between any holder of the fee simple and the lord of the manor, no right of common up to that time had ever existed at all.

I do not think it necessary to canvass the decision of *Thomas* v. *Owen*, *Ewart* v. *Cochrane*, and the like cases, where, there having been a grant of a particular subject of real estate, it was held that an easement—apparently that which was, if not necessary for the enjoyment of, at any rate a thing which had up to that time been enjoyed with, and was, therefore, an important adjunct by way of easement to, the thing granted—did pass. To my mind those cases have nothing to do with the right of common like that claimed in this case, and therefore, for these reasons, I concur in the judgment of the other members of the court, and think that this appeal should be dismissed, with costs.

Appeal dismissed.

Solicitors for the appellant, *Horne & Birkett.*

Solicitors for the respondents, *Lawrence, Graham, Gray, & Sutherland.*

High Court of Justice.

Chan. Div. North, J. — June 28, 1892.

In re PALK.
In re DRAKE.
CHAMBERLAIN *v.* DRAKE. (*a.*)

Trustee—Breach of trust—Liability of deceased trustee for breach of trust committed after his death.

The estate of a deceased trustee is not liable for a breach of trust committed after his death where he has left the trust funds in a proper state of investment at his death.

W. H. Palk by his will, dated the 12th of December, 1884, bequeathed the residue of his estate to his executor and trustee, T. E. Drake, upon the trusts therein mentioned. The testator died on the 28th of July, 1885, and the will was duly proved by T. E. Drake, who took over the trust estate.

By his will, dated the 27th of September, 1886, T. E. Drake gave the residue of his estate equally between his three daughters, and appointed his daughter Harriet Drake as executrix. T. E. Drake died on the 9th of March, 1888, and his will was duly proved by Harriet Drake. At the time of the death of T. E. Drake all the trust securities of W. H. Palk were standing in T. E. Drake's name.

By a deed dated the 17th of January, 1890, Harriet appointed the plaintiff and one Probyn (since deceased) to be trustees of the will of W. H. Palk. This deed contained a statement of the securities in which the trust estate of W. H. Palk was invested. After the execution of the deed it was discovered that certain of the securities mentioned in it were not in the possession or under the control of Harriet Drake. She had employed her brother, C. H. Drake, as her solicitor in the winding up of T. E. Drake's estate. It now appeared that she had under the advice and influence of C. H. Drake (not clearly understanding what she was doing) executed transfers of the missing securities, and had allowed him to receive the purchase-moneys, which he misappropriated. Some part of the money had been recovered from C. H. Drake, but a considerable balance remained unpaid.

The present action was brought against Harriet Drake and her two sisters. The plaintiff claimed a declaration that the whole estate of T. E. Drake was liable to make good to the plaintiff, as trustee of Palk's will, the trust funds formerly vested in T. E. Drake as such trustee; that accounts might be taken to ascertain the amount of the liability, and proper orders made to enforce it; that the defendant Harriet Drake might be declared personally liable for such parts of the estate of Palk as she had suffered to be received by C. H. Drake, and that she might be ordered to make good the same; and that if and so far as might be necessary the estates of Palk and T. E. Drake might be administered by the court.

By her defence Harriet Drake stated that she was willing that her interest in the estate of T. E. Drake should be treated as liable to make good such amounts as through the misappropriations of C. H. Drake remained owing to Palk's estate.

The defendants alleged that the whole of the funds subject to the trusts of Palk's will were properly invested at the time of the death of T. E. Drake, and they submitted that his estate was not liable to make good any losses which had arisen by reason of any act or default of Harriet Drake or of C. H. Drake, or which otherwise had occurred since the death of T. E. Drake.

Beaumont, for the plaintiff.—The estate of a deceased sole trustee remains liable for the trust fund until trustees have been validly appointed in his place and the trust fund has been handed over to them: *Gibbins* v. *Taylor*, 4 W. R. 432, 22 Beav. 344.

Creed, for the defendants.

NORTH, J.—The estate of the deceased trustee is not liable for what he left in a proper state of investment at his death. Harriet Drake is of course liable to make good the whole loss. There will, therefore, be an order declaring that Harriet Drake is personally liable, and that her beneficial interest under her father's will is liable to make good the trust funds, but that the rest of T. E. Drake's estate is not liable.

Solicitors, *Tatham & Procter; Guscotte, Wadham, & Daw.*

Chan. Div. (Vaughan Williams, J.) — July 2, 4, 7, 1892.

In re POSTAGE STAMP AUTOMATIC DELIVERY CO. (*a.*)

Company—Winding up—Directors—Concealed profits—Gift by promoter and vendor—Extent of liability—Knowledge and acquiescence of shareholders—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.

Where the vendor to, and promoter of a company agreed to give A., B., C., and D. a share of his profits as such vendor if they would become directors of the company, and A., B., C., and D., having consented and

(*a.*) Reported by G. B. M. COORE, Esq., Barrister-at-Law.

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

having become directors, took transfers accordingly from the vendor, of shares in the company allotted to him in part payment of his purchase-money, although there were still matters open between him and the company at the time,

Held, on an application to make the directors liable for misfeasance under section 10 of the Companies (Winding-up) Act, 1890, that, a prospectus having been issued inviting the public to subscribe for shares, in respect of any shares so transferred by way of gift to the directors, as to which there had been concealment of the fact from the public, the directors were liable, and that the fact of knowledge of the transaction on the part of all the actual members of the company made no difference.

Held, also, that, these directors having paid full value for similar shares subscribed for by them, that raised as against them, in the case of the shares given to them, a presumption that these shares were of value.

Summons.

This was a summons taken out in the winding up of the above-named company by the liquidator under section 10 of the Companies (Winding-up) Act, 1890, asking that each of the respondents, the four original directors of the company, might be declared guilty of misfeasance under the following circumstances, and liable accordingly as mentioned below.

The summons was heard before Vaughan Williams, J., sitting as an additional judge of the Chancery Division.

One Dowse, an inventor, being possessed of certain patents for automatic machines, desired to promote a company to purchase his patents and the benefit of a notion which he had conceived for the sale of penny postage stamps to be automatically delivered to purchasers, and for this purpose got seven gentlemen, including one of the respondents, to sign (in respect of one share each) the memorandum of association of this company, which was incorporated on the 30th of September, 1890. Its capital was £5,100, divided into 5,000 ordinary shares of £1 each and 100 founders' shares of £1 each.

The company, which was, under its memorandum of association, to enter into and carry into effect, with or without modifications, an agreement already prepared for the purchase of the patents from Dowse by the company, was met at the outset by difficulties about obtaining directors and subscriptions for shares beyond the minimum of seven shares agreed to be taken by the subscribers of the memorandum. Dowse thereupon arranged for the respondents to become directors and subscribe respectively for 100 £1 shares in the company, he undertaking, if they would so do, to give each of them one-fifth share in his profits under the said agreement. The said agreement was then modified, and, as modified, provided that the company was to pay Dowse as purchase-money £2,600, payable as to £1,250 in cash and as to £1,350 in fully paid-up shares, 100 of which were to be founders' shares.

Provision was also made thereby for the agreement being registered by the company in accordance with section 25 of the Act of 1867, and for the issue to the vendor and his nominees after such registration of 1,350 shares as fully paid up, as mentioned in the schedule thereto, and in the said schedule each of the respondents appeared as an allottee of twenty founders' shares, and the vendor of twenty founders' shares and 1,250 ordinary shares in the company. It thus appeared on the face of the agreement that *some* consideration was being paid or some gift was being made by Dowse to the respondents. By clause 7 thereof "£1,250, balance of the purchase-money," was to be payable out of the net profits of the company remaining after payment of dividends as therein mentioned"; and by clause 10 the validity of the agreement was not to be impeached on the ground that the vendor, as promoter or otherwise, stood "in a fiduciary relation to the company," or that the directors, having accepted office at his request, did not "constitute an independent board."

On the 17th of November the subscribers to the memorandum of association appointed the four respondents directors of the company, and the modified agreement was approved. The agreement, as modified, was executed as of the 21st of November, and registered before the allotment of shares, in order to comply with section 25 of the Act of 1867. On the 9th of December 1,250 ordinary shares, fully paid, were allotted to Dowse, and twenty founders' shares to each of the four respondents and to Dowse.

On the 21st of November a letter had been written by Dowse to each of the four respondents in the following terms:—"Provided you subscribe and pay for not less than 100 shares in the Postage Stamp Automatic Co. within fourteen days, I hereby agree to transfer to you 250 fully paid ordinary shares as and when the same are allotted to me, and also to give you a charge for £100 on my cash interest in the aforesaid company, such charge to be forthwith prepared by the secretary, Mr. Barker," and on the 16th of December Dowse transferred to each of the respondents 250 of the ordinary shares received by him as vendor, and wrote to each of the respondents a letter in the following terms:—"In consideration of an agreement I undertake to pay you out of the sum of £1,250 payable to me in cash by the Postage Stamp Automatic Delivery Co., under an agreement filed with the Registrar of Joint-Stock Companies, the sum of £100, the same to be paid proportionately with other payments by the company under the said agreement, and I agree to this charge being forthwith filed with the Postage Stamp Automatic Delivery Co. (Limited.)"

The liquidator, Barker, who was secretary of the company, was treated by the court as aware of all the preceding facts, excepting the letter of the 21st of November, and the arrangement under which Dowse obtained the assent of Jones and the other respondents to become directors and subscribe for 100 shares each, and also of the transfer by Dowse on the 16th of December of 250 ordinary shares to each of the respondents. The respondents and Dowse each took up and paid for 100 £1 shares in the company. Except these shares and the one share each agreed to be taken by the subscribers of the memorandum of association, no shares were taken up by anyone, and the only other person that became a shareholder (by transfer, in June, 1891, of Dowse's shares) was aware of all the relations and arrangements between Dowse and the respondents, including the letter of the 21st of November.

The company carried on business on a small scale until the spring of 1891, and, more capital being then urgently needed, a prospectus was, in June, 1891, issued to the public asking further subscriptions. Neither this prospectus nor a prospectus previously printed, but not issued by the directors, contained any mention of the transfer by the vendor of shares to the directors, or of the agreement to make them a cash payment, and an intention to conceal from the public invited to take shares the fact of such transfer and agreement was found as a fact by the court.

The subscribers of the memorandum of association were aware that the respondents were to share profits with the vendor.

An extraordinary resolution for voluntary winding up was passed on the 1st of April, 1892, and an order was afterwards made to continue the voluntary winding up under the supervision of the court.

The creditors of the company were few, and the

principal creditor was Barker, for services rendered as an accountant.

On the 3rd of May, 1892, this summons was issued by Barker, as liquidator of the company, for a declaration that each of the respondents was guilty of misfeasance and breach of trust in relation to the company, in accepting, by way of gratuity, a gift from Dowse, the promoter of and vendor to the company, of 270 fully paid-up shares of £1 each, being part of the consideration payable and paid by the company to Dowse, under an agreement, dated the 21st of November, 1891, and made between Dowse of the one part and the company of the other part, and that each of them was liable and might be ordered to pay to the company and the liquidator thereof £270, together with interest thereon at the rate of £4 per cent. per annum, from the 21st of November, 1890, until payment.

Eve, for the liquidator, referred to the cases collected at p. 406 of Mr. Buckley's book on the Companies Acts, 6th ed.

T. L. Wilkinson, *Swinfen Eady*, and *Peterson*, for the respondents, contended that they were not accountable to the company for anything in respect of the shares on three grounds—first, because there was no concealment from the actual members of the company, and it was intended to work the company as a private company; secondly, because the shares were not a gift, but a consideration for the respondents subscribing for shares; lastly, because the shares never had any value, and the respondents, if liable, were only responsible for the highest value of the shares since they received them; and cited *Eden* v. *Ridsdale's Railway Lamp and Lighting Co.*, 38 W. R. 55, 23 Q. B. D. 368; *Nant-y-Glo and Blaina Ironworks Co.* v. *Grave*, 26 W. R. 504, 12 Ch. D. 738; the judgment of Mellish, L.J., in *Carling's case*, 24 W. R. 165, 1 Ch. D. 115; *Parker* v. *McKenna*, 23 W. R. 271, at p. 279, L. R. 10 Ch. App. 96, at p. 118; *Hay's case*, 24 W. R. 191, L. R. 10 Ch. App. 593; *In re British Seamless Paper Box Co.*, 29 W. R. 690, 17 Ch. D. 467; and *Pearson's case*, 25 W. R. 618, 5 Ch. D. 336.

Eve, in reply, referred to *In re Almada and Tirito Co.*, 36 W. R. 593, 38 Ch. D. 415.

VAUGHAN WILLIAMS, J. [after stating the facts, substantially as set out above, continued:—].—The first question which I have to decide is whether the respondents are accountable to the company for the shares which they received from the vendor.

First, then, as to the founders' shares, I do not think the respondents are liable, because with regard to these there was no concealment, the agreement with the company disclosing the fact that such founders' shares would be allotted to the respondents, and the 10th clause of the agreement disclosing the fact that the respondents became directors at the request of the vendor, and that the board of directors would consequently not be independent. With regard to the ordinary shares the case is different, because undoubtedly with regard to these there was concealment from the public to whom the prospectus was issued, although the public did not take up any shares.

Now, it is contended that the respondents are not accountable to the company for these shares on the following grounds:—First, because there was no concealment from the actual members of the company, and it is said that it was intended to work the company as a private company. I find, however, as a fact, having regard to the issue of the prospectus, that the intention was to get the public to subscribe. Secondly, it is said that the shares were not a gift to the respondents, but transferred to them in consideration of their subscribing for 100 shares each. Lastly, it is said that even if the respondents are liable, they are only responsible for the highest value of the shares since they received them, and that the shares have never had any value. I will deal with these contentions *seriatim*.

The first contention, in my opinion, fails. The issue of the prospectus shows an intention to deceive future allottees. The fact of the knowledge of the actual members of the company will not in such cases avail directors. This is clear from the judgment in *In re British Seamless Paper Box Co.* I do not think that the case is materially different by the fact that the respondents did disclose to the company that they were receiving *some* consideration or gifts from the vendor. The fact of the mention of the transfers in the minute-book is not a sufficient disclosure. The transfers might in fact have been for valuable consideration, notwithstanding they are expressed to be for 15s.

The second point also, in my opinion, fails. Even assuming that the inducement to the vendor was the undertaking of the respondents to take up shares, I think that in substance the shares were given to the respondents in consideration of their becoming directors, and at a time when there were still matters open between the company and Dowse.

Lastly, I think that the contention that the shares were of no value fails. The respondents themselves paid full value for the shares. This raises a presumption of value against them.

Application allowed in part.

Solicitors for the liquidator, *Savidge & Southern.*

Solicitors for the respondents, *Fox & Joy; Long & Gardiner*, for *F. H. Anderson*, York.

Q. B. Div.
(Lord Coleridge, C.J., and Cave, J.) — Aug. 11, 1892.

In re AN ARBITRATION BETWEEN PREBBLE AND ROBINSON. (*a.*)

Arbitration—Taxation of costs—Fees of arbitrators and umpire—Jurisdiction to tax—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 2, *and First Schedule, provision* (i).

Where, in an arbitration, an umpire, after making his award, had fixed the amount of the fees due to himself and the arbitrators, but had not made them a part of his award,

Held, that provision (i) *in the First Schedule to the Arbitration Act*, 1889, *did not apply, and that the fees were subject to taxation in the High Court.*

In re Stephens, Smith, & Co. and the Liverpool and London and Globe Insurance Co., 36 SOLICITORS' JOURNAL, 464, *distinguished.*

Appeal from chambers.

The facts were shortly as follows:—

The plaintiff Prebble and the defendant Robinson submitted certain differences between them for the decision of two arbitrators and their umpire, who sat to hear the evidence for six hours upon one day, and for two hours upon the following day.

Subsequently the umpire made his award, and wrote to both parties intimating that it was ready to be delivered upon payment of a sum of £153 16s. 8d. for the fees of the umpire and the arbitrators, in-

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

cluding a small sum for the cost of preparing the award.

The plaintiff took up the award, which was in his favour, and sent in his bill of costs, including the item of £153 16s. 8d., to the defendant.

The award contained no mention of these fees.

Upon taxation of the bill, the defendant objected to this item, on the ground that the umpire did not in his award give the amount of the arbitrators' and umpire's fees, and that the same were excessive and ought to be reduced by the taxing master.

The taxing master stated that in his opinion these costs were most unreasonable and that he would have reduced them if he thought he had power to do so, but he refused to tax them on the authority of *In re Stephens, Smith, & Co. and The Liverpool and London and Globe Insurance Co.*, 36 SOLICITORS' JOURNAL, 464 May 7, 1892).

The defendant appealed to Bruce, J., in chambers, who referred the matter to the court.

The Arbitration Act, 1889, provides (section 2):—"A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the Fisst Schedule to this Act so far as they are applicable to the reference under the submission."

Provision (*i*) in the First Schedule is as follows:—"The costs of the reference and award shall be in the discretion of the arbitrators and the umpire, who may direct to, and by whom, and in what manner, those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client."

Moyses, for the defendant.—The master had power to tax this sum: it was not part of the award, and could, therefore, be taxed without setting aside the award itself. [He was stopped by the court.]

Marshall, for the plaintiff.—The arbitrators or umpire are given express power by provision (*i*) to settle their own charges, which are part of the general costs of the arbitration. The umpire in this case did settle his own and the arbitrators' charges at the sum of £153 16s. 8d., and this sum is not subject to any further taxation unless the whole award be set aside on the ground of misconduct under section 11 of the Act. This case is governed by *In re Stephens & Co.*, which was cited to the taxing master.

Lord COLERIDGE, C.J.—I fully sympathize with the difficulty which was felt by the master and the judge in this case, and I think it would be well if a clear provision existed that arbitrators and umpires should not be the final judges of their own fees. However, I think it is tolerably clear that these charges are subject to taxation. The case in the SOLICITORS' JOURNAL which was cited is a decision by judges of very great authority, but there is a great difference between it and the present case. In that case the arbitrators did what provision (*i*) allows them to do: they stated in their award what were the costs of the reference and the award, and directed by whom they should be paid; and the judges said that they could not tax individual items of these costs without setting aside the whole award, and that they were not asked to do. The distinction is clear: there the sum was a part of the award itself, here these charges are not ascertained by the award at all. Undoubtedly they would have been subject to taxation before the Arbitration Act came into force, and as the umpire has not brought himself within the words of the Act I think there is no difference between these proceedings and proceedings taken before the date of the Act.

CAVE, J.—I am of the same opinion. [His lordship read provision (*i*) and continued:—] The arbitrators or umpire may direct by whom the costs are to be paid—that is a provision which was very commonly inserted in references before the Act was passed. Then they may "tax or settle" the costs, and may award costs as between solicitor and client.

Now there is no indication in this provision that the arbitrators are to "tax or settle" after they have made the award: this power is coupled with a power which was often exercised before the passing of the Act in and by the award itself. It seems to me, therefore, that when this power given by the Act to tax is not exercised in and by the award, it has not been used at all, and that the master has power to tax these charges. The case must be referred to the master for taxation.

Case remitted for taxation.

Solicitor for the appellant, *William H. Lydall.*

Solicitors for the respondent, *Marshall & Marshall.*

Q. B. Div.
(Pollock, B., and Vaughan Williams, J.) June 2, 1892.

STORY v. SHEARD. (*a*.)

Highway—Damage caused by excessive weight—Power of road authority to recover expenses—Death of person liable—Action against executors—"Actio personalis moritur cum persona"*—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23.

Proceedings under section 23 *of the Highways and Locomotives (Amendment) Act*, 1878, *to recover the amount of extraordinary expenses incurred in the repair of a highway by reason of damage caused by excessive weight passing along the same or extraordinary traffic thereon cannot be maintained against the legal personal representatives of a deceased person by whose order the excessive weight or extraordinary traffic was put upon the road, such proceedings being founded in tort, and the maxim* "Actio personalis moritur cum persona" *applying.*

Case stated by justices of the county of Derby.

The Highways and Locomotives (Amendment) Act, 1878, s. 23, provides as follows:—"Where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway . . . that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses as may be proved to the satisfaction of the court having cognizance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid."

The appellant was the surveyor for the county of Derbyshire, and the respondent was the executrix under the will of John Sheard, who died in May, 1891.

The appellant had certified in October, 1891, that extraordinary expenses to the extent of £295 3s. 5d. had been incurred by the Derbyshire County Council during the year ending the 31st of March, 1891, in repairing certain main roads in the county, by reason

(*a*.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

of damage caused by excessive weight passing along the same and extraordinary traffic thereon—viz., locomotive engines drawing trucks laden with coal—and that such weight and traffic was conducted over the said main roads by order of John Sheard, deceased.

An information was lodged in January, 1892, against the respondent as John Sheard's executrix, with a view to the recovery from his estate by the county council as the road authority of the amount of such extraordinary expenses. The magistrates dismissed the information, upon the ground that the proceedings under section 23 were purely personal against the person who gave the order and could not be prosecuted against his estate. The question was whether this view was correct.

Carver, for the appellant.—Section 23 is not a penal section: it merely makes provision for the summary recovery of these expenses as a debt; the right to recover these expenses, therefore, survives against the estate of a deceased person.

T. E. Ellison, for the respondent, was not called upon to argue.

POLLOCK, B.—In January, 1892, proceedings were taken against the executrix of a deceased person who was alleged to have used a public road in such a way as to put excessive weight upon it, whereby extraordinary expenses were incurred in repairs. The objection was taken that although the deceased might have been liable in respect of these expenses, his executrix was not liable because the proceedings under this section were in tort, and the magistrates decided in favour of this objection and against the applicant under the information. The question at issue can be decided by looking into the substance of these proceedings. If they are taken for the purpose of recovering a debt they will lie against the executrix. If they are in tort the rule "*actio personalis moritur cum persona*" applies, and they will not lie against the executrix. That is a well-established rule binding upon us, and I cannot doubt that this is really a case of tort. It arises in this way. A person uses a highway in an excessive manner. Under the old law proceedings might be taken by the owners of the highway by action or by indictment, and if by action the foundation of it would certainly be in tort. Then as the use of these heavy machines became common the Legislature made this special provision, that upon the certificate of the surveyor the expenses may be recovered in a summary manner from the person by whose order the excessive weight was put upon the road. Until the passing of this Act no action could have been brought against a person who had misused a highway in this manner except on the supposition that he had committed a tort; and this statute, while giving a new method of recovering the damages, has not changed the nature of the acts upon which the proceedings are founded.

VAUGHAN WILLIAMS, J.—I agree.

Appeal dismissed.

Solicitor for the appellant, *Busby*, Derby.

Solicitors for the respondent, *Geare, Son, & Pease*, for *Wake & Sons*, Sheffield.

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams, J.) — Oct. 26, 27.

In re VANSITTART.
Ex parte BROWN. (*a.*)

Bankruptcy—Voluntary settlement—Gift of diamonds by husband to wife within two years of the bankruptcy—Claim of trustee—"Settlement"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.

A gift of diamonds by a husband to his wife is a "settlement" on the wife within the meaning of section 47 *of the Bankruptcy Act*, 1883, *and, in the event of the husband becoming bankrupt within two years afterwards, such settlement will be void as against his trustee.*

Application by the trustee in the bankruptcy for an order that certain articles of jewellery given by the debtor to his wife within two years of the bankruptcy should be handed over for the benefit of the creditors.

The bankrupt, C. G. Vansittart, formerly lived in India, and was stated to have been sometimes known amongst the natives as the Gold King of India.

Between December, 1890, and December, 1891, Mr. Vansittart purchased diamonds of considerable value, which he presented to his wife.

Shortly afterwards he became bankrupt, and the jewellery in question was now claimed by his trustee.

Witt, Q.C., and *Germaine*, for the trustee.—My first point is that, on the evidence, what was done was merely a mode adopted by the bankrupt to hold his property. He retained dominion over these presents, and the alleged gift was not a reality, but was held by the wife in trust. But even if the jewellery was really given, it constituted a transfer of property within two years of the bankruptcy, and falls within section 47 of the Bankruptcy Act, 1883.

Yate Lee, for Mrs. Vansittart.—The jewellery now sought to be recovered was really given on four occasions, including the birthday of the bankrupt's wife, and the anniversary of their marriage, and also on one occasion when a horse of the bankrupt named Romance won its first race. Mr. Vansittart then gave his wife a diamond bracelet which was known as the Romance bracelet. The gifts were ordinary presents, and there is no evidence that they remained the property of the husband. Then as to this being a settlement within section 47, my contention is that that section does not apply. The section refers to a "settlement," "settlor," and "trustee of such settlement," and it is a perversion of terms to say that a section containing those words ever contemplated a gift of diamonds by a man to his wife. This application is not made under the Statute of Elizabeth, which might apply, and section 47 is aimed at property being settled on a trustee and does not apply to a pure gift.

He referred to *In re Player, Ex parte Harvey*, 15 Q. B. D. 682, 34 W. R. Dig. 170.

Cur. adv. vult.

October 27.—VAUGHAN WILLIAMS, J.—It is extremely difficult to extract from the decided cases any clear definition of the transfers which will and which will not fall within the operation of this section. The section has a history. The word "settlement" did not appear in the original statute 1 Jac. 1, c. 15, s. 5. The words used there were, "Be it further enacted that if any person which hereafter is or shall be a

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

bankrupt by intent of this statute shall convey, or procure or cause to be conveyed, to any of his children, or other person or persons, any manors, lands, tenements, hereditaments, offices, fees, annuities, leases, goods, chattels, or transfer his debts into other men's names," &c. In *Kensington* v. *Chantler*, 2 M. & S. 36, Lord Ellenborough held that money did not fall within the section, which was confined to things which were the subject of conveyance or capable of being conveyed or procured to be conveyed. Lord Ellenborough did not mean by this that the section only extended to land and did not extend to personal property. He meant apparently that the section did not apply to a gift of money, which if given directly to the donee could not have been intended to be preserved, and he seems to have mentioned the fact that money was not included in the words of the statute rather as an illustration that the statute was not intended to apply to gifts of personal property not intended to be preserved by the donee, than as a definition of the subject-matter intended to be the subject-matter of the section.

I infer from this and other decisions on the same lines referred to in the text-books that the judges so read the section as to make the application of it depend on the intention of the donor, at all events to this extent—that the section did not apply to cases where the circumstances of the gift made it manifest that the subject-matter of the gift was not intended to be preserved by the donee, as would be manifest in the case of a gift of money to a son to advance him in his busines or for his maintenance. The words of the original section so far as they affect the point under discussion remained unaltered until 1869, when for the first time the word "settlement" was introduced into the Bankruptcy statute and substituted for the words which I have cited. Perhaps the object of the change was on the one hand to indicate that the section was not intended to apply to transfers of property which, from the nature and circumstances of the transfer, showed that the donor did not contemplate the preservation of the actual subject-matter of transfer by the transferee; and, on the other hand, to indicate that the section did apply to the transfer even of money when the intention was manifest that the money should be preserved either in its original form or in some other form of investment. It is difficult to account for the use of the word "settlement" in substitution for the word transfer or conveyance unless the Legislature intended to indicate something of this kind. This was what I understand Cave, J., to mean in the case of *In re Player, Ex parte Harvey*, where he says, "The word to look at is 'settlement.' It means that 'settlement' shall not be confined to ordinary formal settlements commonly so called, but may include any transfer of property. But settlement must be the end and purpose of the transaction, that is, the preservation of the thing, whatever its form, for the enjoyment of another person." Taking this view, I am afraid that a present of diamonds by a man to his wife is a present which I ought to hold was a settlement on the wife. It seems to me that, to use the words of Cave, J., the purpose of the transaction was the preservation of the thing, whatever its form, for the enjoyment of another person. I think that the donor contemplated the retention by his wife of the present which he gave her. I should have held just the same if he had given her money to buy herself a present. I wish to add that, if I had had to construe the section apart from previous decisions, I am not at all sure that I should not have limited its operation to written transfers. I am not sure that this is not what Lord Ellenborough meant in *Kensington* v. *Chantler*, but it is quite impossible at this time to introduce such a limitation into the section, which up to the present time has never been introduced, at all events expressly, in any of the judgments in any of the decided cases.

Application allowed.

Solicitors for the trustee, *R. & E. Bastard.*

Solicitors for Mrs. Vansittart, *Sanderson, Holland, & Adkyn.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Kay, L.JJ.) — Oct. 31; Nov. 1.

HURLBATT v. BARNETT. (a.)

Arbitration—Practice—Compulsory reference—Question in dispute in part a matter of account—Reference of all issues in the cause to an official referee—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 14.

The Arbitration Act, 1889, *is an amending, not a consolidating, Act, and, under section* 14, *the court has jurisdiction to order a compulsory reference of a whole cause to an official referee if the main, but not the only, question in dispute between the parties is a matter of account.*

Appeal of the defendants from an order of the Queen's Bench Division (Lord Coleridge, C.J., and Bruce, J.) dismissing an appeal from an order of Day, J., at chambers, compulsorily referring the whole cause to one of the official referees. The plaintiffs were the assignees of the estate and effects of Sawyer, Wallace, & Co., of New York, which firm prior to the 4th of September, 1890, when their business was assigned to the plaintiffs, carried on the business of commission agents in the United States and also in Europe. The agent of Sawyer, Wallace, & Co. in Europe was L. W. Sawyer, and he employed certain sub-agents. The statement of claim alleged that the defendants had been employed as such sub-agents, and in that capacity had entered into numerous transactions, and had received large sums of money on behalf of Sawyer, Wallace, & Co. The action was brought for an account of all such moneys received by the defendants. The defendants admitted that in respect of contracts entered into by them as agents for Sawyer, Wallace, & Co., and fulfilled before the 4th of September, 1890, there was a certain sum due from them to the plaintiffs, but alleged that, by reason of the assignment of the business of Sawyer, Wallace, & Co. on the 4th of September, 1890, and by reason of a claim by Sawyer, Wallace, & Co. to close all outstanding contracts from that date, they (the defendants) had become liable, as principals, on all contracts entered into by them as agents for Sawyer, Wallace, & Co. which were outstanding at the date of the assignment of the business. The defendants denied that the plaintiffs were entitled to an account in respect of such last-mentioned contracts; they were willing, however, to give credit to the plaintiffs for all amounts due on contracts completed before the 4th of September, 1890, but claimed to set off against any sum due from them to the plaintiffs a larger sum alleged to be due to them in respect of work done and commissions earned under their agreement with Sawyer, Wallace, & Co.

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Boyd, for the defendants. — The case does not come within section 14 of the Arbitration Act, 1889, because if the contention of the defendants is correct there will be no matters of account in dispute at all. Section 14 was intended to consolidate the law as enacted by section 3 of the Common Law Procedure Act, 1854, and sections 56 and 57 of the Judicature Act, 1873. It was not intended to enlarge the jurisdiction of the court as to compulsory reference. He cited *Weed* v. *Ward*, 37 W. R. 406, 40 Ch. D. 555, and Lord ESHER, M.R., referred to *Knight* v. *Coales*, 35 W. R. 679, 19 Q. B. D. 297.

Pollard, for the plaintiffs.—The effect of section 14 was to give the court enlarged powers of reference, and this case comes within the words of the section, because the questions in dispute consist mainly or in part of matters of account. The judge had jurisdiction to make the order, and it has not been shewn that he exercised his discretion wrongly.

Boyd replied.

Lord ESHER, M.R.—In this case the judge in chambers and also the Divisional Court have made a compulsory order for the trial of the action before an official referee. In so directing they acted under section 14, sub-section (*c*), of the Arbitration Act, 1889, and the first question, therefore, which we have to consider is, What is the true construction of that section? The Arbitration Act, 1889, is not a mere consolidating Act, but is also an amending Act. It was passed after there had been certain decisions of the court on the corresponding sections of the Common Law Procedure Act and the Judicature Act. One of these decisions was the case of *Weed* v. *Ward*, and in that case a somewhat limited interpretation was put upon these Acts, and the court held that there was no jurisdiction to refer an action unless it could be seen that there must of necessity be an account. That being the interpretation put upon the former Acts, and when it is found that the words have been enlarged in the amending Act, the inference is that that enlargement must have been intentional on the part of the Legislature. We must consider, therefore, for the purpose of deciding this case, whether the larger words used in section 14 of the Arbitration Act, 1889, show any such limitation as was put upon section 56 of the Judicature Act in *Weed* v. *Ward*. The words of section 14, sub-section (*c*), are as follows: "If the question in dispute consists wholly or in part of matters of account" the court may order the whole cause to be tried before an official referee. If these words are compared with the words "in any cause or matter requiring any prolonged examination of documents or accounts," in section 57 of the Judicature Act, it is clear that it was the intention of the Legislature that under the Act of 1889 the court should have wider powers of reference than formerly. The section does not say that in order to give the court the power of compulsory reference the dispute must be one which cannot end otherwise than in an account; and I think that if the court can see that a part of the dispute really is as to a matter of account, then the court has jurisdiction to refer the whole case.

In the present case it is obvious that the great question in dispute between the parties is as to a matter of account, and therefore the court has jurisdiction. Having jurisdiction the court has a discretion to say whether its jurisdiction shall be exercised in a particular case or not. The Court of Appeal can overrule the exercise of a discretion by an inferior court; but it should be very cautious in doing so. In *Knight* v. *Coales* a very good rule as to the exercise of this discretion is laid down, though I do not mean to say that it is one that must invariably be followed. It was there said, "We are of opinion that this discretion should be exercised with extreme caution, regard being had to the relative importance of that which is matter of account as compared with that which is not. The matter of account giving the jurisdiction should not be incidental or subordinate to the other questions in dispute, but should be a substantial element to be decided in the action to justify a compulsory reference." I do not think that that rule goes so far as to say that, merely because there is a dispute as to a contract, and on one reading of it there would have to be an account, there must necessarily be a reference. In different cases the court may take a different view, and that is a matter of discretion. In this case it is clear that the amount of the account is the most substantial thing in dispute between the parties; the court had jurisdiction, and, in my opinion, exercised its discretion rightly. This appeal must therefore be dismissed.

LOPES and KAY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *Freshfield & Williams.*

Solicitors for the defendants, *Stibbard & Gibson.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Kay, L.JJ.) — Oct. 24.

In re WATSON.
Ex parte JOHNSON. (*a*.)

Attachment—Jurisdiction—Judgment debt — "Execution"—Irish judgment registered in England—Judgments Extension Act, 1868 (31 & 32 *Vict. c.* 56), *ss.* 1, 4—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5.

The Judgments Extension Act, 1868, *gives no jurisdiction to commit a judgment debtor to prison under the Debtors Act upon the certificate of a judgment obtained in Ireland and registered in England under the former Act, inasmuch as such committal is not a process of "execution," and the general words of section* 1 *of the Judgments Extension Act, giving jurisdiction to the English courts upon such a judgment, are controlled by section* 4, *and limited to "execution" under that Act.*

This was an appeal from a refusal of Pollock, B., sitting as judge in bankruptcy, to order the committal of the respondent to prison upon a judgment summons taken out under section 5 of the Debtors Act, 1869, upon a judgment recovered in Ireland on the 23rd of June, 1892, and registered in the English courts under the Judgments Extension Act, 1868.

Section 1 of that Act provides that where judgment has been obtained in the courts at Westminster a certificate thereof registered in Ireland, and where judgment has been obtained in Ireland a certificate registered in England, shall "be of the same force and effect, and all proceedings shall and may be taken on such certificate as if the judgment of which it is a certificate had been a judgment originally obtained or entered up on the date of such registration as aforesaid in the court in which it is so registered," &c.

Section 4 provides as follows:—"The Courts of Common Pleas at Westminster and at Dublin, and the Court of Session in Scotland, shall have and exercise the same control and jurisdiction over any judgment or decreet, and over any certificate of such judgment or decreet, registered under this Act in such courts

(*a*.) Reported by JOHN P. MELLOR, Esq., Barrister-at-Law.

respectively, as they now have and exercise over any judgment or decreet in their own courts, but in so far only as relates to execution under this Act."

H. Reed, Q.C., for the appellant.—The effect of the registration of an Irish judgment in the English courts under the Judgments Extension Act, 1868, is to enable all steps to be taken to enforce it which, under the Debtors Act, could be taken upon an English judgment. That is the true effect of section 1, and the interpretation of "execution" in section 4 must be determined by reference to section 1. [Lord ESHER, M.R.—You have to read section 1 and show it is unlimited by section 4.] Assuming the powers given under the Act to be limited by section 4, "execution" must be taken to mean enforcing a judgment in any way the Act permits, and imprisonment under the Debtors Act is a mode of enforcing the judgment. It is a process of execution. The Debtors Act has been held to apply to a decree. [He cited *Ferguson* v. *Ferguson*, L. R. 10 Ch. App. 661, 24 W. R. Dig. 184.] [LOPES, L.J.—The Judgments Extension Act cannot apply to the Debtors Act, inasmuch as it was passed in the year before.]

Channell, Q.C., and *Beddall*, for the respondents, were not called upon.

Lord ESHER, M.R.—If section 1 of the Judgments Extension Act stood alone it may or may not be the case that the words of it are large enough to cover this case. But it is not necessary to determine that, because the Act must be read as a whole, and section 1 must be read with reference to section 4. When you have general words in one section of an Act, and have a subsequent special section which limits the general words, that is the governing section.

Now here we have section 4, which expressly limits the jurisdiction given by section 1 to "execution" under this Act. Is, therefore, the power of imprisoning for non-payment of debts which the court has under the Debtors Act a process of "execution" at all? It seems to me that it is not, and I think it has been so held; when you have exhausted all the powers you have under the Debtors Act the execution still remains. I am of opinion, therefore, that imprisonment cannot be inflicted here upon an Irish judgment so registered under this Act, and that the appeal must, consequently, be dismissed, with costs.

LOPES, L.J.—This is an Irish judgment, and it is sought by the appellants, under the Judgments Extension Act, to proceed under section 5 of the Debtors Act, as if it were an English judgment, and he admits that he must bring himself within that Act.

Now section 1 is general in its terms, and says that "all proceedings" may be taken upon the certificate of a judgment registered under the Act as if it were an English judgment. The appellant relies upon the force of these words "all proceedings." But at the time that Act was passed the Debtors Act was not, and they could not, therefore, be applicable to proceedings under that Act.

But there is a stronger ground than this, because, by section 4 of the Act, the proceedings which may be taken under it are expressly limited to "execution." Imprisonment for debt is not a process of execution, it is a punitive provision, and when a man has suffered all the punitive effects of the Debtors Act the execution remains.

KAY, L.J.—I agree entirely in the reasons and conclusions which have been given in the judgments of the other members of the court, and will only add that section 5 of the Debtors Act speaks of the power given of committal as a new jurisdiction, and the words show that under it "execution" shall not be interfered with.

Appeal dismissed, with costs.

Solicitors for the appellants, *Thomas, Metcalfe, & Sharpe.*

Solicitors for the respondents, *H. D. Booth.*

From Q. B. Div. (Lord Esher, M.R., and Bowen and Kay, L.JJ.) — Aug. 8, 1892.

In re AN ARBITRATION BETWEEN KNIGHT AND THE TABERNACLE PERMANENT BUILDING SOCIETY. (*a.*)

Practice—Question for opinion of High Court—Special case stated by arbitrator—Judicial decision—Consultative opinion—Right of appeal to the Court of Appeal—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 19.

The Court of Appeal has no jurisdiction to entertain an appeal from an opinion of the High Court of Justice on a question submitted to it by an arbitrator under section 19 *of the Arbitration Act,* 1889, *such opinion not being a judicial decision, but merely consultative.*

Appeal from a decision of a divisional court.

A dispute having arisen between a building society and one of its members named Knight, a reference was made to arbitration pursuant to the Building Societies Act, 1874. A question of law arose in the course of the reference; and an order was made on the arbitrators to state a special case under section 19 of the Arbitration Act, 1889. This order was affirmed by the Court of Appeal: *In re an Arbitration between Knight and the Tabernacle Permanent Building Society*, 39 W. R. 507, [1891] 2 Q. B. 63, and it was subsequently further affirmed by the House of Lords.

The arbitrators accordingly stated a special case, which was heard before Grantham and Charles, JJ., who decided the question of law thereby raised in favour of Knight.

Section 19 of the Arbitration Act, 1889, is as follows:—"Any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the court or a judge, state in the form of a special case for the opinion of the court any question of law arising in the course of the reference."

The society appealed, but the preliminary objection was taken on the part of the respondent that no appeal lay.

Fillan (*Lincoln Reed* with him), for the respondent.

Cozens-Hardy, Q.C., and *Macoun*, for the appellants.

Lord ESHER, M.R. — The question is whether that which the appellants here complain of is a decision of the High Court of Justice from which there lies an appeal to this court. It is an answer of the Queen's Bench Division to a question stated for their opinion in the form of a special case under section 19 of the Arbitration Act, 1889. *Primâ facie* it is a decision, a judicial decision, but the question is whether, looking at the context of section 19, it is not to be treated as a consultative opinion rather than as a judicial decision. The distinction between the two things was recognized by the House of Lords in *Overseers of Walsall* v. *London and North-Western Railway Co.*, 27 W. R. 189, 4 App. Cas. 30, and under

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

section 29 of the Local Government Act, 1888, which provides that certain questions may be "submitted for decision" to the High Court of Justice, it has been held that the decision of the court is consultative only, and not judicial: *Ex parte County Council of Kent and Council of Dover*, 39 W. R. 465, [1891] 1 Q. B. 725. Section 19 of the Arbitration Act, 1889, says that an arbitrator may "state in the form of a special case for the opinion of the court any question of law arising in the course of the reference." It seems to me that this points to something less than a decision, certainly not to a judicial determination. I think that what we have to deal with here is a consultative opinion of the court, and that there is no appeal.

BOWEN, L.J.—There are two ways in which an arbitrator may submit a question of law to the court. He may state his award in the shape of a special case for the opinion of the court. If he adopts this course, he thereby exhausts his office; his award is a determination of the rights of the parties subject to what the court may order on the hearing of the special case. In such cases there might well be an appeal to this court from the decision of the High Court. The other course which he may adopt is to ask the opinion of the court in a consultative manner. This is in effect an interlocutory consultation of the court. Here the arbitrator does not divest himself of jurisdiction over the case. He is originally clothed with the duty to finally determine the case; and although an honest arbitrator is bound under such circumstances to follow the opinion expressed by the court, he is only so bound in honesty and morals. His consulting the court does not result in the determination of the case by any order of the court. In such a case I think there is no appeal to this court.

KAY, L.J., concurred.

Appeal dismissed.

Solicitor for the appellants, *J. R. Pakeman.*

Solicitors for the respondent, *Halchett-Jones & Co.*

From Q. B. Div. (Lord Esher, M.R., and Bowen and Kay, L.JJ.) July 4, 1892.

BLEWITT *v.* TRITTON. (*a.*)

Practice — Appeal — Evidence — Document — Sufficiency of stamp — Ruling of judge — Trial without jury — Right of appeal — Ord. 39, r. 8.

The ruling of a judge at the trial of an action, whether with or without a jury, that a document offered in evidence is sufficiently stamped, is not subject to review in the Court of Appeal.

Appeal by the defendant from a judgment of Day, J., at the trial of an action without a jury.

This was an action on a promissory note for £216. At the trial the plaintiff put in the note, which was stamped with a penny stamp.

Objection was taken that it was insufficiently stamped under the Stamp Act, 1870. Day, J., overruled the objection and admitted the note in evidence, and gave judgment in favour of the plaintiff.

The defendant appealed on the ground that the note had been wrongfully admitted in evidence.

W. Higgins, for the defendant.—By the Stamp Act, 1870, which governs this case, every kind of promissory note whatsoever requires to be stamped with an *ad valorem* stamp: see *Ashling* v. *Boon*, 39 W. R. 298, [1891] 1 Ch. 568. [*Houghton*, for the plaintiff, referred to ord. 39, r. 8, which says, "A new trial shall not be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp.] That rule only applies to applications for a new trial and not to appeals. [Lord ESHER, M.R., referred to *Siordet* v. *Kuczynski*, 4 W. R. 153, 17 C. B. 251.] At any rate it only applies to cases which are tried before a jury. On an appeal from a judgment of a judge at the trial of an action without a jury, this court ought to disregard any evidence which was wrongfully admitted at the trial: *Jacker* v. *International Cable Co.*, 5 Times L. R. 13.

Houghton referred to *Heiser* v. *Grout*, 8 W. R. 79, 5 H. & N. 35.

Lord ESHER, M.R.—If this case had been tried before a jury, the only way in which this point could have been taken would have been by an application for a new trial, on the ground that the judge had received evidence which he ought not to have received. But section 31 of the Common Law Procedure Act, 1854, prevents such an objection being taken by providing that no new trial shall be granted by reason of the ruling of a judge that the stamp on any document is sufficient, or that it does not require a stamp. And in *Siordet* v. *Kuczynski* it was held that a judge court not reserve the point whether a document offered in evidence was sufficiently stamped, the intention of the Legislature being that the decision of any stamp objection was to be reserved for the judge at the trial alone. Ord. 39, r. 8, follows the words of that section. And the rules being applicable to all cases, I am of opinion that we ought to apply the words of this rule to both kinds of trial, viz., those with a jury and those without a jury.

We cannot, therefore, enter into the question whether the learned judge's decision on the Stamp Act was right.

BOWEN, L.J.—I am of the same opinion. In *Siordet* v. *Kuczynski* the court had to put a construction on section 31 of the Common Law Procedure Act, 1854, and they construed it to mean that you could not do indirectly what the Act prevented you from doing directly. Before that enactment you could, on showing that the judge at the trial had erroneously ruled that a document was sufficiently stamped, have obtained either a new trial or a verdict of nonsuit. Either way might have been tried. Then section 31 expressly barred the first way. But the court thought that the effect of the section was to make the judge at the trial final arbiter on any such question, and to preclude further discussion on it, and held that it prevented, not only a new trial, but also an entry of nonsuit. In *Cory* v. *Davis*, 14 C. B. N. S. 370, Willes, J., said the same thing. Then we come to ord. 39, r. 8. Ought we not to hold that the Rule Committee in repeating the words of section 31 must have intended to use them in the sense which the court had put on them? Assume that a plaintiff puts in a document, that the defendant objects that it is insufficiently stamped, and the judge overrules the objection and admits the document. Assume that the plaintiff has other evidence on which he might rely, but he decides to let his case rest where it is. Unless we are right in our judgment, the Court of Appeal would be in this position, if they thought the judge's ruling wrong—they would be bound either to take no notice of the mistake, or else to order a verdict for the defendant without knowing whether they had all the evidence before them. I am of

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

opinion that we ought to carry on the old construction which has been put on the words—viz., that the judge's decision is final.

KAY, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Blewitt & Tyler.*

Solicitors for the defendant, *Beall & Co.*

High Court of Justice.

Chan. Div. North, J. } Nov. 1.

In re MAHON AND ANOTHER. (*a.*)

Solicitor — Taxation — Costs—Solicitors' Remuneration Act, 1881—*General Order*, 1882, *Schedule II.*

In the taxation of costs under Schedule II. of the General Order of the Solicitors' Remuneration Act, 1881, *headed "Instructions for drawing, &c, deeds, wills, and other documents," the taxing master may, in extraordinary cases, in the exercise of his discretion, for special reasons, increase or reduce the scale of charges. By extraordinary cases are meant cases either more or less difficult than the normal. The taxing master is not obliged to state his reasons for such increase or reduction. Cases for the opinion of counsel are included in the words "other documents."*

Adjourned summons.

This was an application by some solicitors that their objections to an order of a taxing master in this matter might be allowed, and that it might be referred back to the master to vary his certificate.

Schedule II. of the General Order made under the Solicitors' Remuneration Act, 1881, provides as follows:—"Schedule II.—Instructions for Drawing and Perusing Deeds, Wills, and other Documents.—Such fees for instructions as, having regard to the care and labour employed, . . . and the other circumstances of the case, may be fair and reasonable. In ordinary cases, as to drawing, &c., the allowance shall be: For drawing, . . . 2s. per folio. Attendances.—For ordinary cases, . . . 10s. In extraordinary cases the taxing master may increase or diminish the above charge, if for any special reasons he shall think fit." The second part of the schedule then provides for "Abstracts of Title" and "Journeys from Home," with a similar note that the taxing master may increase or diminish the allowance for the same.

The solicitors' client required a taxation of his bill. In the bill the solicitors had charged, *inter alia*, 10s. each for eighty-three attendances; of these ten were disallowed altogether, thirty were allowed at 10s. each, and the remaining forty-three were reduced to 6s. 8d. No objections were taken to the ten disallowed altogether. The client raised no objection to the thirty for which 10s. each was allowed. But the solicitors in their written objections said, with regard to some seventeen of the forty-three attendances reduced to 6s. 8d.: "These were ordinary attendances in an ordinary case, for which solicitors are entitled to charge 10s. each under Schedule II., and it is submitted that, not being an extraordinary case, a taxing master has no discretionary power to diminish such charges, and, even if he had, there must be some special reason for the reduction."

In two instances also the taxing master allowed only 1s. per folio for drawing a case for the opinion of counsel. In their objections the solicitors said: "A case to counsel is a 'document' under Schedule II. which of all others requires care and labour, and 2s. per folio is the proper charge."

In his answers to the objections the taxing master said: "I am not sure I precisely understand what is meant by 'extraordinary.' In the present case many of the attendances were of an extraordinary simple character. . . . In cases of extraordinary difficulty I can well understand the taxing master having discretion to increase the 10s. for an attendance. . . . Does it not follow that in extraordinary simple cases the master has power to diminish the 10s. where in his discretion he thinks it proper to do so? . . . In taxing costs under the Act, Schedule II., it has been the uniform custom and practice of all the masters in the Chancery Division to exercise their discretion in dealing with items of the description comprised in the objection, and the case of *In re Reade*, 33 SOLICITORS' JOURNAL, 219, seems not only to justify this custom, but to go much further, for the master's discretion would seem to include the whole of the items covered by Schedule II."

With regard to the cases to counsel the taxing master said: "The fact is that the cases in question, so far from being of an extraordinary nature, were of a very simple character. Under Schedule II. the taxing masters one and all allow 1s. per folio for drawing a case for the opinion of counsel, . . . 'documents' are not to be taken in the largest sense of the word, 'abstracts' are not included. . . . Further, if my reading of *In re Reade* be correct, the master's discretion would again come in. In this matter I am clearly of opinion that if I had any discretion, 1s. per folio is ample for the case in question. . . ."

The taxing master accordingly overruled the above objections.

Sir Horace Davey, Q.C., and *R. F. Norton*, for the solicitors.—The taxing master has no power to diminish the charge for attendances. He may perhaps increase it in extraordinary cases. If he can diminish them he must have special reasons for so doing, and he must state them. Here he has really taken 6s. 8d. as the ordinary charge, not 10s. Cases for counsel are "other documents," within the schedule, under which the ordinary charge is 2s. per folio.

J. G. Butcher, for the client.—The taxing master has a discretion to increase or diminish the charge for attendances. If cases to counsel are within the words "other documents," still the taxing master by his answers shows that he considers that he has a discretion, which discretion he has exercised.

NORTH, J.—The amount at stake in this case is not of importance, but it is a question of general interest. [His lordship then went through the schedule as above set out, and continued.] Then we come to the words, "In extraordinary cases the taxing master may increase or diminish the above charge if for any special reasons he shall think fit." The note at the end of the second part of the schedule corresponds with this note at the end of the first part, and I think that the word "extraordinary" draws a distinction between "extraordinary" and normal cases immediately above each note, and that it includes, not only more difficult, but also less difficult cases than the normal, and means everything not ordinary or normal, be it more or less, which is further shown by the words of the note, which say, "he may increase or diminish." Now, coming to the words "if for any special reasons he shall think fit," it is argued this means that he must state for what reasons he thinks fit. But I do not think the words bear this interpre-

(*a.*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

tation. I do not think he need state his reasons. The schedule, in my opinion, provides a scale of charges for the ordinary normal cases, and in extraordinary cases the taxing master is to have special reasons for increasing or diminishing the scale, but he need not state his reasons, he has merely to consider in his own mind and give his decision. Now, taking the case of attendances. The ordinary charge formerly was 6s. 8d., now it is fixed by the schedule at 10s., and the taxing master may make the charge either greater or less, according to circumstances, in his discretion, and by attendances of course are meant the ordinary normal attendances of solicitors, and he is to consider what are such attendances and what are not. Now in this case eighty-three attendances by the solicitor are charged for; thirty were allowed, ten disallowed altogether, and there is no objection to these. I don't suppose those attendances did not take place at all, but the master in his discretion disallowed them, and he has discretion to disallow for attendances which ought not to have taken place; for example, if a solicitor attends thrice in one day where once would suffice, &c. This leaves a margin of forty-three attendances reduced to 6s. 8d. Of these seventeen only are complained of. It is objected that the taxing master has no discretion so to reduce the charge. In my opinion he has. It is said, if he reduces the amount he is bound to give special reasons for so doing, but in my opinion he is not bound to state the reasons upon which he acts, and in the present case I don't see how he could, for he could not give reasons in writing for each case.

Then there is an objection raised to the principle of his decision. It is said he treated 6s. 8d. as the normal charge, and not 10s., as he should have done. But, in my opinion, he has not done this, but has made reductions in his discretion sufficient for the purpose. On the first point, therefore, the objectors fail.

Then as to the other point. Two charges are made in respect of cases laid before counsel. The proper charge to be allowed is at the rate of 2s. per folio. The taxing master has only allowed 1s. per folio. It is said he has no discretion as to that, but, in my opinion, he has; he could lessen the charge, either by reducing it from 2s. per folio to 1s., or by reducing the number of folios allowed. But in this case he has not so exercised this discretion. He has allowed the charge at the rate of 1s. per folio on the ground that the schedule scale for drawing "deeds, wills, and other documents"—that is, 2s. per folio—does not include cases for counsel, which he considers are not "other documents" within the schedule, and he illustrates his argument by saying that "abstracts" are not included in the term "other documents." That is so, however, because they are specifically provided for by the schedule. In my opinion, then, cases for the opinion of counsel undoubtedly come within the schedule, being included in the words "other documents," and on this point I do not agree with the taxing master. Then he says it is the invariable rule in the office only to allow 1s. per folio. I see no reason for any such rule. Though he clearly has jurisdiction to allow 2s. more or less, yet, unless there is some special reason, he ought to allow 2s. If he had exercised his discretion I should not have felt it open to me to review his decision; but I do not so read his reasons. If he had said 2s. is the normal charge, but I think 1s. sufficient, that would have been good; but he has not taken this course. I do not, however, think it is necessary to refer the matter back to him, as I am satisfied that in this case 2s. per folio is the proper charge. No costs to either party.

Solicitors, *Hyde, Tandy, Mahon, & Sayer; Hicks, Arnold, & Morley.*

Chan. Div. North, J. June 30; July 5, 1892.

In re PORTER.
COULSON *v.* CAPPER. (*a.*)

Will—Vested remainder—Forfeiture—Attempt to assign—Inoperative settlement.

Life estates were given by a testator to his two sisters (both since deceased), and the survivor of them, and subject thereto to all testator's nephews and nieces equally who should attain twenty-one, with a proviso that, in case any of the nephews or nieces should, during the life estates, or either of them, assign or in any manner dispose of their expectant share in testator's estate, or attempt so to do, they should forfeit all benefit under testator's will. A niece of testator's, having attained twenty-one and married, during one of the previous life estates, executed a post-nuptial settlement, in which she included her reversionary interests under testator's will. This settlement was inoperative.

Held, that the post-nuptial settlement was an attempt to assign within the meaning of the will; that the niece's share under the will was therefore forfeited; and that the clause relating to forfeiture would apply equally to a share vested, but subject to be divested, as to a contingent share.

Testator, W. Porter, who died in June, 1851, by his will devised and bequeathed all his real and personal estate to trustees upon trusts as therein mentioned, and subject thereto upon trust for testator's two sisters, H. Bentley and S. Bakewell (both since deceased), as therein mentioned, and after the decease of the survivor of them upon trust to pay and divide all the trust moneys between the children of his said two sisters and all other his nephews and nieces who should attain the age of twenty-one years equally as therein mentioned. And testator then declared that in case any of his nephews or nieces should, during the lives of his said sisters or the survivor of them, sell, mortgage, assign, charge, or otherwise dispose of (save by a last will or codicil or some writing in nature thereof which should be revocable) his, her, or their expectant share or part in the said trust moneys or any portion thereof, or any beneficial estate or interest therein, or should attempt so to do, then in any such case he, she, or they so selling, mortgaging, or otherwise disposing of the expectant part or share, or attempting so to do, should forfeit and lose all benefit under testator's will, and the same mortgage, assignment, &c., so far as the same should purport to affect any part of the trust moneys, or any interest therein, should be utterly null and void, and the share and interest of the person so selling, &c., the trust moneys, or attempting so to do, should go in like manner as if he, she, or they had never been born.

Mrs. A Sullivan, daughter of the said S. Bakewell, having attained the age of twenty-one years, married in 1876. No settlement was made on her marriage, but in 1879 she and her husband, during the life of one of the testator's sisters, executed a post-nuptial settlement, in which she included her reversionary share in the testator's estate, in favour of herself, her husband, and her children. At the date of the settlement Mrs. Sullivan was domiciled in South Australia, in which colony there was at the time no law in force enabling her, even with her husband's concurrence, to assign her reversionary interests under the testator's will, and the said settlement did not operate as an assignment of such interests.

(*a.*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

This was the further consideration of an action for the administration of the testator's estate.

Borthwick, for the plaintiffs.

R. J. Parker, for a defendant entitled in case of forfeiture, cited *In re Wormald*, 38 W. R. 425, 43 Ch. D. 630.

Oswald, for another defendant similarly entitled, cited *Stephens* v. *James*, 4 Sim. 499; *Wilkinson* v. *Wilkinson*, 3 Swans. 515; *Kearsley* v. *Woodcock*, 3 Hare, 185.

T. Rolls Warrington, for Mrs. Sullivan and the trustees of her settlement.—The intention of the testator was to secure the property for the benefit of Mrs. Sullivan and her children, and he could not have intended to prohibit such a dealing with it. "Attempt so to do" was intended to apply to some disposition which, but for the proviso, would have been effectual. The gift being vested, the condition is repugnant, and therefore void.

He considered *In re Payne*, 25 Beav. 556; *Stephens* v. *James*; *Kearsley* v. *Woodcock*; *Churchill* v. *Marks*, 1 Coll. 441; and *In re Rosher*, 32 W. R. 821, 26 Ch. D. 801; and NORTH, J., referred to *Martin* v. *Margham*, 14 Sim. 230.

NORTH, J.—In this case I think that what the testator has contemplated by his will as possible, has taken effect, or, rather, has been done, and therefore the provision for divesting the share operates. The direction in the will is this: certain life estates are given to two sisters and the survivor of them, and after the death of the surviving sister then "upon trust, subject as aforesaid, to pay and divide the trust moneys between all the children, if any, of my two sisters and all other my nephews and nieces whatsoever equally," to be paid to them, subject as therein mentioned, when he, she, or they should attain the age of twenty-one years. Now, if that was the entire gift there is a vested gift in remainder, vested at birth, payable at twenty-one, but subject to the preceding life estates; those life estates have now come to an end, and one of the persons who, if there was no other clause in the will, would have taken under the clause that I have read asks for a share—I mean Mrs. Sullivan. The will, however, goes on to provide: [His lordship then read the clause in the will concerning forfeiture, stated the facts set out above, said that in his opinion Mrs. Sullivan's marriage was not itself an assignment within the meaning of the clause, and continued.] The argument is that because she did not assign it, inasmuch as she could not assign it, therefore she in effect did nothing, and has not forfeited her interest. I could have followed that argument if the words "or attempt so to do" had been omitted from the will; but I find those words there, and I do not see my way to rejecting them or striking them out. Assigning is one thing; attempting to assign is another; and the will clearly contemplates a difference between the two, because it deals, first, with the assigning, and, secondly, with the attempting to assign, which must mean, not assigning, because that is covered by the first phrase, but attempting to assign must mean, attempting to do something which is not an assignment. Therefore it is either assigning, or, without assigning, attempting to assign. In this case it seems to me clear that this was an attempt to assign; and, unless I reject those words altogether, I must treat it as producing the result which the testator intended to avoid.

Now there are a great many cases in the books bearing on the subject. Mr. Warrington has attempted to distinguish one of them from the present, on the ground that what was the subject of the assignment in that case was at the time of assignment contingent and not vested. I do not see how there is any distinction for the present purpose between a share which is contingent and a share vested, subject to be divested; that is to say, I do not see any legal principle upon which I can say that the clause in the present will would not apply to a vested share subject to divesting, though it might apply to a contingent share. It seems to me there are a great many cases in which the court has recognized that where a legacy has been given absolutely with a provision that in case the legatee should die before the legacy became payable, then that the gift over should take effect, and it has been held that the gift over is perfectly good as addressed to the death of an absolute legatee dying before it becomes payable. There has been some little difference in the cases as to what its becoming payable meant, whether it meant the end of twelve months after the death of the testator when a legatee has a right to say that the executor is bound to pay a legacy, or whether it might be carried back to a rather earlier date—such earlier time in the twelve months as there may be assets available to pay the legacy; but in either case if the legatee died after the death of the testator, but before there were assets available to pay within twelve months, the gift over is good. I never heard it suggested that such a gift over as that was repugnant. I do not see how it can be, and that class of cases is one class which seems to me to negative the argument of Mr. Warrington in this case. Whether the testator would, if he had known the circumstances, have said that this bequest should be void in the events that have happened, I do not know; but that it comes within the words used in the will I do not feel any doubt about. His lordship then declared that the post-nuptial settlement executed by Mrs. Sullivan was an attempt to assign her share within the meaning of the will, and that her share was, therefore, forfeited.

Solicitors, *Miller, Smith, & Bell*, for *Jervis*, Uttoxeter; *Anderson & Sons*; *Wilkins, Blyth, Dutton, & Co.*

Chan. Div. } July 13, 1892.
Kekewich, J. }

CHADBURN v. MOORE. (a.)

Vendor and purchaser—Principal and agent—Estate agent—Authority—Specific performance.

An estate agent has no authority to enter into a contract for sale of real estate unless he has express authority from the vendor to sign such contract.

Trial of action.

This was an action for specific performance of a contract contained in two letters for the sale of twenty-nine leasehold houses.

The plaintiff saw in the *Daily Telegraph* of the 14th of April, 1891, the following advertisement:—"Forced sale by order of the mortgagees.—Thirty-four well-built houses situated at Grays, close to the station on the London, Tilbury, and Southend Railway, within easy reach of the docks; all let to respectable tenants at rents amounting to £640 per annum; held for about ninety-five years at ground-rents amounting to £146; price £3,500, of which £3,000 can remain on mortgage—For further particulars apply to Messrs. Pinder, Simpson, & Newman, 33 and 34, Saville-row, London, W.," and on the same day he called on

(a.) Reported by J. WINKFIELD, Esq., Barrister-at-Law.

Messrs. Pinder, Simpson, & Newman, a firm of surveyors and estate agents, and having obtained further information, visited the houses and returned on the same day and made an offer for them which was reduced into writing. It appeared from the evidence that this offer was submitted by Mr. Newman to his client (the defendant), and that the plaintiff was to return the next day for the answer. Newman saw the defendant, who gave him instructions to withdraw five of the houses and fixed the price; but, according to the view of the evidence taken by the court, the defendant did not specifically instruct Newman to sign a binding contract. The plaintiff called on the next day, when the two following letters, which formed the alleged contract, were written out by a clerk and respectively signed by the plaintiff and Mr. Newman and exchanged.

"Sutton, Surrey,
"April 15, 1891.

"To Messrs. Pinder, Simpson, & Newman,
"33 and 34, Saville-row, W.

"Gentlemen,—Having looked at the twenty-nine houses at Grays, situate in Cromwell and Hampden-roads, I am willing to give the sum of £2,300 (two thousand three hundred pounds) for the leasehold interest, which I understand is for about ninety-five years unexpired at a ground-rent of £120 per annum.

"I shall be willing to pay a deposit of two hundred pounds and complete on the 1st day of May, 1891, on the understanding that I have free conveyances and that you advance me a sum of two thousand one hundred pounds by way of mortgage at 4½ per cent. per annum. I shall be willing to give additional security if necessary. I understand the title is good.

"Yours truly,
"JAMES CHADBURN.

"P.S.—Particulars of the houses are attached hereto."

Full particulars of the houses follows, signed by the plaintiff.

The other letter was as follows:—

"33 and 34, Saville-row,
"Burlington-gardens, W.,
"April 15, 1891.

"Dear Sir,—We accept your offer dated 15th April, 1891, for the purchase of the twenty-nine leasehold houses at Grays.

"Yours truly,
"PINDER, SIMPSON, & NEWMAN."

From the correspondence which was put in it appeared that the offer and acceptance were forwarded by the estate agents to the defendant, who thereupon wrote to the plaintiff asking him to call in reference thereto, and on the 20th of April wrote to Newman a letter of which the following is the material part:—

"I think you were, as you usually are, a little premature in actually entering into what might be a binding contract. It is always best to have an offer and acceptance subject to a formal contract being entered into, as otherwise the vendor under an open contract gets landed into all sorts of difficulties."

To which Newman replied on the 21st of April:—

"The offer for the above was accepted under your definite instructions, and it is a very good get out for you."

Several interviews took place between the plaintiff and the defendant, at which the latter endeavoured to persuade the former to abandon the contract, and ultimately the writ was issued in this action.

Renshaw, Q.C., and *F. T. Duka*, for the plaintiff.—The question is, Was Newman authorized by defendant to accept plaintiff's offer? It appears from the evidence that plaintiff's offer of the 14th of April was submitted to the defendant, and from the correspondence that defendant and Newman thought there was a binding contract. *Hamer* v. *Sharp*, 23 W. R. 158, L. R. 19 Eq. 108, does not apply. In the first place, that decision was prior to the Vendor and Purchasers Act, 1874, and the Conveyancing Acts, and therefore the objection as to there being no conditions to save expense to the vendor does not apply. Further, that case turned on the written instructions given to the estate agent. Here there are none.

Prior v. *Moore*, 3 Times L. R. 624, was also referred to.

Marten, Q.C., and *E. S. Ford*, for the defendant, were not called on.

KEKEWICH, J.—Having heard Mr. Newman, who was called without the plaintiff knowing what he was going to say, and having read the correspondence, I have little doubt that I have the real transaction, which is a mere transaction between principal and agent, before me. I suggested that the defendant should be called. It might be that a different complexion would be put upon the matter by his cross-examination, but this was not done, and he is entitled to have judgment upon the point of law. The defendant, undoubtedly, authorized Newman to find a purchaser for the houses. It is true the expression does not come out on the correspondence. On the second occasion he appears to have been instructed to negotiate a sale. Whatever else he did do, the defendant did not, in express terms, authorize Newman to enter into a contract. Newman was to find a purchaser, and to negotiate a sale. The question is, is this sufficient?

No evidence of any motion was adduced to show that a house or estate agent resembles a broker on the Stock Exchange or any other exchange. A house or estate agent is in a different position owing to the peculiarity of the property with which he has to deal, which does not pass as simply as stocks and shares do, but has to be transferred after investigation of title and in accordance with strict laws. An agent for the sale of real estate must be more formally constituted than an agent for the sale of stocks and similar securities. There is no definite authority.

In *Hamer* v. *Sharp* Hall, V.C., does not go so far as to say an estate agent cannot enter into any contract, nor does he decide the question of authority, but merely states his opinion. In *Prior* v. *Moore* I indicated my own opinion that instructions to a house agent to procure a purchaser and negotiate a sale do not amount to authority to the agent to bind his principal by a contract. There is in this case a circumstance which must not be forgotten, the defendant on the second occasion named the price he was prepared to take for the twenty-nine houses, Newman then jumped at the conclusion that he had power at that price to enter into a contract.

That is, in my opinion, not sufficient, the vendor must instruct the agent to enter into an agreement, and unless he does so, the principal reserves his final right to accept or refuse. In his letters Newman tells the defendant that the bargain is a good one, and that he has entered into it in accordance with the defendant's definite instructions, but in the witness box Newman says that the definite instructions meant, not definite instructions to enter into a contract, but to fix the price. It is unnecessary for me to consider the relations between the plaintiff and defendant, but I have come to the conclusion that the defendant never gave authority to Newman to enter into a contract, and has never conceded that he gave authority to Newman; he, in fact, treated it as negotiation.

A further point was raised on behalf of the plaintiff—viz., that in *Hamer* v. *Sharp* the Vice-Chancellor's

reasons for considering that the instructions in that case were not a sufficient authority to the agent to sign a contract for the sale of the property, for the price stated in the instructions were based on the difficulties then existing with regard to a contract for sale, and that these difficulties have now been removed by legislation, but, as I read the case, it goes further than that. Moreover, in the defendant's letter to Newman he objects to the latter entering into what might be a binding contract, which implies that he did not give Newman authority to enter into such a contract. On the simple point of law, or rather, first, on the fact what authority did Newman have, and, secondly, on the point of law what did that authority amount to, the plaintiff's case fails, and there must be judgment for the defendant, with costs.

Solicitors, *R. J. Bowerman; C. H. Moore.*

Q. B. Div.
(Mathew and Bruce, JJ.) Oct. 25.

In re AN ARITRATION BETWEEN THE RICHMOND GAS CO. AND THE MAYOR, &c., OF THE BOROUGH OF RICHMOND (SURREY).

Gas company—Statutory liability—Fixed price—Failure of supply—Unavoidable occurrence—Liability to abatement of price—Gasworks Clauses Act, 1871 (34 & 35 *Vict. c.* 41), *ss.* 24, 36—*Richmond Gas Act*, 1881 (44 & 45 *Vict. c. xxxv.*), *s.* 25.

A gas company who are under a statutory obligation to supply a fixed quantity of gas to the public lamps in a district at a fixed price during a certain period are not liable to a reduction in that price if, by reason of an occurrence over which they had no control (such as a frost of exceptional severity), the fixed amount of gas has not been supplied during a part of that period.

Special case stated under the Arbitration Act, 1889, by an umpire to whom certain differences between the Richmond Gas Co. and the Mayor, Aldermen, and Burgesses of the Borough of Richmond (Surrey) had been referred.

The material facts, as stated in the case, were as follows:—The Richmond Gas Co. are incorporated by Acts of Parliament, and are thereby authorized to supply gas within certain limits, which include the parish of Richmond.

By section 48 of the Richmond Gas Act, 1867, the company are required to supply gas to the public lamps adjoining the company's mains during such hours as shall be settled by agreement between the company and the vestry or other lighting authority.

By section 24 of the Gasworks Clauses Act, 1871, it is provided (*inter alia*) that "the undertakers shall supply gas to any public lamps within the distance of fifty yards from any of the mains of the undertakers in such quantities as the local authorities of each district or the trustees of any turnpike road or highway board within the limits of the special Act may from time to time require to be supplied, and the price to be charged by the undertakers and to be paid to them for all gas so supplied shall be settled by agreement between the local authorities and the undertakers."

By section 36 of the said Gasworks Clauses Act, 1871, it is provided (*inter alia*) that "whenever the undertakers neglect or refuse to supply gas as by this Act required to all or any of the public lamps in accordance with the provisions of this Act, they shall be liable to a penalty not exceeding forty shillings for each default."

By section 25 of the Richmond Gas Act, 1881 (which incorporates the Gasworks Clauses Act, 1871), it is provided that "the charge for supplying gas to the public lamps in the parish of Richmond, including the providing and use of such lamps and all proper lampposts, lampirons, burners, and fittings connected therewith, also the renewing and maintaining the same and the lighting, cleaning, and extinguishing the lamps shall, on and from the thirtieth day of June, 1881, be four pounds five shillings per lamp per annum, subject to an increase or reduction of five shillings per annum for every increase or reduction of threepence per one thousand cubic feet, to the ordinary consumer within the said parish. The said lamps to be lighted from sunset to sunrise, and the burners used therein to consume not less than five cubic feet of gas per hour."

During the period between the 1st of October, 1890, and the 31st of March, 1891, the company, in pursuance of the said section 25, supplied gas to the parish of Richmond, the duty of providing for the lighting of the parish belonging during the early part of that period to the vestry, and afterwards, upon the incorporation of the borough, to the corporation as the urban sanitary authority.

During the months of December, 1890, and January, 1891, it frequently happened that many of the public lamps in the parish of Richmond were not kept lighted by the company from sunset to sunrise, and that many others were supplied with and consumed less than five cubic feet of gas per hour.

For the purpose of this case it was admitted that the cause of the matters mentioned in the last preceding paragraph was that by reason of the frosts of exceptional duration and severity which occurred in the said months of December and January, the aqueous vapour unavoidably present in the gas was frozen in the pipes and that naphthaline crystals were deposited therein, and that by the ice and crystals so formed the pipes were on several occasions stopped up and the passage of the gas to the burners prevented.

It was also admitted that the company made special effort to overcome the obstructions above mentioned, and during the continuance of the above-named periods of frost employed extra labour and spent large sums of money in such efforts.

The company contended that they were entitled for the period aforesaid to be paid the full price provided for in the said 25th section of the Richmond Gas Act, 1881, without any deduction in respect of the deficiency of supply and consumption of gas above-mentioned, and without having to make or allow any payment to the corporation, whether by way of damages or otherwise, in respect of the same; and, further, that the only remedy of the corporation, if any, was to proceed for penalties under section 36 of the Gasworks Clauses Act, 1871. The corporation, on the other hand, contended that in cases in which there was such deficiency of supply or consumption as aforesaid the company were not entitled to recover the full statutory charge, but could recover such sum only as might be fair, having regard to the supply of gas actually provided.

The question for the court was which of these contentions was correct.

A. J. Kam, for the company.—The company are entitled to the full payment provided for by the Act. They are under a statutory liability to supply gas, and are thereby placed in the same position as per-

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

sons under a liability at common law to do certain acts. Such persons are released from their liability if by reason of an unavoidable occurrence such as the act of God, the performance of the act is rendered impossible. The frost in this case was such an unavoidable occurrence: *River Wear Commissioners* v. *Adamson*, 26 W. R. 217, 2 App. Cas. 743, per Lord Cairns, L.C., at p. 749; s.c. 24 W. R. 872, 1 Q. B. D. 546, per Mellish, L.J., at p. 554. The proper remedy (if any) is by proceedings for penalties under section 36 of the Gasworks Clauses Act, 1871: *Atkinson* v. *The Newcastle and Gateshead Waterworks Co.*, 25 W. R. 794, 2 Ex. D. 441; *Vallance* v. *Falle*, 32 W. R. 770, 13 Q. B. D. 109.

C. A. Russell for the corporation.—The corporation are entitled to a reduction in respect of the deficiency of light. They are not seeking to enforce a claim for damages for breach of the company's obligation, but they are not bound to pay for what they never received. The consideration for which the company are entitled to receive the £4 5s. per burner is that they shall supply the specified quantity of gas to the burners and keep it alight during the specified hours: section 25 of the Richmond Gas Act, 1881. This they have not done, and the amount payable to them should be reduced *pro tanto*.

MATHEW, J.—I think that our judgment must be in favour of the gas company. The question is whether they must submit to a reduction in the lump sum payable to them under the Act because of an occurrence which it is admitted was unavoidable. The Acts require that the company shall expend large sums upon the manufacture and supply of gas, and they are to do this upon the terms stated in the Acts. One term is that they shall receive £4 5s. per burner per annum. [His lordship read section 25 of the Act of 1881.] There is another important clause which points out the event in which the company may be treated as not complying with the statutory conditions—that is, section 36 of the Gasworks Clauses Acts, 1871. [His lordship then read the paragraphs of the case as to the effect of the frost.] The condition of the weather was such that it was impossible to convey the gas to the burners by the ordinary methods. Everything that the company could do to supply gas to the lamps was done, but, owing to causes over which the company had no control, the gas could not reach the lamps. It was said that by virtue of this statute the company had entered into a contract to supply light, and that if on any occasion the lamps were put out by a storm or by the malicious action of any person the corporation were at liberty to take notice of that and to require a proportionate reduction in the price; in fact, that under the Act the company were bound to keep all the burners alight. I think that that is an unreasonable construction to put upon the Act, and that the contention of the company is correct.

BRUCE, J.—I am of the same opinion. At first sight it seemed unreasonable that the corporation should be bound to pay for what they had not received the benefit of. But I think it is clear that the company are under a statutory obligation to supply gas and the necessary fittings, and if they "neglect or refuse" to do so they are liable to a penalty; and the corporation are bound to pay for the gas at the rate specified. It was argued that if the company do not supply to the burners the full amount of gas which they are bound to supply, the £4 5s. may be in some way apportioned. I think that is not so, but that the obligations are independent, one by the company to supply gas and the other by the corporation to pay the £4 5s. The case will, therefore, be remitted to the umpire with this expression of our opinion.

Case remitted accordingly.

Solicitors for the Richmond Gas Co., *Smith & Burrell.*

Solicitor for the Corporation of Richmond, *F. B. Senior*, Town Clerk, Richmond (Surrey).

Q. B. Div.
(Wright and Bruce, JJ.) Aug. 8, 1892.

AYLESFORD v. GREAT WESTERN RAILWAY CO. (a.)

Practice—Married woman—Examination as to property—"Debtor"—County Court Rules, 1889, *ord.* 25, *r.* 52.

A married woman against whom a judgment has been obtained is within the terms of ord. 25, *r.* 52, *of the County Court Rules*, 1889, *and may be ordered to attend for examination as to whether she has means of satisfying the judgment.*

Appeal of the defendants from an order of the judge of the Warwickshire County Court, discharging an order that the plaintiff, the Countess of Aylesford, should attend before him to be examined as to whether she had any, and what, means of satisfying the judgment in the action.

In the year 1889 the plaintiff brought an action in the county court of Warwick against the defendants to recover £50 for the loss of a dog. The plaintiff was nonsuited and ordered to pay the costs of the action. The plaintiff did not appeal, and had not paid the costs. The defendants obtained *ex parte* from the county court judge the above-mentioned order for the examination of the plaintiff under ord. 25, r. 52, of the County Court Rules. On the day appointed for the examination of the plaintiff objection was taken before the county court judge by her solicitor that the plaintiff, being a married woman, did not come within the words of the rule, and that the order was, therefore, bad. The county court judge upheld the objection, and discharged the order.

The defendants appealed.

Ord. 25, r. 52, of the County Court Rules, 1889, is as follows: "When a judgment or order is for the recovery or payment of money, the party entitled to enforce it may apply to the court or a judge for an order that the debtor liable under such judgment or order be orally examined as to whether any, and what, debts are owing to the debtor, and whether the debtor has any, and what, other property or means of satisfying the judgment or order before a judge or an officer of the court as the court or a judge shall appoint."

Lyttelton, for the defendants.—The county court judge was wrong in discharging the order. He acted on the authority of *Scott* v. *Morley*, 36 W. R. 67, 20 Q. B. D. 120; but his attention was not called to two later cases—*Holtby* v. *Hodgson*, 38 W. R. 68, 24 Q. B. D. 103, and *Pelton Brothers* v. *Harrison*, [1892] 1 Q. B. 118, 40 W. R. Dig. 181, in which the question of a married woman's liabilities on a judgment recovered against her was discussed. These cases show conclusively that a married woman may be "a debtor liable under a judgment or order," and therefore the order for the plaintiff's examination was rightly made and ought

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

not to have been discharged. [He was stopped by the court.]

E. M. Pollock (*T. Willes Chitty* with him), for the plaintiff.—An order such as is asked for in this case can only be made against a "debtor." A married woman cannot be a debtor within the words of the rule: *In re Gardiner, Ex parte Coulson*, 36 W. R. 142, 20 Q. B. D. 249. The effect of *Scott* v. *Morley* has not been altered by the later decisions.

He also referred to *Irwell* v. *Eden*, 35 W. R. 511, 18 Q. B. D. 588.

WRIGHT, J.—I am of opinion that this case is clearly within the language of the rule. A married woman is not a debtor for all purposes and in all senses, but she is a debtor liable to the extent of her separate estate. I think that the language of Lord Esher in *Holtby* v. *Hodgson* is distinctly in point. That case was decided on ord. 42, r. 32, of the Supreme Court, the language of which is identical with this county court rule.

BRUCE, J.—I am of the same opinion.

Appeal allowed.

Solicitors for the plaintiff, *Sharpe, Parker, Pritchard, & Barham*, for *Hughes & Masser*, Coventry.

Solicitor for the defendants, *R. R. Nelson.*

House of Lords.

From C. A. (England). March 28, 1892.

TAYLOR *v.* RUSSELL. (*a.*)

Mortgage—Priority—Tacking.

In November, 1862, *the S. trustees mortgaged certain lands, including the piece in question, to L., but by some accident the title deeds of the piece remained with the S. trustees. In January*, 1883, *the survivor of the S. trustees, together with the tenant for life, conveyed this piece to T., and he received the title deeds.*

T., in February, 1883, *mortgaged this piece of land to the appellants, but the title which he purported to show was a forgery.*

In October, 1887, *T. mortgaged the same piece of land to R., showing in his abstract the real title, and handing over the real title deeds.*

R., having afterwards discovered that there was an outstanding mortgage in the representatives of L., asked them to release the piece of land from the mortgage debt secured by the indenture of November, 1862, *and to convey the legal estate to the S. trustees discharged from the mortgage debt, upon the express condition that they should thereupon convey the legal estate to R. This was carried out.*

Held, that R., thus getting in the legal estate, was not to be postponed to the prior equitable mortgagee.

Decision of the Court of Appeal (*reported* 39 *W. R.* 81, [1891] 1 *Ch.* 8) *affirmed.*

This was an appeal from a decision of the Court of Appeal (Sir James Hannen, and Bowen and Fry, L.JJ.), reported 39 W. R. 8 [1891] 1 Ch. 8.

The facts are given very fully in the judgments and in the report in the court below.

Haldane, Q.C., and *Levett, Q.C.*, for the appellants.—Legard's trustees had no right to convey in this way. The mortgagees could have released, but only in favour of those entitled to the equity of redemption. You cannot by any bargain with a stranger get rid of notice. Legard's trustees, though innocent, were committing a breach of duty. The estate is in the mortgagees merely as security. Beyond his security a mortgagee is a trustee. If he goes into possession he has to account for rents, &c., as trustee, or if he sells wrongfully. The appellants are entitled to insist on an estoppel. The Surtees trustees were not entitled to prefer one to another.

The following cases were cited or referred to: *Seton* v. *Slade*, 7 Ves. 265, 273; *Thornbrough* v. *Baker*, 2 W. & Tud. L. C., 6th ed., 1166; *Matthison* v. *Clarke*, 3 W. R. 2, 3 Drew. 3; *Thornton* v. *Court*, 3 De G. M. & G. 293, 2 W. R. Dig. 49; *Harpham* v. *Shacklock*, 30 W. R. 49, 19 Ch. D. 207, 214; *Mumford* v. *Stohwasser*, 22 W. R. 833, L. R. 18 Eq. 556; *Cory* v. *Eyre*, 1 De G. J. & S. 149, 167, 12 W. R. Ch. Dig. 61; *Colyer* v. *Finch*, 5 H. L. Cas. 905, 928, 5 W. R. Dig. 255; *Jennings* v. *Jordan*, 30 W. R. 369, 6 App. Cas., per Lord Blackburn, p. 714; *Dixon* v. *Muckleston*, 21 W. R. 178, L. R. 8 Ch. 155, 161; *Roberts* v. *Croft*, 5 W. R. 773, 24 Beav. 223.

J. Scott Fox and *Eastwick*, for the respondents, were not heard.

The House took time for consideration.

March 28.—Lord HERSCHELL.—The question raised in this action is whether the appellants are entitled to a first charge as mortgagees of certain hereditaments comprised in an indenture of mortgage dated the 15th of February, 1883. The learned judge who tried the action declared them to be so entitled, but his decision was reversed by the Court of Appeal. The case is one of that unfortunate class where one of two innocent parties must suffer from the fraud of a person with whom they have dealt. Thomas Toward, whose frauds have led to this litigation, executed on the 15th of February, 1883, an indenture of mortgage conveying to the appellants the property now in question to secure an advance of £2,500. The title which he purported to show was a deed of conveyance of the property to himself from the trustees of one Samuel Smithson. The signatures of the trustees were in fact forgeries, and the land had never formed part of the Smithson Estate. The appellants were content to take the title without further inquiry because they had shortly before become the mortgagees of certain other hereditaments in the same neighbourhood, conveyed to Toward by Smithson's trustees, and had then investigated the title, and had no reason to suspect that the forged deed was otherwise than genuine.

Thomas Toward had in fact acquired the land in question from the trustees of Robert Surtees by a conveyance dated the 30th of January, 1883. On the 20th of October, 1887, he mortgaged it to the respondent, Arthur Henry Russell, to secure an advance of £2,500, showing in his abstract the real title and handing over the deeds to the respondent. I have said that Thomas Toward had acquired the land by conveyance from Surtees' trustees, but he did not in fact obtain the legal estate, although so far as appeared from the conveyance and abstract of title he did so. By an indenture dated the 19th of November, 1862, the trustees under the will of Robert Surtees had conveyed a considerable quantity of land, including the piece in question, by way of mortgage to Sir Francis Legard to secure the sum of £9,000 and interest. This mortgage was outstanding at the date of the conveyance to Toward, and was apparently overlooked. The result was this, that although both the appellants and the respondent Russell thought they had obtained the legal estate, neither of them

(*a.*) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

had in fact done so. But inasmuch as at the date of his conveyance to the appellants, Toward had an equitable estate subject to the mortgage to Sir F. Legard, the appellants obtained a good equitable title. And their title, being of earlier date than the equitable title of the respondent Russell, would undoubtedly on that ground have had the priority but for what subsequently happened. I say this, of course, apart from the question of negligence, on which ground also the respondent contends that the appellants' security must be postponed to his.

When Toward's frauds became known the respondent Russell, having ascertained the existence of the outstanding mortgage, approached the representatives of Sir F. Legard, and applied to them to release the land in question from the mortgage debt secured by the indenture of November, 1862, and to convey or cause to be conveyed the legal estate in the same to the respondents. Sir F. Legard's representatives, being satisfied that the remainder of the property comprised in the mortgage was sufficient security for the sum due to them, agreed to take this course. It was accordingly arranged that they should convey the legal estate to the Surtees trustees discharged from their mortgage debt, upon the express condition that they should thereupon convey the legal estate in the premises comprised in the respondents' mortgage to them. The Surtees trustees assented to this arrangement, which was accordingly carried out by two indentures. By one of the 21st of November, 1888, the Legard trustees conveyed to the Surtees trustees, who in turn, by an indenture of the 26th of November of the same year, conveyed to the respondents. The respondents thus became possessed of the legal estate in the premises comprised in their mortgage, and it is on this (apart from the question of negligence to which I have already alluded), that they base their claim to priority over the appellants whose equitable interest was prior in point of time to their own.

It is not disputed that the doctrine of equity is well settled, "that a man who has *bonâ fide* paid money without notice of any other title, though at the time of the payment he as purchaser gets nothing but an equitable title, may afterwards get in the legal title if he can, and may hold it, though during the interval between the payment and the getting in of the legal title he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself." I am using the language of Lord Selborne when delivering the opinion of the Judicial Committee in the case of *Blackwood* v. *London Chartered Bank of Australia*, 22 W. R. 419, L. R. 5 P. C. 92. It is said that there is engrafted upon this rule of equity this exception, that the possession of the legal estate cannot be insisted upon as against a prior equitable incumbrancer where it was obtained from one who held it merely as trustee. The language of the late Master of the Rolls in *Harpham* v. *Shacklock* was strongly relied on in support of this view. His words were: "Nothing is better settled than that you cannot make use of the doctrine of *tabula in naufragio* by getting in a legal estate from a bare trustee after you have received notice of a prior equitable claim." It is not necessary for your lordships to determine whether this view is in accordance with the authorities, but I am content to assume it to be well founded. Where the person in whom the legal estate is vested stands in the relation of trustee to the prior incumbrancer, it would certainly be strange if a subsequent incumbrancer with notice of these facts could secure any advantage by obtaining a conveyance of the legal estate to himself.

The appellants put their case in this way. They say that by the indenture of mortgage of February, 1883, the equity of redemption which had passed to Toward by the deed of January, 1883, became vested in them, and that they thus had an equitable estate in fee simple, subject to the mortgage to Legard. And, further, that Toward, as between himself and the Surtees trustees, was entitled to a conveyance of the legal estate of the property freed from the mortgage of November, 1862, and that this right passed to them. These propositions are not open to contest. Their next position is that when the legal estate became vested in the Surtees trustees by virtue of the conveyance of the 21st of November, 1888, they became trustees of it for the appellants, and that the respondents have thus obtained the legal estate from bare trustees who were bound to convey it to the appellants. But for the circumstances under which that conveyance took place, this might well be so. But it must be taken as proved that the legal estate was conveyed to the trustees of Surtees' will at the request of the respondent Russell, "and only upon the terms and express condition agreed to between them, the said trustees and the successors in title of Sir F. Legard, that they the said trustees would immediately thereafter convey the said premises and the legal estate therein" to him. The representatives of Sir F. Legard being under no obligation to convey to the Surtees trustees, and having made the conveyance only on the condition and for the purpose mentioned, the learned counsel for the appellants were forced to admit that their clients could not successfully have invoked the aid of a court of equity to compel a conveyance to themselves. They equally failed to establish that the appellants could have obtained an injunction to prevent the conveyance to the respondent. Whether there was to be a conveyance to the Surtees trustees or not was a mere question of the machinery by which the arrangement between the respondents and Sir F. Legard's representatives was to be carried out, and I am of opinion that the matter must be dealt with upon the same footing as if the conveyance had been made directly from those representatives to the respondents.

The controversy, therefore, resolved itself into this: Was there anything in the circumstance that the legal estate was obtained from Legard's representatives, which precludes the respondents from claiming the benefit of it as against the appellants? It was contended on their behalf that inasmuch as they were the owners of the property subject to the mortgage, Legard's representatives were trustees for them, and that in conveying to the respondents without consideration they were guilty of a breach of trust to which he was a party; that if they were satisfied with less than the entire property comprised in their security, it was only to the appellants that they could lawfully release any part of it. No authority was cited for the proposition that a mortgagee is, subject to his security, a trustee of the legal estate for the mortgagor. The rights of a mortgagor are, no doubt, well established in a court of equity. He may redeem the mortgage, and no dealings with the property by the mortgagee, save a conveyance under the power of sale, can deprive him of this right. But it is quite a different proposition, and one which I think is wholly untenable, to assert that a mortgagee is trustee for the mortgagor. It is admitted that a mortgagee may create such estates as he pleases; he may convey, by way of submortgage, to whom and in as many parcels as he pleases. This seems to me to show that Legard's representatives cannot be regarded as holding the legal estate as trustees for the appellants. If the conveyance to the respondents was a breach of trust on the part of Legard's representatives, as against the

appellants, they could, I presume, have come to a court of equity for an injunction to prevent the conveyance being executed. But had they done so the answer would surely have been, "Come and redeem; that is the right which you possess, and you are not entitled, whilst abstaining from the exercise of that right, to restrain the appellants from dealing with the legal estate vested in them." I am quite unable to see that Legard's representatives committed, as against the appellants, any breach of trust or other wrong of which they are in a position to complain, and this being so, the respondents, in taking the conveyance, were not parties to any breach of trust or other wrong. The case is a novel one. But I do not think that the appellants have brought themselves within any established exception to the rule that a subsequent incumbrancer without notice who has got in the legal estate may hold it as against one whose equitable title is prior in point of time. And I am unable to see any equity in the appellants entitling them to insist that the respondents shall not enjoy the advantage derived from the possession of the legal estate.

The view which I take renders it unnecessary for me to express an opinion upon the other ground upon which the respondent relies—viz., the alleged negligence of the appellants.

I am of opinion that the judgment of the court below was right, and that this appeal should be dismissed, with costs.

Lord MACNAGHTEN.—There are no facts in dispute in this case, though much is left to inference and conjecture, which the appellants might have cleared up if they had thought fit to do so. The author of the mischief which has given rise to the present controversy was one Thomas Toward, of Shildon, in the county of Durham, a builder by trade, and a man certainly of more ingenuity than honesty. Toward absconded some time in the year 1888, the precise date is not given, but it was stated at the bar that it was in the month of August—and thereupon, or shortly afterwards, he was declared bankrupt.

On Toward's disappearance it was discovered that he had contrived to mortgage a small property in the town of Old Shildon, twice over for its full value. first to the appellants, and then to the respondent Russell, a solicitor in York, who is interested in the mortgage on his own account, and on account of his partner, the respondent Mackay.

The property belonged at one time to a gentleman of the name of Surtees, who died in 1857. Mr. Surtees devised his real estate in strict settlement. The trustees of the will, who were devisees to uses, had under the will powers of sale and mortgage, and, as incidental thereto, power to revoke the uses declared by the will.

On the 30th of January, 1883, the surviving trustee of Surtees' will, with the concurrence of the tenant for life, conveyed the property in question, together with a plot containing 820 square yards, making in all 2a. 2r. 1p., to Toward in fee, in consideration of £1,060, and the title deeds of the property, which it seems Mr. Surtees had acquired by purchase, were handed over to him.

In April. 1883, Toward conveyed the 820 square yards to the trustees of a Methodist chapel. He built some houses on the rest of the property, and mortgaged it more than once. Ultimately, on the 20th of October, 1887, he conveyed it to Russell by way of mortgage, for the purpose of securing an advance of £2,500, out of which a prior mortgage had been discharged. On the occasion of this mortgage to Russell the title was carefully investigated, and on the completion of the transaction, the title deeds of the property, which had been in the hands of Russell's firm on behalf of the prior mortgagee, were retained and held by him on behalf of himself and Mackay, and in his hands they have remained ever since. Not only had Russell no notice of any prior charge, but it is clear that no skill or diligence on his part could have detected any flaw or defect in the title furnished to him.

The circumstances attending the mortgage to the appellants are more interesting. On the 27th of April, 1881, Toward, who was then represented by a respectable firm of solicitors, mortgaged to the appellants a house in the village of New Shildon, known as No. 1, St. John's-road, which the trustees and the beneficial owner under the will of a Mr. Smithson had conveyed to him by an indenture, dated the 21st of August, 1878. It seems that on the occasion of this mortgage, Toward, with an eye to future business, took the precaution of keeping a copy of the conveyance to him. In January, 1883, when he was in treaty with the trustee of Surtees' will, he applied to the appellants without the intervention of a solicitor, for an advance of £2,500 on the security of the property. The appellants through their solicitors asked for an abstract of title. He furnished them with an abstract of a deed, purporting to be dated the 3rd of November, 1882, and to be a conveyance to him from the Smithson trustees, and the beneficial owner under Smithson's will, in consideration of £1,500. The appellants through their solicitors then desired to compare the abstract with the deed abstracted, and Toward produced to them a document in the form of a deed, which he had fabricated, by taking everything except the parcels and the date from his copy of the conveyance of the 21st of August, 1878, and inserting as the parcels a description more or less accurate of the property which he was purchasing from the trustee of Surtees' will, and forging thereto the names of the Smithson trustees, and the name of the beneficial owner under Smithson's will. Beyond comparing the abstract with the forged deed the appellants made no investigation of Toward's alleged title; they made no inquiry for the purpose of ascertaining whether the property formed part of the estate devised by Smithson's will, nor did they call for the production of the earlier title deeds, although the forged deed on the face of it referred to a covenant to be executed by the beneficial owner under Smithson's will for the production of title deeds. According to their own account, they were favourably impressed by the shortness of the title, and they were satisfied that the property which Toward offered them in the town of Old Shildon was part of the Smithson Estate, because they had been assured by Toward's solicitors on the previous occasion that, "as a fact, the greater part of New Shildon was built upon land sold off by Mr. Smithson."

The mortgage to the appellants was dated the 15th of February, 1883, and it is not disputed that it operated to pass the estate and interest which Toward had acquired on the 30th of January preceding.

The appellants and the respondents each supposed that their own mortgage was a first charge, and protected by an assurance of the legal estate. It turned out, however, that the legal estate was outstanding, although the fact had escaped notice until after Toward's disappearance. It seems that on the 19th of November, 1862, by a deed of that date the Surtees trustees, with the concurrence of the then tenant for life, had conveyed the property afterwards sold to Toward, together with other property of much greater value, to one Sir Francis Legard in fee

by way of mortgage for the purpose of securing £9,000, of which £3,000 was paid off in 1887. By some oversight the title deeds of the property afterwards comprised in Toward's purchase were not handed over to the mortgagee, and the fact that the property was in mortgage was overlooked when it was sold and conveyed to Toward.

After Toward's disappearance, Russell took possession of the property in question in this action under or by virtue of his mortgage, and then finding that the appellants claimed priority under a mortgage of earlier date, he applied to the trustees of Sir Francis Legard's will, in whom the mortgage of 1862 was then vested, and induced them to convey the property to the Surtees trustees upon the express condition agreed to between them and the Surtees trustees that the Surtees trustees would immediately thereafter convey the legal estate to him. This arrangement, the terms of which are not in dispute, was carried out by two deeds—a conveyance of the 21st of November, 1888, from the Legard trustees to the Surtees trustees, with the consent of the tenant for life under Surtees' will, and a conveyance of the 26th of November, 1888, from the Surtees trustees to Russell.

It is admitted that by this transaction Russell acquired the legal estate; and it is not disputed that an equitable mortgagee who has advanced his money without notice of a prior equitable mortgage may gain priority by getting in the legal estate unless the circumstances are such as to make it inequitable for him to do so, as would be the case, for example, if the legal estate were held upon express trusts or according to recent authorities, if it were vested in a satisfied mortgagee.

The mere fact that the subsequent incumbrancer has notice of the prior incumbrance when he gets in the legal estate counts for nothing. "It is," as Lord Hardwicke says (2 Ves. 574), "the very occasion which shows the necessity of it."

It is therefore incumbent upon the appellants, who were the plaintiffs in the action, to show that Russell acted inequitably in getting in the legal estate, or that there is some equity which prevents him from availing himself of its protection.

In considering the circumstances under which the legal estate was got in, it would, I think, be a mistake to attribute to the persons concerned in the transaction the knowledge which we now possess, whether the possession of that knowledge would or would not have affected their position.

The first question, in my opinion, is, What did the Legard trustees know about the facts of the case? It is not alleged in the pleadings or in the evidence, nor has it been suggested at the bar, that they knew anything about the appellants or their claim to be mortgagees of the property. Observations were made upon their conduct, as if they had officiously meddled in a quarrel which did not concern them, and had given, or had attempted to give, some advantage to one of two competing claimants, out of mere caprice, or possibly through some misapprehension of the real state of things. That is not, I think, the true view of the case. One has, in some degree, to guess at the facts, because the appellants, on whom the burden of proof lies, have not chosen to go into evidence about them. But, taking everything most strongly in favour of the appellants, it seems to me that no fault can be found with the action of the Legard trustees. They were applied to by a person who had apparently been misled through the negligence of their predecessor in title, and had advanced his money without notice on the security of a small portion of the property mortgaged to them. They did not require that portion for the purposes of their own security. Why should they not hand it over to the applicant? He had a mortgage perfect on the face of it, and possession of deeds showing a good title for sixty years. The Surtees trustees consented; so did the tenant for life under Surtees' will. And, as far as I can make out, the Legard trustees knew nothing whatever about anybody else in connection with the property. Notwithstanding the very able arguments addressed to us, I cannot see anything in their position as mortgagees to oblige them to play the part of the dog in the manger, and keep what they did not want themselves from a person who seemed to have a very good claim to it.

The next question is, What did Russell know? It is conceded that he knew that the appellants claimed priority on the ground of having a mortgage prior in date to his. More than this he cannot, I think, be taken to have known. There is no reason to suppose that the appellants had explained to him the circumstances which they now contend excused them from obtaining the title deeds of the property. It would have been strange if they had. They do not appear to have known the circumstances themselves. They did not even take the trouble to make themselves acquainted with the facts when they put in their statement of claim four months afterwards. The case made in their pleadings was that Russell only obtained possession of the title deeds to the premises under the conveyance of the 26th of November, 1888. In fact, the appellants seem to have displayed no greater diligence after Toward absconded than they did when they took their security. Russell certainly knew that there were claimants prior to him in date; but he also knew that those claimants could not have a single title deed relating to the property except their alleged mortgage. That circumstance unexplained would affect their claim to priority. Why was Russell to assume that it was capable of explanation when the persons interested did not choose to come forward and explain it? So long as it is the settled rule of the court that a subsequent incumbrancer may gain priority by getting in the legal estate, and that there is nothing in itself inequitable in so disarranging equities, I do not see how it can be contended that there was anything contrary to equity, or anything involving a breach of trust or a breach of duty in the transfer of the legal estate from the Legard trustees to Russell.

But then it is said that the legal estate passed through the hands of the Surtees trustees, and that they were trustees for the appellants in a sense. I am not quite sure that I know what that expression exactly means; but of this I am sure, that it is only when the legal estate has been acquired from a trustee in the proper sense of the term that the acquisition of it has been held of no avail; and certainly the Surtees trustees were never trustees of this property for the appellants; they were only devisees to uses under Surtees' will; they never had the legal estate until it was conveyed to them on a special trust or confidence to hand it over to Russell. In point of fact, I think they may be left out of the question altogether. The case seems to me to be precisely the same as if the legal estate had been conveyed directly by the Legard trustees to Russell. It is not clear why recourse was had to the interposition of the Surtees trustees, or why the conveyance to them took so singular a form. It may be, as suggested in the respondents' case, that that course was adopted with the view of affording protection to the trustees of the Methodist chapel, whose property was also included in the appellants' mortgage. At any rate, it is no part of the appellants' case that the particular machinery that was made use of was designed to embarrass or defeat their claim.

On these simple grounds, without discussing the doctrine of *tabula in naufragio*, or attempting to define the limits of its application (which it appears to me would be no easy matter, having regard to the current of modern authority), I think the appeal must be dismissed. The appellants have not succeeded in showing that Russell has done anything inequitable or improper in getting in the legal estate.

This view of the case renders it unnecessary to consider what would have been the priority of the parties if the legal estate had not been got in. That question was not fully discussed, and I prefer to leave it undetermined. I will only say that I am satisfied that, on the part of the appellants, there was an amount of negligence which it is difficult to excuse or understand; and I am not at present convinced of the correctness of the view expressed by the learned judge who tried the case in the first instance that negligence necessary to postpone a prior equitable mortgagee in such a case as the present, must be so gross as to render him responsible for the fraud committed on the second mortgagee, and that, in fact, it is immaterial in such cases whether the prior mortgagee has or has not the legal estate.

Lord WATSON.—I have had an opportunity of considering the opinion which has just been delivered by Lord Macnaghten, and I entirely concur in it.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *C. and S. Harrison & Co.*

Solicitors for the respondents, *Iliffe, Henley, & Sweet.*

Privy Council.

Jan. 27; Feb. 23, 1892.

BANK OF AFRICA *v.* SALISBURY GOLD MINING CO. (*a.*)

(*On appeal from the Supreme Court of Natal.*)

Company—Lien on member's shares—Waiver—Articles of association.

A lien conferred by articles of association on the shares of any member indebted to the company is valid, any transfer by such indebted member being thereby made dependent on the consent of the directors.

Bradford Banking Co. *v.* Briggs, 35 *W. R.* 521, 12 *App. Cas.* 29, *approved.*

Such a lien may be discharged by a new arrangement between creditor and debtor, the terms of which are incompatible with its retention. But the mere fact of the debtor agreeing to give his creditor authority to sell part of the subjects without notice, upon his making default, is not sufficient to warrant the inference that the creditor is not to realize the other parts of his security.

Where a shareholder indebted to a company applied for time, and gave such an authority with respect to certain shares other than those in question in this action,

Held, that no limitation of the lien in regard to the shares in the action was contemplated, and that a transfer of such shares by the indebted shareholder should not be registered.

This was an appeal from an order of the Supreme Court of Natal (the 31st of January, 1890) whereby a claim by the appellant company to have 400 shares in the respondent company over which the latter claimed a lien in respect of a debt due to them by Tristram Woolridge, in whose name the shares were then registered, transferred to their nominee, the certificate of the shares having been deposited with the appellants by Woolridge in part security of a current account.

The facts are detailed in their lordships' judgment.

Phipson Beale, Q.C., and *Methold*, for the appellants, contended that they were *bonâ fide* holders for value of the shares without notice of the respondent's lien. Moreover, the respondent company had accepted a promissory note and a transfer of certain other shares in exoneration of the shares now in question. The conduct of the respondents showed *laches* and acquiescence.

They cited *Cowell* v. *Simpson*, 16 Ves. 279; *Mason* v. *Morley*, 13 W. R. 669, 34 Beav. 471; *Hooper* v. *Gumm*, 15 W. R. 464, L. R. 2 Ch. 282, 291; *Angus* v. *M'Lachlan*, 31 W. R. 641, 23 Ch. D. 330; *In re Taylor and Others*, 39 W. R. 417, [1891] 1 Ch. 590.

Buckley, Q.C., and *Cave*, for the respondents.—Under our articles of association we had a lien on these shares for Woolridge's debt, which existed at the time when registration of their transfer was claimed by the appellants. [They referred to articles 13-17, 21, 38, 45, 46, 48, 52, and to *Bradford Banking Co.* v. *Briggs*, 35 W. R. 521, 12 App. Cas. 29.] There had been no discharge of the debt and no waiver of the lien.

Beale, Q.C., in reply.

Cur. adv. vult.

The judgment of their lordships (Lord WATSON, Lord HOBHOUSE, Lord MACNAGHTEN, Lord HANNEN, and Sir RICHARD COUCH) was delivered by

Lord WATSON.—The object of this action is to compel the respondent company to register a transfer by one Tristram Woolridge to the appellant bank of 400 of its paid-up shares. The company declines to do so until a debt due by Woolridge, the registered owner of the shares, has been satisfied. By section 38 of its articles of association, the company has a first and paramount lien upon all the shares registered in the name of each member for his debts to the company, and section 52 provides that no shareholder shall be entitled to transfer his shares, without the approval of the directors, "so long as his shares are not fully paid up, or afterwards if he, either alone or jointly with any person or persons, is indebted to the company on any account whatever." The validity of a lien conferred in these or similar terms by articles of association was fully recognized by the House of Lords in *Bradford Banking Co.* v. *Briggs & Co.*

The appellants do not dispute that, in the absence of any waiver of its lien, the company would be justified in refusing to register their transfer. But they maintain that certain transactions which took place between Woolridge and the company, as well as between the company and themselves, necessarily imply a surrender of the company's right to treat the 400 shares in question as a security for the debt due by Woolridge.

It appears that the company, in December, 1888, resolved to increase its capital by the creation of 3,000 new shares of £1 each, of which 750 were kept in reserve, and the remainder offered to the public. George Brown, a broker in Pietermaritzburg, acting under a power of attorney from Woolridge, tendered for the whole 2,250 shares, £1 subscription with a premium of £35 16s. for each of them, payable one-fourth immediately, another fourth upon allotment,

(*a.*) Reported by J. M. COLLYER, Esq., Barrister-at-Law.

and the balance upon the 28th of February, 1889. The tender was accepted, and Woolridge duly paid the first two instalments, amounting to £41,400. Before the balance became due he paid the amount stipulated for 1,250 shares, and obtained certificates for them as fully paid up.

When the 28th of February arrived Woolridge did not find it convenient to pay the balance then due in respect of the remaining 1,000 shares, which amounted to £18,400. On that day the company, at his request, agreed to take his promissory note for the balance, payable on the 15th of May, 1889, in consideration of his consenting that, in the event of the note being dishonoured at maturity, the company should have full power to dispose of the 1,000 shares, which were either to be retained in the meantime or transferred to a trustee for the company.

Under a written agreement between him and the appellant bank, made in March, 1888, Woolridge was allowed to draw against a mass of securities deposited with the bank, which he was permitted to reclaim from time to time on substituting other securities for those withdrawn; his obligation being to keep the amount of the bank's advances to him fully covered. In March, 1889, he deposited with the bank, in pursuance of that obligation, certificates representing the 400 shares now in dispute.

Before his promissory note matured Woolridge applied to the company for a further extension of the term of payment. To that request the company acceded, upon terms which were embodied in two agreements dated the 6th and 10th May, 1889. In accordance with these terms, Woolridge gave a new promissory note for the amount of his debt, to be renewed from time to time if both parties consented. He also agreed to transfer the 1,000 unpaid shares to the company's solicitor, in trust for the purposes of the agreement, and in security of the debt; and he authorized the trustee, in case of his default, to realize the shares at once, and to pay the proceeds to the company, "in satisfaction or on account of the said liability."

It was argued by the appellants that the company, in February, and again in May, 1889, transacted with Woolridge upon the footing that his debt, as then constituted by a promissory note, was to be specially charged upon the 1,000 shares, and must therefore be held to have passed from any lien previously affecting the 1,250 shares for which certificates had been issued.

Their lordships do not doubt that a right of lien may be discharged by a new arrangement between creditor and debtor, the terms of which are incompatible with its retention, or by any other arrangement which sufficiently indicates the intention of the parties that the right shall no longer be enforced. An agreement giving the creditor new and special powers with respect to part of the subjects covered by his original lien may be conceived in such terms as to imply that he is not to have recourse against the remaining subjects. But the mere fact of the debtor agreeing to give his creditor authority to sell part of the subjects without notice, upon his making default, is not, in the opinion of their lordships, sufficient to warrant the inference that the creditor is not to realize the other subjects of his security, if necessary. It indicates the intention of the parties that the burden of the debt shall be cast, in priority, upon the subjects to which the authority relates; but it does not necessarily imply that the security of the creditor is to be restricted to these subjects.

Their lordships are unable to find in the agreements of February and May, 1889, any stipulation or expression calculated to suggest that a limitation of the lien given to the company by its articles of association was in the contemplation of either party. On both occasions Woolridge asked for time and nothing else, and the indulgence was granted in consideration of his authorizing the 1,000 shares to be sold if and when default was made, without the necessity of waiting for fourteen days after written notice to him, as prescribed by section 39 of the articles of association.

Upon the 22nd of June, 1889, the appellants, by a letter addressed to the secretary of the company, intimated that they had a lien over 400 shares registered in the name of Woolridge, and requested that any dividend arising upon these shares should be paid to them. Until receipt of that communication the company had no notice of the bank's title to these shares, and had no reason to suppose that any one was asserting an interest preferable to its own lien. On the same day the secretary sent a reply, declining to recognize any other person than the registered owner as having right to dividends, and suggesting that the appellants should obtain an order from Woolridge for payment of dividends to them. No reference was made in that letter to the company's lien; but, on the 11th of July, 1889, the secretary, having meanwhile brought the matter before his directors, wrote by their instructions to the appellants, stating "that, acting under and by virtue of the provisions of clauses 38 and 52 of our articles of association, they cannot in any way recognize the lien held by your bank over shares in Mr. Woolridge's name." At the time when this correspondence passed Woolridge had not executed a transfer of the shares to the appellants, and, in point of fact, he did not do so until the 30th of August, 1889.

If the appellants, during the interval of time between their receipt of the secretary's letters of the 22nd of June and the 11th of July, had made fresh advances to Woolridge, in the belief that the company did not mean to claim any right to the shares, the question would have arisen whether the company could assert its lien so as to defeat the security of the appellants for these advances. But the relative position of the appellants and their debtor Woolridge remained unaltered during that period. It was also suggested that the company had lost its lien by giving effect to transfers by Woolridge of other parcels of his 1,250 paid-up shares, and thereby charging an undue proportion of Woolridge's debt upon the shares deposited by him with the appellants. It is sufficient answer to say that the suggestion is without foundation in fact, because the evidence shows that after the 22nd of June, 1889, although various transfers by Woolridge were presented for registration, the transference was in every case suspended, possibly in order to await the result of this controversy.

In these circumstances their lordships are of opinion that the judgment of the court below is right, and they will therefore humbly advise Her Majesty to dismiss the appeal. The appellants must pay the costs incurred here by the respondents.

Solicitors for the appellants, *Budd, Johnsons, & Jecks.*

Solicitor for the respondents, *W. F. Tarn.*

Court of Appeal.

From Chan. Div. (Lindley, Bowen, and A. L. Smith, L.JJ.) [and Chan. Div. Stirling, J.] — Nov. 16, June 16, Aug. 9, 1892.

In re DOODY. FISHER *v.* DOODY.
HIBBERT *v.* LLOYD. (*a.*)

Solicitor — Costs — Taxation — Solicitor co-mortgagee — Foreclosure action — Profit costs — Sale of mortgaged property — Solicitor mortgagee's firm acting for mortgagees.

A solicitor mortgagee is not entitled, as against the mortgagor, to charge profit costs in respect of business relating to the mortgage transacted by the solicitor acting for himself and a co-mortgagee, or by a firm of solicitors of which he is a partner.

The rule established by Cradock *v.* Piper, 1 *Mac. & G.* 664—*that where a solicitor or his firm appears in an action on behalf of himself and a co-trustee, and the expense has not thereby been increased, the solicitor is entitled to the usual costs—is not applicable to the costs of a solicitor mortgagee acting for himself and his co-mortgagees.*

In re Donaldson, 27 *Ch. D.* 544, 33 *W. R. Dig.* 61, *overruled.*

F. (who was a solicitor) and A. were transferees of a mortgage created by D. D. died, and the transferees brought an action for administration of his estate, and obtained the usual administration judgment. Orders were subsequently made for the sale of the mortgaged property out of court, and that the purchase-money should be received by the plaintiffs, they undertaking to pay into court the balance after satisfying the mortgage debt. The sale took place, and the plaintiffs carried in for taxation two bills of costs delivered by the firm of F. & H., one for costs incurred upon the transfer of the mortgage, and the other for costs incurred in carrying out the sale. The taxing master disallowed all costs, except costs out of pocket, on the ground that F., one of the mortgagees, was a member of the firm of F. & H., by whom the costs were claimed. The business charged for was transacted exclusively by H. and the clerks of the firm. The plaintiffs took out a summons to review the taxation.

Held, by Stirling, J., *that F. could not retain his share of the profit costs as against the estate of D., but that on principle there was nothing to prevent H. from receiving remuneration for his trouble, and the matter would, therefore, be remitted to the taxing master for re-consideration, with a direction to ascertain what would be properly chargeable against the estate of D. if an independent solicitor had been employed, and to allow such proportion of that amount as H. was entitled to in respect of the general profits of the partnership as between himself and F.*

Two mortgagees, one of whom was a solicitor, brought an action for foreclosure, and obtained judgment. The mortgagees were represented in the action by the solicitor mortgagee. The taxing master disallowed as against the mortgagor all profit costs of the action.

Held, by the Court of Appeal *(affirming the decision of* Stirling, J.), *that the taxing master was right, and that the costs were properly disallowed.*

Two summonses to review the taxation of costs in the two above-named actions had been taken out before Stirling, J., and they raised substantially the same question, which was whether a solicitor mortgagee is entitled, as against the mortgagor, to charge profit costs in respect of business relating to the mortgage carried through by the solicitor acting for himself and a co-mortgagee, or by a firm of solicitors of which he is a partner.

In re DOODY, FISHER *v.* DOODY.

In the year 1858 George Doody, since deceased, borrowed £1,200 of one Liddle, on the security of a legal mortgage of real estate created by an indenture dated the 30th of March, 1858. In 1887 Liddle appears to have given notice to pay off the debt, and in consequence of such notice it was arranged that the mortgage should be transferred to the plaintiffs, Henry Fisher and John Hodgkins. Soon afterwards George Doody died, and this action was brought by the plaintiffs as creditors for administration of his estate, and the usual administration judgment was given. On the 30th of June, 1890, an order was made for the sale of the mortgaged property, and subsequently on the 19th of February, 1891, a further order was made directing that the sale should be concluded out of court, subject to a reserved price and the auctioneer's charges being approved by the judge, and that the purchase-money should be received by the plaintiffs, they undertaking to pay into court the balance of purchase-money, if any, after payment and satisfaction of the sum due to them on their mortgage, such sum to be certified. The sale had taken place, and the balance mentioned in the order was being ascertained. For that purpose the plaintiffs had carried in for taxation several bills of costs, and in particular two bills of costs due to Messrs. Fisher & Hodges, of Newport, solicitors, one bill being for costs alleged to have been incurred on the occasion of the transfer of the mortgage to the plaintiffs in 1887, the other being for costs alleged to have been incurred in carrying into effect the sale out of court sanctioned by the order of the 19th of February, 1891. In taxing these bills the master had disallowed all costs except costs out of pocket, on the ground that the plaintiff, Henry Fisher, one of the mortgagees, was also a member of the firm of Fisher & Hodges, to whom the costs were claimed to be due. It appeared from an affidavit, which had by special leave been filed since the matter was before the taxing master, that all the business charged for by Messrs. Fisher & Hodges in the bills in question was (with the exception of a small part transacted by the plaintiff Henry Fisher as steward of a manor) transacted solely and exclusively by Mr. Edward Hodges (the partner of Henry Fisher) and the clerks of the firm, and not by or through Henry Fisher personally, and that Heny Fisher acted throughout simply as mortgagee or transferee jointly with his co-plaintiff John Hodgkins.

The applicants took out a summons to review the taxation.

Hastings, Q.C., and *Prior*, for the applicants.—The cases of *Clack* v. *Carlon*, 9 W. R. 568; *In re Wallis*, 38 W. R. 482, 25 Q. B. D. 176; and *Stone* v. *Lickorish & Bellord*, 39 W. R. 331, [1891] 2 Ch. 363, are in point as showing the principle on which profit costs are not allowed to a solicitor mortgagee. But where one of two or more mortgagees is a solicitor there is no reason why he or his firm should not be employed to act on behalf of his co-mortgagees and charge profit costs. This case is governed by the case of *In re Donaldson*, 27 Ch. D. 544, 33 W. R. Dig. 61, in which it was held that one of two mortgagees, who was a solicitor and acted as such in enforcing the security, was entitled to profit costs against the mortgagor, whether the mortgagees were trustees or not. That decision has never been overruled. The

(*a.*) Reported by M. J. BLAKE and W. A. G. WOODS, Esqrs., Barristers-at-Law.

taxing master in taxing the plaintiffs' costs has taxed in the usual way certain costs paid by the plaintiffs to Mr. Liddle, the solicitor to the original mortgagees in respect of his transfer to them, but these costs ought to be moderated and not so taxed: *Allen* v. *Jarvis*, 17 W. R. 943, L. R. 4 Ch. App. 616; *In re Park, Cole* v. *Park*, 37 W. R. 742, 41 Ch. D. 326. Profit costs ought to be allowed in the case of the sale, for it was practically court business: *Cradock* v. *Piper*, 1 Mac. & G. 664; *In re Corsellis*, 35 W. R. 309, 34 Ch. D. 675. It has never yet been decided that where a mortgagee or trustee who is a solicitor acts for himself and his co-mortgagees or co-trustees profit costs will be disallowed. [*Micklem* referred to *Field* v. *Hopkins*, 44 Ch. D. 524, 38 W. R. Dig. 134.] That case is not in point, for the principle there applied was that a mortgagee could not clog the redemption. *Sclater* v. *Cottam*, 5 W. R. 744, 3 Jur. N. S. 630, was decided on the footing that the solicitor mortgagee who was not allowed profit costs was a sole mortgagee.

Micklem, for the defendant Grace Street.—This case comes within the principle of *In re Wallis* and *Stone* v. *Lickorish & Bellord*, and the objection that in those cases the solicitor was a sole mortgagee is met by *Field* v. *Hopkins*, which shows that it makes no difference whether the solicitor mortgagee is acting for himself alone or for his co-mortgagees. A solicitor cannot charge profit costs for the preparation of a mortgage from his client to himself: *In re Roberts*, 38 W. R. 225, 43 Ch. D. 52. [STIRLING, J., referred to *Wyatt* v. *Cook*, W. N., 1868, p. 237, where Lord Cairns, L.C., decided that a mortgagee was not entitled to the costs of preparing the mortgage.] If a solicitor is not entitled to charge profit costs when he does the work, *à fortiori* he is not entitled when his clerk or some member of the firm does the work. In *Clack* v. *Carlon* there was an agreement between the solicitor and his firm that he should not have any share in the profit costs. The only difference between the present case and *In re Wallis* and *Stone* v. *Lickorish & Bellord* is that here one of the mortgagees is acting through his firm. The analogy of trustees holds good in the case of mortgagees, and the same principle applies to both cases: *Christophers* v. *White*, 10 Beav. 523. The case of *In re Donaldson* was not followed in the subsequent cases, and is inconsistent with *Sclater* v. *Cottam*. [STIRLING, J., referred to *Matthison* v. *Clarke*, 3 W. R. 2, 3 Drew. 3.] *Cradock* v. *Piper* introduced an anomalous rule in the case of solicitor trustees, and is confined to the costs of litigation. The principle of that case ought not to be extended, but *Sclater* v. *Cottam* ought to be followed.

Hastings, Q.C., in reply.—*The National Provincial Bank of England* v. *Games*, 34 W. R. 600, 31 Ch. D. 582, is a case in point on the subject of the mortgagee's costs in respect of the preparation of the mortgage. In *Matthison* v. *Clarke* the governing principle was that the mortgagee who sold the mortgaged property was a trustee of the surplus money for the mortgagor, but it does not apply here. The real point is whether the solicitor mortgagee did the work. If he did he cannot recover profit costs; if he did not, and that is all we have to prove, the bill is sent in to him and his colleagues, and ought to be paid. This is consistent with *In re Wallis*, and is not inconsistent with the other cases cited.

HIBBERT *v.* LLOYD.

This was a foreclosure action in which a judgment for foreclosure had been made.

The plaintiffs, Messrs. L. Hibbert and T. D. Bolton, were the mortgagees, and on taxing their costs of the action the master had disallowed all profit costs, on the ground that they had been and were represented in the action by one of themselves—viz., Mr. Bolton, who was a solicitor carrying on business under the name of "Bolton & Co."

The plaintiffs took out a summons to review the taxation.

Hastings, Q.C., and *Methold*, for the applicants.—The arguments in this case would be the same as the argument for the applicants in the previous case, and we do not, therefore, propose to repeat them.

Challis, for parties interested in the equity of redemption.—A solicitor mortgagee who appears for himself and a co-plaintiff is in the same position as if he appeared for himself alone, and is not entitled to profit costs. In *Stone* v. *Lickorish & Bellord*, *Sclater* v. *Cottam*, *In re Taylor*, 2 W. R. 249, 18 Beav. 165, and *In re Donaldson* the parties were treated throughout on the footing of trustees.

Hastings, Q.C., replied.

Cur. adv. vult.

August 9.—STIRLING, J.—These are summonses raising some questions of practical importance as to the taxation of costs of mortgagees where one of them happens to be a solicitor. The circumstances which give rise to the dispute are of common occurrence, and one would have expected to find the law well settled, but no authority has been found which precisely governs the cases which I have now to decide. [His lordship then stated the facts, and continued:—] The question is whether these decisions of the taxing master are in accordance with the law. In argument much reference was made to the analogies presented by the case of solicitor trustees, and, as this branch of the law has been more frequently the subject of reported decisions, it may be well to begin by considering how it stands. The general principle is stated clearly by Lord Cranworth, L.C., in *Broughton* v. *Broughton*, 3 W. R. 602, 5 De G. M. & G. 160. At p. 164 of the report he said:—"The rule applicable to the subject has been treated at the bar as if it were sufficiently enunciated by saying that a trustee shall not be able to make a profit of his trust, but that is not stating it so widely as it ought to be stated. The rule really is that no one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty; and a case for the application of the rule is that of a trustee himself doing acts which he might employ others to perform, and taking payment in some way for doing them. As the trustee might make the payment to others, this court says he shall not make it to himself; and it says the same in the case of agents, where they may employ others under them. The good sense of the rule is obvious, because it is one of the duties of a trustee to take care that no improper charges are made by persons employed for the estate. It has been often argued that a sufficient check is afforded by the power of taxing the charges, but the answer to this is that that check is not enough, and the creator of the trust has a right to have that and also the check of the trustee. The result, therefore, is that no person in whom fiduciary duties are vested shall make a profit of them by employing himself, because, in doing this, he cannot perform one part of his trust—namely, that of seeing that no improper charges are made. The general rule applies to a solicitor acting as a trustee, and the only question is, how far the circumstances of the present case take it out of this rule."

It therefore follows that, as a general rule, neither a solicitor trustee nor a firm of which the trustee is a member can receive out of the trust estate profit costs by way of remuneration for transacting legal business

in connection with the trust. To this general rule there are some exceptions, to one of which I refer at once. It was decided by Lord Hatherley, when Vice-Chancellor, in *Clack* v. *Carlon*, that a solicitor trustee may employ his partner to act as solicitor for himself and his co-trustees with reference to the trust affairs, and may pay him the usual charges, provided that it has been expressly agreed between himself and his partner that he himself shall not participate in the profits or derive any benefits from the charges. Nothing short of this will be sufficient. In particular it was decided in *Christophers* v. *White* that the general rule applies, although all the business has been transacted by the partners of the solicitor trustee, and not by the trustee himself. Now it has been expressly decided that under some circumstances and to some extent solicitor mortgagees are subject to the same rules as solicitor trustees. In the case of *Matthison* v. *Clarke*, decided in 1854 by Kindersley, V.C., the head note is this:—"A mortgagee with power of sale was a member of a firm of auctioneers. The firm sold for him. Held, they were not entitled to their commission." And the Vice-Chancellor said, 3 Drew., at page 4, "It is a well-established rule in equity that a trustee cannot as against his *cestui que trust* make any profit out of the execution of the trusts in respect of the application and his personal trouble." The same principles appear to have been acted on by Lord Romilly in the case of *In re Taylor*, to which I shall refer in greater detail hereafter. It is plain, however, that the Vice-Chancellor did not consider that the law as to solicitor trustees is always applicable to solicitor mortgagees, for he says "a mortgagee, in his mere character of mortgagee, is not a trustee," and it is next to be inquired what is the rule which governs that case. It is to be found in the judgment of the same Vice-Chancellor in *Sclater* v. *Cottam*, where he says, "One principle is that the mortgagee is entitled, as between him and the mortgagor, to have taken into account in a suit to redeem him any costs which he has incurred in protecting his title to the mortgaged property. Another principle is that the mortgagee, though he may be entitled to certain expenses properly incurred in relation to the mortgaged property, as the expense of employing a collector, cannot himself charge for his own trouble." A little further on he says, "It is not the same as the case of a trustee being allowed his costs, but, upon the two principles put together, I think he is entitled to what he disbursed, but not to that which is the remuneration for his own personal trouble." It was therefore held that a solicitor mortgagee who had defended the title to the mortgaged property in two actions, in one of which he acted as solicitor for himself and co-mortgagee, and in the other for himself alone, was entitled to costs out of pocket only. In *In re Roberts* it was held by Kay, L.J., on the like principle, that a solicitor cannot charge his client with profit costs for the preparation of a mortgage from the client to himself. These decisions and the principle on which they are based were approved and applied by the Court of Appeal in *In re Wallis*. The costs relating to a transfer of a mortgage appear to me to fall, not within the decision in *Matthison* v. *Clarke*, but within that in *In re Roberts*, and if Mr Fisher had been sole mortgagee, and had had no practice, the application in the first of the cases before me, so far as it relates to the cost of the transfer, must have been held to be concluded against the applicants on authority.

It is, however, contended that a distinction ought to be made, first, because he is only one of two mortgagees, and, secondly, because he has a practice. As regards the first distinction, I think that, both on principle and on authority, it cannot prevail. The principle is that a solicitor mortgagee is not to receive remuneration for his own trouble, and it appears to me that it can make no difference in the application of that principle whether the trouble is taken by the solicitor on his own behalf solely, or on behalf of himself jointly with someone else. Moreover, the point is covered by the decision in *Sclater* v. *Cottam*; for there the Vice-Chancellor disallowed the profit costs of the solicitor in an action in which he appeared for a co-mortgagee as well as for himself. The second ground of distinction gives rise to greater difficulty. The rule, it is said, being simply that the solicitor mortgagee is not entitled to remuneration for his own trouble, what is there to prevent his partner from receiving remuneration for his trouble? In my opinion the rule does not prevent the partner from receiving remuneration, but the question immediately arises, What is the partner's remuneration to be? If the partners enter into an agreement that the mortgagee partner is not to share in the profits arising from the transaction, I should feel free to hold that the usual costs were to be allowed in full; in the absence of such an agreement it does not appear that this ought to be done. To make the point more simple I shall consider a case into which the element of partnership does not enter. Assume that a mortgagee solicitor employs another solicitor with whom he is not in partnership to transact the legal business connected with the mortgage, and that there is between them an agreement, such as actually existed in *In re Taylor*, that the work shall be done on agency terms, that is to say, that the profit costs are to be shared in defined proportions between the two solicitors. Can the solicitor mortgagee retain his share of the profit costs against the mortgagor? I think not. The rule is that the mortgagee solicitor is not to be remunerated for his own trouble; *à fortiori*, he cannot be allowed remuneration for the trouble of someone else. This was the decision of Lord Romilly in *In re Taylor*; but it is right to say that the costs in that case related to sales by the mortgagee under a power of sale, and consequently they fell within the decision of Kindersley, V.C., in *Matthison* v. *Clarke*. Now, if on taking the plaintiffs' accounts between Mr. Fisher and Mr. Hodges it turned out that a share of the profit costs was allowed to Mr. Fisher, and that he had actually got the benefit of that share in account, it would seem to me that he could not retain that benefit against the mortgagor. On the other hand, if the account shows that the mortgagee was indebted to his co-partner, the latter ought not to be deprived of so much of the costs as was required to be applied in satisfaction of the debt.

Now to make the taxation depend on the result of the taking of a partnership account would, as seems to me, simply be to introduce a rule unworkable in practice, and to push abstract principle to a point at which it ceases to give results consistent with justice; in short, to add another to the sufficiently numerous illustrations of the adage, *Summum jus summa injuria*. Two alternatives only appear to me open, either to allow the whole of the costs, just as if an independent solicitor had been employed, or else to allow the partner the same share of the profit costs in the specific matter as he is entitled to in the general profits of the partnership business. If the former course is adopted the mortgagor may be charged with a greater amount of costs than he ought to bear; if the latter, there is some danger of giving the mortgagee's partner less than his due. On the whole I come to the conclusion that the latter alternative gives a nearer approximation to what would be required by a strict regard to principle, and is therefore preferable: and I do so the more readily that I find upon inquiry

that, although there is no established practice on the subject in the taxing master's office, this view has actually been taken and acted upon there. It was contended that the point had been decided the other way in *In re Donaldson*, and a closer examination of the report does appear to show that Mr. Donaldson, the mortgagee solicitor in that case, was a member of a firm of Brown & Donaldson. There is no allusion, however, to this fact in the argument or the judgments; and some at least of the observations in the judgments, as well as the decision itself, seem difficult to reconcile with the principles laid down by the Court of Appeal in the subsequent case of *In re Wallis*, by which I am bound. Under these circumstances I cannot regard the case of *In re Donaldson* as governing the case of *In re Doody*.

I now return to the consideration of the rules which govern the rights of solicitor trustees. An exception to the general rule already stated was established by the case of *Cradock* v. *Piper*, decided in 1850 by Lord Cottenham. It is to this effect: that where a solicitor (or his firm) appears in a suit or action on behalf of himself and a co-trustee, and the expense has not thereby been increased, then the solicitor (or his firm, as the case may be) is entitled to the usual costs. The summons in *Hibbert* v. *Lloyd* raises the next question, whether a similar exception exists in the case of solicitor mortgagees. The ground of the decision appears at pp. 678-80 of the report. [His lordship referred to the report of *Cradock* v. *Piper*, and continued:—] The rule has been adversely criticized on more than one occasion—as, for example, by Lord Cranworth in *Broughton* v. *Broughton* (see pp. 164, 165 of the report)—but it has been acted upon ever since. It was recently considered by the Court of Appeal in *In re Corsellis, Lawton* v. *Elwes*, 34 Ch. D. 675. In that case Lindley, L.J., said, at p. 687: "I am not one of those who admire the decision in *Cradock* v. *Piper*. It is one of those cases which are anomalous, but which have laid down a certain rule, and that rule has been acted upon by everybody whom it concerns for so long a time that we cannot and ought not to vary it. It was a rule laid down by Lord Cottenham when Lord Chancellor in 1850, and it has been acted upon ever since by the taxing masters, and therefore we must accept it; but we must accept it as an anomalous rule applicable to the case to which it applies and which ought not to be extended. But although we ought not to extend the rule, it will not do to fritter it away." And Lopes, L.J., expresses himself to the same effect. With these expressions, if I may say so, I desire respectfully to express my concurrence.

I have thought it right to inquire whether the rule established in *Cradock* v. *Piper* has been applied to solicitor mortgagees by the taxing masters, and I have received the following certificate from the senior master, Mr. Buckley:—"In answer to your lordship's question I beg to certify that according to the practice of this office the principle of *Cradock* v. *Piper* is not applicable to the costs of a solicitor mortgagee acting for himself and his co-mortgagees. This practice is founded on the case of *Sclater* v. *Cottam*, which decides that under such circumstances the solicitor is entitled to costs only out of pocket, and this is confirmed by the recent cases of *Stone* v. *Lickorish* and *In re Wallis*."

Now the decision of *Sclater* v. *Cottam* is in point although it does not appear that *Cradock* v. *Piper* was called to the Vice-Chancellor's attention. Seeing, however, that that decision was given in 1857, and has been acted on uniformly by the taxing masters, and that the rule established by *Cradock* v. *Piper* is an anomaly, and is not to be extended, I think that it ought not to be applied in the case of solicitor mortgagees.

The result is that in *In re Doody, Fisher* v. *Doody* the summons will be allowed as regards both classes of items which I have mentioned, and the matter will be remitted to the taxing master for reconsideration, with a direction that he is to ascertain the amounts which would have been properly chargeable against the mortgagor if an independent solicitor had been employed, and to allow the same proportion of that amount as Mr. Hodges is entitled to in respect of the general profits of the partnership between himself and Mr. Fisher. The costs of both parties to the summons will be costs in the action.

In *Hibbert* v. *Lloyd* the summons will be dismissed, without costs.

From this decision the applicants in *Hibbert* v. *Lloyd* appealed.

Graham Hastings, Q.C., and *Methold*, for the appellants.—The principle laid down by Lord Cottenham in *Cradock* v. *Piper* with respect to a solicitor trustee acting for himself and his co-trustee is equally applicable to a solicitor mortgagee acting for himself and his co-mortgagee. [LINDLEY, L.J.—*Cradock* v. *Piper* has repeatedly been adversely commented on, even in the House of Lords. It is an anomalous case. BOWEN, L.J.—Does not the rule that a trustee shall not make a profit out of his trust depend on the principle that a trustee should not place himself in a position in which his interest and his duty might conflict?] That is not the principle on which the rule that a mortgagee shall not make a profit out of the mortgaged estate rests; it rests on the principle that it is a matter of contract between the mortgagor and mortgagee what costs the mortgagee can charge. [A. L. SMITH, L.J.—How do you get over the decision of the Court of Appeal in *In re Wallis* as to a sole solicitor mortgagee? How does the fact that the solicitor mortgagee has a layman as co-mortgagee affect the principle of that decision?] We rely on the analogy of the rule applicable to a solicitor co-trustee: *Cradock* v. *Piper*. Again, in *In re Donaldson* the taxing master allowed a solicitor co-mortgagee to charge, as against the mortgagor, profit costs, and Bacon, V.C., upheld the taxing master. That case, therefore, shows that the view of the taxing master in the present case as to the practice in the office is not accurate, and the decision is exactly in point. The taxation must work out cheaper where the solicitor mortgagee acts himself.

Challis and *Birrell*, for the respondents, were not called on.

LINDLEY, L.J., said that a foreclosure decree had been obtained in an action brought by two mortgagees, one of whom was a solicitor, and he had acted in the proceedings on behalf of himself and his co-mortgagee. It was conceded that he was entitled, as against the mortgagor, to his costs out of pocket. He wanted to have his ordinary solicitor's costs, which, if allowed, would enable him to make a profit out of the persons who were entitled to the equity of redemption of the mortgaged property. Was that right? Take the simple case of a sole mortgagee who was a solicitor. It had been settled for years that such a mortgagee could only get, as against the mortgagor, his costs out of pocket, not because he was a trustee (for he was not), but because the bargain between him and the mortgagor was that the latter should be entitled to redeem the property on payment of principal, interest, and costs, and costs did not include profit costs. The result was therefore, in fact, the same as in the case of a trustee who was a solicitor,

though it was arrived at on different grounds and by a different process. Did this rule apply when there were two mortgagees, one of whom was a solicitor? If it did not, the solicitor mortgagee would be making a profit out of the mortgagor. There was no authority that the rule did not apply to this case except the decision of Bacon, V.C., in *In re Donaldson*. But there had been a long course of practice in the taxing masters' office contrary to that decision, though the practice had not, perhaps, been as universal as his lordship at first supposed. The attention of the taxing masters may not have been always directed to the point. The recent decisions in *Stone* v. *Lickorish* and *In re Wallis* showed that the rule was that profit costs could not be allowed to a solicitor mortgagee. No doubt the decision of Bacon, V.C., in *In re Donaldson* was to the contrary, but his lordship thought that the learned Vice-Chancellor went a great deal too far. His decision was inconsistent with the principle of the decision of the Court of Appeal in *In re Wallis*, and the reasoning on which that decision was founded.

Reliance had been placed by the appellants' counsel on the decision of Lord Chancellor Cottenham in *Cradock* v. *Piper*, in which he laid down the rule (whether for the first time his lordship did not know) that if there were two trustees, one of whom was a solicitor, the solicitor trustee acting for both in a litigation would be entitled to profit costs. His lordship thought he would not be going too far if he said that Lord Cottenham rather lost sight of the fact that it was the double position of trustee and solicitor occupied by the trustee that gave rise to the difficulty; and he certainly would not be going too far in saying that whenever this case had been since discussed the correctness of the decision had been doubted. It had, however, never been reversed by any court, but it had been treated as anomalous. It stood, and still stands, as an established rule, but it did not cover the case of a solicitor mortgagee. If its principle were sound the court ought to extend its application. But if, as seemed to be the better opinion, the principle were not sound, the court ought not to extend its application.

BOWEN, L.J., said he quite concurred, especially as regards the observations made by Lindley, L.J., on *Cradock* v. *Piper* which was an anomalous case, and ought not to be extended.

A. L. SMITH, L.J., also thought that the decision of Stirling, J., was right. *In re Wallis* expressly decided (as indeed had been previously decided) that a sole mortgagee solicitor could not get profit costs as against the mortgagor. His lordship did not in the least see why the mortgagee solicitor was any the more entitled to them because he had joined with him as co-mortgagee, a layman. He concurred in the remarks of the other Lords Justices as to *Cradock* v. *Piper*.

Appeal dismissed.

Solicitors in *In re Doody, Fisher* v. *Doody*: for the applicants, *Cope & Co.*, for *Fisher & Hodges*, Newport; for the respondents, *Sharpe, Parker, & Co.*, for *Cave & Laycock*, Altrincham.

Solicitors in *Hibbert* v. *Lloyd*: for the appellants, *Bolton & Co.*; for the respondents, *Cheston & Sons*.

From Chan. Div. (Lindley, Bowen, and A. L. Smith, L.JJ.) — Oct. 28.

ONWARD BUILDING SOCIETY v. SMITHSON. (a.)

Deed—Estoppel—Sale—Mortgage—Fraud—Innocent misrepresentation—Covenant for title—Averment of legal estate.

By indenture of the 4th of December, 1875, the defendants, being seised in fee of certain real estate, conveyed a plot of ground, part thereof, to the use of T., his heirs and assigns, by way of sale. By indenture of the 25th of May, 1876, T. conveyed the plot by way of mortgage to the A. Society. By an indenture of the 4th of April, 1877, after reciting that the testator, of whose real estate the defendants were the trustees, being at the date of his will, and so continuing till the time of his death, seised in fee simple, free from incumbrances, of certain real estate, of which the plot thereby granted formed part, made his will, and thereby devised his real estate unto the defendants, their heirs and assigns, upon certain trusts, and also reciting that the testator died without having revoked or altered his will, and also reciting that the defendants, in exercise of a power in the will, had agreed with T. for the absolute sale to him of the plot of land and premises intended to be thereby granted, and the inheritance thereof, in fee simple in possession, free from incumbrances, at a certain price, and also reciting that H. S., one of the defendants, as beneficial owner of the plot of ground subject to the power of sale, had agreed to concur in the indenture, it was witnessed that the defendants did grant and convey, and the defendant H. S. did grant and confirm, the plot of ground unto and to the use of T., his heirs and assigns, for ever. The indenture contained a covenant that the defendants and the defendant H. S. respectively had not incumbered; and also a covenant that the defendant H. S., together with the defendants, had good right to convey. By an indenture of the 22nd of September, 1877, T. purported to convey the plot of ground and premises comprised in the indenture of the 4th of April, 1877, to the plaintiffs by way of mortgage to secure certain moneys. The plot of ground comprised in the indentures of the 4th of April, 1877, and the 22nd of September, 1877, was comprised in, and had been already conveyed by way of sale and by way of mortgage by, the indentures of the 4th of December, 1875, and the 25th of March, 1876, respectively. The indenture of the 4th of April, 1877, was innocently executed by the defendants at the request of T., who was employed by them in the development of the testator's estate, and who enjoyed their confidence, and upon a representation made by him, which they accepted in good faith, that the plot of ground had not already been sold. The plaintiffs innocently advanced their money upon the faith of the representations made through T. to them by the defendants in the indenture of the 4th of April, 1877. In an action for breach of covenant for title,

Held, that the statements as to title in the deed of the 4th of April, 1877, were not sufficiently precise to raise an estoppel against the defendants so as to prevent them from denying that in fact they had no title to convey, and from setting up the true facts.

Held, by Lindley, L.J., *that the defendants were not liable to the plaintiffs for the loss sustained by them on the mortgage of the 22nd of September, 1877, on the further grounds—(1) that the plaintiffs were in no better position as against the defendants than T., from whom they took the mortgage, and (2) that the misrepresentation of the defendants, by which the plaintiffs had been misled, was an innocent one.*

Decision of Kekewich, J., *reversed.*

(a.) Reported by ARTHUR LAWRENCE, Esq., Barrister-at-Law.

Quære, *whether, supposing there had been an estate created by estoppel as against the defendants, a plea of fraud would be well answered by the reply of purchase for value without notice.*

Appeal from a decision of Kekewich, J.

The plaintiffs were a building society incorporated under the Building Societies Act, 1874, and were in course of winding up. By an indenture dated the 4th of April, 1877, and made between the defendants of the first part, the defendant Harry Sheldon Cradock Smithson of the second part, and Thomas Toward of the third part; after reciting that Samuel Smithson, being at the date of his will and so continuing till the time of his death seised in fee simple in possession free from incumbrances of an estate at Shilton, in the county of Durham, of which the plot of land thereby granted formed part, made his will dated the 7th of October, 1873, and thereby devised his real estate unto the defendants, their heirs and assigns, upon trust to stand seised thereof upon the trusts thereinafter declared, that was to say (after declaring certain trusts as to an estate at Dalnabrich, in the county of Perth) as to all the residue of his real estate in trust for the defendant H. S. C. Smithson, his heirs and assigns, if he should attain the age of twenty-one years, and also reciting that the testator empowered his trustees, in case his personal estate should be insufficient to pay all his debts, funeral and testamentary expenses, and legacies, by mortgage, or sale, or otherwise, to raise any sum which his trustees should think fit in order to discharge such debts, expenses, and legacies, and also reciting that the testator died on the 5th of November, 1874, without having revoked or altered his will, which was proved as therein mentioned, and also reciting that the defendant H. S. C. Smithson attained twenty-one on the 26th of June, 1875, and also reciting that the defendants, in exercise of the power so as aforesaid contained in the will of the testator, had agreed with Thomas Toward for the absolute sale to him of the plot of land and premises thereinafter particularly described and intended to be thereby granted, and the inheritance thereof in fee simple in possession, free from incumbrances, at the price of £35 4s., and also reciting that the defendant H. S. C. Smithson, as beneficial owner of the real estate of the testator subject to the power of sale, had agreed to concur in the indenture now in statement, it was witnessed that, in pursuance of the contract and in consideration of the sum of £35 4s., the defendants, in exercise of the power, did grant and convey, and the defendant H. S. C. Smithson did grant and confirm, unto T. Toward and his heirs the plot of ground, messuage, and hereditaments therein particularly described, to hold the same unto and to the use of the said T. Toward, his heirs and assigns, for ever.

The indenture contained a covenant by each of the defendants with T. Toward, his heirs and assigns, that they, the defendants, respectively had not at any time done or executed, or knowingly suffered or been party or privy to any act, deed, or thing whereby the plot of land and premises thereby granted were, had been, or could or might have been incumbered. It also contained covenants by the defendant H. S. C. Smithson with T. Toward, his heirs and assigns, that (notwithstanding any act, deed, matter, or thing by him, the defendant H. S. C. Smithson, or any of his ancestors, or any person lawfully claiming through him or any of them, theretofore done, permitted, or known to the contrary) he the defendant H. S. C. Smithson, together with the defendants, had in themselves or himself good right, full power, and lawful and absolute authority to grant the purchased plot of ground and premises unto and to the use of T. Toward, his heirs and assigns, in manner therein expressed.

A receipt for the £35 4s. was indorsed on the indenture and signed by the defendants.

By an indenture dated the 22nd of September, 1877, and made between Thomas Toward of the one part and the plaintiffs of the other part, the plot of ground, messuage, and hereditaments comprised in and expressed to be conveyed by the indenture of the 4th of April, 1877, was granted and conveyed by Toward to the plaintiffs by way of mortgage for securing payment to the plaintiffs of the sum of £330 advanced by them to Toward, and the interest and other moneys in the indenture mentioned. Upon Toward being subsequently adjudicated a bankrupt the plaintiffs gave notice to the tenant of the premises comprised in the mortgage to pay the rent to them, whereupon it appeared that the premises were claimed by the Bishop of Auckland Building Society under the circumstances hereinafter mentioned, which were then for the first time discovered by the plaintiffs.

By an indenture dated the 4th of December, 1875, and made between the same parties as were subsequently parties to the indenture of the 4th of April, 1877, the premises afterwards expressed to be conveyed by the indenture of the 4th of April, 1877, were with other hereditaments, part of the real estate of the testator, conveyed by the defendants as trustees, and by the defendant H. S. C. Smithson as beneficial owner, unto and to the use of Thomas Toward, his heirs and assigns.

By an indenture dated the 25th of May, 1876, and made between Thomas Toward of the one part and the Bishop Auckland Building Society of the other part, the whole of the premises comprised in the indenture of the 4th of December, 1875, were granted and conveyed by Thomas Toward to the Bishop Auckland Building Society by way of mortgage to secure the principal moneys and interest therein mentioned. The Bishop Auckland Building Society had, by virtue of the indentures last mentioned, entered into possession of the hereditaments comprised therein, including the hereditaments which Toward purported to mortgage by the indenture of the 22nd of September, 1877, to the plaintiffs.

There was owing to the plaintiffs on the security of their supposed mortgage the sum of £445, with a considerable arrear of interest.

Thomas Toward was, previously to the date of the indenture of the 22nd of September, 1877, a land agent and builder, and had been up to that time employed by the defendants for the purpose of superintending the development of the estate of the testator and of preparing plans from time to time on the sale to purchasers from the defendants of portions thereof, and had enjoyed the full confidence of the defendants.

The plaintiffs commenced this action against the defendants by direction of the judge of the county court of Durham in which the society was being wound up, alleging that they advanced the sum of £330 to Thomas Toward upon the faith that the representations made by the defendants in the indenture of the 4th of April, 1877, were true, and that at the date of that indenture the defendants had power to convey the premises comprised therein to Thomas Toward free from incumbrances.

The plaintiffs claimed a declaration that, by reason of the representations and covenants by and on the part of the defendants respectively in the indenture of the 4th of April, 1877, contained, the defendants were liable to make good to the plaintiffs the moneys advanced by them on the security of the indenture of

the 22nd of September, 1877, together with interest from the date of the last payment of interest by Toward; and that the defendants might be ordered to make good such principal money and interest accordingly; or, in the alternative, damages for breach of the covenants.

The defendants in their defence alleged (and it was admitted by the plaintiffs) that the indenture of the 4th of April, 1877, was innocently executed by them at the request of Toward and upon the faith of a representation made by him, and accepted as the truth in good faith and without question by the defendants, that the hereditaments comprised in and expressed to be conveyed by that indenture were parcel of the testator's estate and had not been sold, mortgaged, or otherwise incumbered by the defendants to or in favour of anyone.

Kekewich, J., held that the plaintiffs were entitled to recover, by way of damages for breach of the covenant on the part of the defendants contained in the indenture of the 4th of April, 1877, the moneys advanced by the plaintiffs on the security of the mortgage of the 22nd of September, 1877, or the value of the premises comprised in the mortgage security, whichever sum should be the smaller.

From that decision the defendants appealed.

Scott Fox, for the appellants.—The plaintiffs claim through Toward, and cannot stand in any better position than he did. A man cannot transfer an estate which he has not got—which was Toward's case—and, *à fortiori*, cannot transfer a right to sue on a covenant running with land which he has not got. The assignee of a covenant cannot sue the covenantor in a case where the assignor could not sue on the covenant: *Doe d. Bullen* v. *Mills*, 2 Ad. & El. 17, per Taunton, J., at p. 20: *Taylor* v. *Needham*, 2 Taunt. 278. A covenant does not act as an estoppel; it is either good, or bad, on which the covenantor may be sued for breach, but it creates no estoppel (see per Jessel, M.R., in *General Finance, Mortgage, and Discount Co.* v. *Liberator Permanent Benefit Building Society*, 27 W. R. 210, 10 Ch. D. 15). The defendants are not liable for the misrepresentation made through Toward to the plaintiffs, for it was an innocent one. If Toward had an estate by estoppel (which he had not) he could not possibly be in a better position than if he had had an estate at law or in equity, in neither of which cases would he have been able to give his assignee more than he himself had.

He also cited *Frowike & Kingsmill's case*, Keilw. 21 Hen. 7, fo. 70, p. 6; *Thoroughgood's case*, 2 Co. Rep. 9*a*; Coke upon Littleton, l. 1, c. 1, s. 1, 3*b*; *Henry Pigot's case*, 11 Co. Rep. 27; and *Foster* v. *Mackinnon*, 17 W. R. 1105, L. R. 4 C. P. 704; and referred to *Lainson* v. *Tremere*, 1 Ad. & El. 792, and *Cuthbertson* v. *Irving*, 4 H. & N. 742, 7 W. R. C. L. Dig. 35, 6 H. & N. 135.

Warmington, Q.C., and *Warrington*, for the respondents.—We allow that Toward could not have successfully sued the defendants because of his fraud. But the deed was not void, only voidable. The defendants were not misled as to the contents of the deed, but only as to their having authority or power to make the grant, and those are two different things. The fraud does not arise from the deed itself, but from something collateral to it. [BOWEN, L.J.—The assignee of a contract obtained by fraud cannot sue on the contract.] Yes, but the plaintiffs are not assignees of the covenant; they are assignees of the estate to which the covenant is incident, and so they are not bound by the equities of their predecessor; there is no assignment of the covenants, they run with the land. The deeds show a good title in the plaintiffs; therefore, if the plaintiffs are to be set aside, it must be by means of something *dehors* the deeds. The defendants are estopped, as between themselves and every person who may innocently acquire the estate, from saying they had not a title to convey. It is true that in fact no estate passed from the defendants to Toward, but they are estopped from saying so. In an action by an assignee of land on a covenant which runs with the land, fraud on the part of the original grantee is no defence on behalf of the original grantor unless it is such fraud as will support a plea of *non est factum*. The question really is whether the deed was a good deed or not. This deed was not void: see per James, L.J., in *Hunter* v. *Walters*, 26 W. R. 218, at p. 219, L. R. 7 Ch. 75, at p. 84, referring to *Kennedy* v. *Green*, 3 My. & K. 699; *Vorley* v. *Cook*, 1 Giff. 230, 6 W. R. Ch. Dig. 43; and *Edwards* v. *Brown*, 1 Cromp. & J. 307. [BOWEN, L.J.—All fraud does not make a deed void; it must be such fraud as makes the mind of the person executing it a non-assenting mind.] The assignee of a covenant sues upon it to the same extent as if he were the original covenantee.

They also referred to *Foster* v. *Mackinnon* and *Cuthbertson* v. *Irving*.

Scott Fox, in reply.—The plaintiffs must show that the assignee of a covenant can sue on it when the assignor could not; and they have not done that. (1) The deed *non est factum*. (2) But if it was a good deed, it was voidable. (3) There is no estoppel: *Hayne* v. *Maltby*, 3 Term Rep. 438; *General Finance, &c., Co.* v. *Liberator, &c., Building Society*; *Heath* v. *Crealock*, 23 W. R. 95, L. R. 10 Ch. 22; *Right d. Jefferys* v. *Bucknell*, 2 Barn. & Ad. 278. (4) If there is estoppel, both sides are estopped; the plaintiffs cannot say both "You are estopped from saying no estate passed" and also "You have committed a breach of covenant because no estate passed"; they cannot set up both estoppel and the truth: *Scarf* v. *Jardine*, 30 W. R. 893, 7 App. Cas. 345.

LINDLEY, L.J.—This is by no means an easy case, and before I proceed to deal with it I must express my sense of the very great assistance which Mr. Fox has given us by the very able manner in which he has argued it. To turn to the case—Toward cheated the plaintiffs and the defendants as well. The plaintiffs lost their money, which they had advanced to Toward, and now they say to the defendants "Pay us the money we have lost," and they are suing them for damages. Why should the defendants indemnify the plaintiffs for that loss? The short facts are these: The defendants are trustees of the real estate of the testator. For the purposes of the development of the estate and selling plots of it they employed Toward. They conveyed to Toward as a purchaser the plot of land in question in fee: that transaction was a perfectly honest transaction. Then Toward mortgaged the land he had purchased to the Bishop Auckland Building Society: that transaction also was perfectly honest. Then Toward cheated the defendants, by a trick getting from them a second conveyance of the land over again, and that enabled him to cheat someone else—namely, the plaintiffs, which he did.

Now how do the plaintiffs put the case as against the defendants? They claim through Toward. Have they any better right to relief than Toward had? I doubt it. They say they have on the ground of estoppel. Leaving aside for the moment the question of estoppel, let us see what the plaintiffs have. They have under their conveyance from Toward all that Toward had to give—that is, an equity of redemption merely. That is what he had; the land was his subject to the mortgage to the Bishop Auckland

Society. As assignees of that equity of redemption the plaintiffs have no claim against the defendants, so they cannot rely upon that. They have nothing upon which to sue the defendants except the representation made through Toward to them that they, the defendants, had power to convey. But that was not a fraudulent misrepresentation, so that will not avail them. But they say to the defendants "You are estopped by your deed from denying that Toward had the estate from you," and then they say that, as incident to the estate by estoppel which they say they have got, they have the right to sue the defendants on their covenants for title. Is that so? Toward had no estate by estoppel. As between Toward and the defendants the deed was not, I think, void. The evidence does not come up to this, that there was any mistake as to the contents of the document which the defendants executed. They knew what they did, but they were induced to execute the deed by the fraud and misrepresentation of Toward. The plea of *non est factum* cannot be supported on behalf of the defendants, but in an action by Toward against them they would have a complete defence on the ground of fraud. I am inclined to think that the plaintiffs are in no better position than Toward for this purpose. I do not recollect any case at law in which a replication of purchase for value without notice has been held a good answer to a plea of fraud. But we are not considering the case of the plaintiffs being attacked. Is there any estoppel at all? The plaintiffs' case is that they have got something by estoppel. It is said that there is something in the deed which prevents the defendants denying that the plaintiffs have got something. I need only refer to the cases of *General Finance, Mortgage, and Discount Co.* v. *Liberator Permanent Benefit Building Society*, *Heath* v. *Crealock*, and *Right d. Jefferys* v. *Bucknell*, which have all been cited in support of the defendants' contention that there is no estoppel here. In my opinion the terms of this deed are not precise enough to create an estoppel. It is not desirable to extend the doctrine of estoppel by getting out of words a meaning which they need not bear. That doctrine is one of evidence, which precludes a man from setting up the truth. If it is a question of truth, the plaintiffs' case fails. This deed does not, in my judgment, go far enough to prevent the defendants setting up the truth. The case, then, fails for three reasons: Firstly, because the plaintiffs are in no better position than Toward; secondly, because there is no estoppel; thirdly, because the defendants' misrepresentation was an innocent one.

BOWEN, L.J.—I agree that the judgment of the court below must be reversed. The defendants are sued on a covenant for title. If this was a question of an ordinary covenant it is clear to my mind that the plaintiffs would take no more than Toward had, subject to any equities that might exist. It is said that this was not a void deed, only voidable; and that, I think, is correct. Then it is said there was an estoppel created. I think the case can best be decided on the ground that there is no estoppel. Estoppels by deed are not created by language except it is express. So we must look to see what the statements in the deed are which it was intended the defendants should be bound by. To be estoppels they must be perfectly clear. Recitals act as estoppels only to that extent. It is a fundamental rule that estoppels must be clear. Where, then, in this deed is there any statement that at the time of the execution of it the grantors were seised in fee? There is none. It will not be sufficient in order to create an estoppel to say that the grantor is "legally or equitably entitled": *Right d. Jefferys* v. *Bucknell*. I am quite satisfied that in this case there is no estoppel, and on that ground the case fails.

I leave open the question whether, supposing there were an estate created by estoppel, a *bonâ fide* purchaser for value could take advantage of the fraud under which the defendants acted; it is not necessary to settle that for the decision of this case, according to the view I take.

A. L. SMITH, L.J.—I agree that the appeal should be allowed. Mr. Warmington has satisfied me that the defendants could not here shield themselves under the defence of *non est factum*. But, in my opinion, they can defend themselves on the ground of no estoppel. The statements in the deed are not sufficiently precise to create estoppel. It is not stated that the defendants were owners in fee, and an inference will not do to raise an estoppel; the statement must be precise. I think there was no estoppel.

Appeal allowed.

Solicitors for the appellants, *Iliffe, Henley, & Sweet*, for *Russell & Mackay*, York.

Solicitors for the respondents, *Bridges, Sawtell, Heywood, Ram, & Dibdin*, for *Hugh, Dunn, & Watson*, Darlington.

From Q. B. Div. (Lord Esher, M.R., and Bowen and A. L. Smith, L.JJ.) — June 23; July 25, 1892.

DUCK v. MAYEU. (a.)

Tort—Joint tortfeasors—Discharge of one from liability—Right to claim against the other—Covenant not to sue—Release.

A covenant not to sue one of two joint tortfeasors does not operate as a release so as to discharge the other.

An agreement to accept a sum of money from one of two joint tortfeasors in full discharge of his liability, without prejudice to the right to claim against the other, ought to be construed, not as a release, but as a covenant not to sue.

Appeal by the defendant from a judgment of Day, J., at the trial of an action without a jury.

The action was brought under 3 & 4 Will. 4, c. 15 by the owner of the right of representation of a dramatic piece called "Our Boys" to recover a penalty of forty shillings from the defendant for representing the piece or causing it to be represented without the plaintiff's consent.

The defendant, Miss Mayeu, who was an actress, and was in the habit of managing stage performances, was engaged by a clergyman named Wills to give a performance of "Our Boys" at the Town Hall, Wandsworth, for the benefit of a charity.

The defendant applied to the plaintiff's agent for leave to give the performance, and was told that the plaintiff's fee for granting a licence was one guinea. The performance, however, took place without the payment of any fee or the granting of any licence. The defendant herself took part in the performance. A claim was then made on behalf of the plaintiff on Mr. Wills and the defendant for the payment of five guineas in respect of the performance. At first they declined to pay, but ultimately Mr. Wills sent two guineas to the plaintiff's solicitor, and received from him a letter as follows:—"10th April, 1891. Dear Sir,—'Our Boys.' I beg to acknowledge receipt of yours of the 9th, with cheque for £2 2s. inclosed, in

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

respect of fee and costs, in full discharge of your personal liability in connection with Miss Marie Mayeu's performance of above at Wandsworth Town Hall on the 23rd of January, 1891. This is, of course, without prejudice to my client's claim against Miss M. Mayeu. —Yours faithfully, W. M. TILSON."

The plaintiff then commenced this action against Miss Mayeu.

Section 2 of 3 & 4 Will. 4, c. 15 provides that, if any person shall represent or cause to be represented any dramatic piece without the consent in writing of the proprietor of the right of representation, "every such offender shall be liable for each and every such representation to the payment of an amount not less than forty shillings, or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages."

Day, J., gave judgment for the plaintiff for 40s.

The defendants appealed.

J. Brook Little, for the defendant.—This must be treated as a case of a joint trespass, for it cannot have been the intention of the Legislature that each of a number of persons who have taken part in a performance without the proprietor's consent should be held liable consecutively. It is a rule of common law that a release of one of several joint trespassers operates as a discharge of the other, a release having the same effect in this respect as a judgment: *Cocke* v. *Jennor*, Hob. 66; *Brinsmead* v. *Harrison*, 20 W. R. 784, L. R. 7 C. P. 547. The letter of the plaintiff's solicitor was a release to Mr. Wills. The effect of it is that the plaintiff is precluded from suing Mr. Wills. There is nothing in the wording of the Act 3 & 4 Will. 4, c. 15 to prevent the common law rule from applying to a case of a joint infringement of a right given by the Act.

He also cited *Dufresne* v. *Hutchinson*, 3 Taunt. 117.

Morton Smith, for the plaintiff.—This is not a case of joint trespass; the cause of action against the defendant is different from the cause of action against Mr. Wills. But in any case the letter from the plaintiff's solicitor to Mr. Wills cannot be held to operate as a release so as to discharge the defendant from liability. It merely amounted to an undertaking not to sue Mr. Wills, which is a different thing from a release: *Hutton* v. *Eyre*, 6 Taunt. 289; *Mayor, &c., of Salford* v. *Lever*, 39 W. R. 85, [1891] 1 Q. B. 168; *Willis* v. *De Castro*, 6 W. R. 500, 4 C. B. N. S. 216.

Cur. adv. vult.

July 25.—The judgment of the COURT (Lord ESHER, M.R., and BOWEN and A. L. SMITH, L.JJ.) was delivered by

A. L. SMITH, L.J.—The first point for determination is whether the defendant has established her defence, that the plaintiff had released her joint tortfeasor, the Rev. Mr. Wills, from a joint cause of action, so as to release her therefrom, or whether what she has established is merely that the plaintiff had covenanted not to sue Mr. Wills.

It is, we think, clear law that a release granted to one joint tortfeasor, or to one joint debtor, operates as a discharge of the other joint tortfeasor, or the other joint debtor, the reason being that the cause of action, which is one and indivisible, having been released, all persons otherwise liable thereto are consequently released. The case of *Cocke* v. *Jennor* is distinct upon the point, and there are many subsequent cases to the same effect.

It has also been held that a covenant not to sue one of two joint debtors does not operate as a release to the other joint debtor (*Hutton* v. *Eyre*), the reason being that the joint action is still alive. We have found no case in which it has been held that a covenant not to sue releases a joint tortfeasor; and in our judgment the principle upon which it has been held that such a covenant does not release a joint debtor applies to the case of a joint tortfeasor.

The question, then, is, does the document of April 10, 1891, operate as a release of the joint cause of action against Mr. Wills and the defendant, or only as a covenant not to sue Mr. Wills? It is as follows: "April 10, 1891. Dear Sir,—'Our Boys.' I beg to acknowledge receipt of yours of the 9th, with cheque for £2 2s. inclosed, in respect of fee and costs, in full discharge of your personal liability in connection with Miss Mayeu's performance of above at Wandsworth Town Hall on January 23, 1891. This is, of course, without prejudice to my client's claim against Miss M. Mayeu.—Yours faithfully, W. M. TILSON."

Tilson was solicitor for the plaintiff. A rule of construction for such a document was laid down by the Court of Queen's Bench in *Price* v. *Barker*, 4 E. & B. 760, at p. 777, 3 W. R. C. L. Dig. 206, where it was held that, in determining whether the document be a release or a covenant not to sue, the intention of the parties was to be carried out, and, if it were clear that the right against a joint debtor was intended to be preserved, inasmuch as such right would not be preserved if the document were held to be a release, the proper construction, where this was sought to be done, was that it was a covenant not to sue, and not a release. In the case of *Bateson* v. *Gosling*, 20 W. R. 98, L. R. 7 C. P. 9, at *nisi prius*, the same canon of construction was applied, and it was held that, the release being, as it was, limited by a proviso reserving rights against the surety, it must be taken that it was a covenant not to sue, and not a release; and this ruling was unanimously upheld by the Court of Common Pleas.

For these reasons we are of opinion that the document of April 10, 1891, is a covenant not to sue, and is not a release of the joint cause of action, and that the defendant's defence fails in fact.

It is unnecessary to consider the true construction of the statute 3 & 4 Will. 4, c. 15.

In our judgment this appeal must be dismissed, and with costs.

Appeal dismissed.

Solicitor for the plaintiff, *W. M. Tilson.*

Solicitors for the defendants, *Steadman, Van Praagh, & Sims.*

From Q. B. Div. (Lord Esher, M.R., and Bowen and Kay, L.JJ.) — July 5, 1892.

PRICE (*Appellant*) *v.* JAMES (*Respondent*). (*a.*)

Licensing law—Application for renewal—Notice of intention to oppose—Temporary authority—"Licensed person"—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 42—5 & 6 *Vict. c.* 44, *s.* 1—9 *Geo.* 4, *c.* 61, *s.* 14—*Special case stated by licensing justices—Respondent—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 33—20 & 21 *Vict. c.* 43, *s.* 2.

The occupier of certain licensed premises being about to leave them, the appellant obtained a temporary authority under 5 & 6 *Vict. c.* 44, *s.* 1, *to carry on the business until the next special session for transfer of licences Such session and the general annual licensing meeting*

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

being held simultaneously, the appellant applied for a transfer of the licence under 9 Geo. 4, c. 61, s. 14, and also for a renewal of the licence. Both applications were refused by the justices, because the appellant did not produce satisfactory evidence of good character. Notice of intention to oppose the renewal of the licence had been served on the former occupier, but not upon the appellant.

Held, that the appellant was not a "licensed person" applying for a renewal of "his licence" within the meaning of section 42 of the Licensing Act, 1872, and, therefore, was not entitled to notice of opposition to the renewal of the licence.

The superintendent of police of the division appeared to oppose the licence before the justices, and notice in writing of the appeal was given him by the appellant in accordance with 20 & 21 Vict. c. 43, s. 2.

Held, that, the case being stated under section 33 of the Summary Jurisdiction Act, 1879, the superintendent of police was rightly made respondent.

Appeal of Price from an order of a divisional court (Wright and Collins, JJ.) affirming the refusal of the licensing justices of the Pontypool division of Monmouthshire to renew a licence, on a case stated by the justices under the Summary Jurisdiction Act, 1879.

The special case stated the following facts:—On the 18th of April, 1891, Mason, the holder of a licence for a beerhouse in Pontypool, called the Britannia Inn, which had been licensed as a beerhouse from a date prior to the 1st of May, 1869, was convicted before two justices in petty sessions for permitting gaming on his premises, and his licence was indorsed.

On the 20th of June, 1891, Mason obtained a temporary authority, under 5 & 6 Vict. c. 41, s. 1, for the appellant to carry on the business until the next special transfer sessions, which would be held on the 22nd of August. Mason gave no notice of his intention to apply for a transfer of the licence to the appellant as required by section 40, sub-section (2), of the Licensing Act, 1872. At the general annual licensing meeting held on the 22nd of August, 1891, which was also a day appointed for the holding of special sessions for the transfer of licences, the appellant applied for a transfer or continuance of the existing licence of the Britannia Inn under 9 Geo. 4, c. 61, s. 14, until the expiration of the licensing year on the 10th of October, 1891. The application was opposed by the respondent, who was a superintendent of police for the district. The justices refused the application. The appellant then applied for a renewal of the existing licence held by Mason from the 10th of October, 1891, to the 10th of October, 1892. The respondent opposed the application, and it was refused by the justices, on the ground that the appellant had failed to produce satisfactory evidence of good character, and that the appellant was not the holder of the licence. No notice of objection had been given to the appellant, but notice was given to Mason, the holder of the existing licence.

The question for the court was whether the appellant was entitled to notice of objection under section 42 of the Licensing Act, 1872.

The Divisional Court upheld the decision of the justices.

The case also raised a question with regard to the appellant's application for a transfer of the licence, but counsel for the appellant admitted that they could not argue against the justices' decision on that point.

Jelf, Q.C., and *Paterson* (*Glascodine* with them), for the appellant.—The appellant was entitled to have notice of objection under section 42 of the Licensing Act, 1872, for he was at the time of the licensing sessions a licensed person within that section by reason of the temporary authority which had been granted him under 5 & 6 Vict. c. 44, s. 1, and the proviso at the end of that section shows that the position of persons under that section is to be the same as that of a licensed person. Even if the appellant is not, strictly speaking, a licensed person within section 42, *Reg.* v. *Justices of Liverpool*, 32 W. R. 20, 11 Q. B. D. 638, and *Reg.* v. *Powell*, 39 W. R. 574, 630, [1891] 2 Q. B. 693, show that there may be the renewal of a licence which is not held by the applicant. *Reg.* v. *Justices of Liverpool* was a case under 9 Geo. 4, c. 61, s. 14, which only gives power to grant licences, not to renew them, and in that case it was held that an occupier not holding a licence was entitled to renewal. [They also referred to *Reg.* v. *Thomas*, 40 W. R. 478, [1892] 1 Q. B. 426.] Secondly, the superintendent of police is not the proper respondent. This is a case stated by licensing justices under section 33 of the Summary Jurisdiction Act, 1879, and the justices ought to have been the respondents.

Poland, Q.C., and *W. Daniell*, for the respondent, on the last point only.—Though the case is stated under section 33 of the Summary Jurisdiction Act, 1879, the procedure is to be as provided by 20 & 21 Vict. c. 43, s. 2, which says that "the other party to the proceeding" shall be the respondent. The justices rightly considered that the superintendent of police, who was opposing the renewal, was the other party. The justices themselves are not parties to the proceedings. It is the common practice in such cases for the superintendent of police to appear and oppose the licence.

Paterson replied.

Lord ESHER, M.R.—In this case a person named Mason, who was the occupier of the premises and the holder of the licence, left the premises, and the appellant became the occupier of the house by arrangement with him. At the annual licensing meeting the appellant made two independent applications to the justices. His first application was made under 9 Geo. 4, c. 61, s. 14, that Mason's licence should be transferred to him. I may here observe that the term "renewal" used in the judgment in *Reg.* v. *Justices of Liverpool* with reference to this section appears to me not an inapt expression to use in speaking of an application for the continuance to the occupier of premises of the licence held by a former occupier, though possibly it would have been more accurate to have spoken of a "grant," which is the word used in the section. I do not agree that the decision in *Reg.* v. *Justices of Liverpool* made any alteration in the established law and practice on this subject. The magistrates had authority to hear and deal with that application of the appellant as they thought right. They did entertain the application, but it failed, because the appellant did not produce the necessary vouchers of character. The appellant then fell back on his second application, which was for a renewal of the licence to him under section 42 of the Licensing Act, 1872. What licence could the appellant have renewed under that section? He could not get a renewal of Mason's licence, but only of a licence which he himself might hold. The section is as clear as possible. It says, "Where a licensed person applies for the renewal of 'his' licence." Therefore the very first thing the appellant had to do in order to give the magistrates jurisdiction was to show that he was "a licensed person," and until he had proved that the magistrates could not entertain the application. In my opinion, however, he had no licence, and therefore he could not ask to have it renewed. But it was argued that, although he had not a licence, yet he held, under 5 & 6 Vict. c. 44, s. 1, what was equivalent to a licence within the meaning of section 42. If you read that section it is apparent that what

is given there is not a licence at all, but is quite distinct from a licence. The section provides that under certain circumstances a person may be authorized to use, exercise, and carry on the business of licensed victualler, and the authority so granted is to be in force only till the next ensuing special sessions for the transfer of licences. That is not a licence in the sense in which the word is used in the Licensing Acts; it is not granted at the licensing sessions, and only lasts until the next licensing sessions. The person who holds this temporary authority may apply for a licence when the licensing day arrives, and that was the appellant's first application in this case which was properly adjudicated on.

As to the appellant's second application under section 42 of the Act of 1872, the moment the magistrates ascertained that the appellant held no license at all they were bound to say that they could not entertain his application. The cases, *Reg.* v. *Justices of Liverpool* and *Reg.* v. *Powell*, which were relied on in the argument for the appellant are not in point here. I think the decision of the justices was right, and that this appeal must be dismissed.

On the question as to whether the chief constable was the proper person to be made respondent in this case, I think that he was. It has always been the practice for the magistrate to allow any person interested in the welfare of a neighbourhood to object before the magistrates to the granting of a licence, and if a case is stated, that person would be properly made respondent if he chose, and, if unsuccessful, would be liable to pay the costs.

In this case the chief constable, who is generally the person who makes objections, was rightly made the respondent.

BOWEN, L.J.—I am of the same opinion. The appellant's first application was made under 9 Geo. 4, c. 61, and the effect, if he had been successful, would have been to enable the appellant to continue in Mason's shoes, by virtue of a grant of a licence. It is immaterial in this case to say whether it would have operated as a renewal or a transfer, because the magistrates refused it. The appellant then fell back on his second application, which was an application by a licensed person for the renewal of his licence under section 42 of the Act of 1872. His object was to escape from the objections which had been made to his first application. If he could show that he was asking for a renewal of his licence, then, no notice of objection having been served upon him, he would come within sub-section 2 of section 42, which says that no objection to the renewal of any licence shall be entertained unless notice of objection has been served on the holder of the licence. The magistrates, however, came to the decision that he was not within section 42, and was not applying for a renewal of a licence of his own. As a matter of fact he simply held a temporary authority to carry on the business which he had obtained a short time before, and which lasted until the holding of the special sessions.

It is obvious that this appeal must fail unless the appellant can satisfy us that he was a "licensed" person applying for a renewal of "his" licence. In the first place it was contended that the appellant's second application was for the "renewal" of a licence. I am doubtful whether that was so. Then we were asked to consider the case of *Reg.* v. *Justices of Liverpool* and other cases in which applications under 9 Geo. 4, c. 61, s. 14, had been spoken of by the courts as applications for transfer or renewal of licences. Upon the authority of those cases it was said that this was an application for the renewal of a licence because it was an application for the grant of a licence by an occupier of premises which had been previously licensed. This argument is of no avail unless it can be shown that the appellant was "a licensed person" applying for the renewal of "his" licence within section 42. In my opinion that was not the case, for by the Act of 1872 a licence is defined as a licence for the sale of intoxicating liquors granted by justices in pursuance of the Intoxicating Liquors Licensing Act, 1828, &c. The appellant was not holding a licence of that sort. He had only got a temporary authority to carry on the business under 5 & 6 Vict. c. 44, s. 1. It was argued that he was a licensed person because of certain obligations thrown on him by the proviso of that section, and because otherwise he would come within the penal enactment in section 3 of the Act of 1872. The answer to that argument is to be found in the section which confers the temporary authority. The person who receives a temporary authority is entitled to carry on the business of a licensed victualler on the premises, and becomes a licensed person so far as is necessary to prevent him being liable to the penalties laid down by section 3 of the Act of 1872. But section 1 of 5 & 6 Vict. c. 44 draws a broad line between the rights and the liabilities of the holder of a temporary authority. He has imposed upon him all the duties and obligations of a licensed person, but he does not become a licensed person: he does not obtain a licensed person's rights or his licence. Further, in order to come within section 42 the appellant must show that he is applying for the renewal of "his" licence. We were told that the word "his" is unimportant, and must be construed as if it was "a." In my opinion the word "his" in that section is important, for the object of the section is to relieve a person applying for the renewal of his licence from certain obligations which were in such a case thought to be oppressive, but it does not follow that the same considerations would apply to the application for the renewal of "a" licence. In some sections of the Act, for example in the interpretation clause, the expression "renewal of a licence" is used as meaning a licence granted by way of renewal; but in this section it is confined to cases where a man is applying for the renewal of his own licence. Therefore that argument on the behalf of the appellant fails.

As to the question whether the proper person has been made respondent, it would be remarkable if there were to be a special case and no one could be made respondent. It is obvious that the justices who state the case ought not to be the respondents. In my opinion any person who is interested in the matter and has been heard before the justices may be made a respondent, and that was the case with the superintendent of police, who is respondent in this case. The case is stated under section 33 of the Summary Jurisdiction Act, 1879, with which the provisions of 21 & 22 Vict. c. 43 are incorporated, and although under that Act proceedings were between complainants on one side and accused persons on the other, nevertheless under the Summary Jurisdiction Act there must be a respondent, and the respondent would be the other party to the proceedings, who in this case was the superintendent of police.

For these reasons I think this appeal ought to be dismissed.

KAY, L.J.—I am of the same opinion. The appellant's application for a renewal of the licence formerly held by Mason was refused by the justices, and it is contended that that refusal was wrong because the appellant had no notice of objection under section 42, sub-section (2), of the Licensing Act, 1872, and therefore it is said the justices had no jurisdiction to entertain the objection. In my

opinion section 42 does not apply to this case. The appellant never had a licence unless the temporary authority, as it is called, which was granted to him under 5 & 6 Vict. c. 44, s. 1, amounted to a licence, and I think it is clear that it did not. That temporary authority is distinguished from what is in the same statute called a licence. One answer to this proposition would be that if the temporary authority is a licence, then there would be two licences in existence in respect of the same premises at the same time. Therefore the appellant was not a licence-holder within section 42, and was not entitled to notice of objection. As to the cases of *Reg.* v. *Justices of Liverpool* and *Reg.* v. *Powell*, they do not affect this case. All that the first of those cases decided was that the person in occupation of the premises at the time of the general licensing sessions was within 9 Geo. 4, c. 61, s. 14, and was entitled to apply for the grant of a licence to himself from the expiration of the existing licence, which might for the purpose of the argument in that case be called a renewal of a licence, that is to say, a renewal of the previously existing licence. *Reg.* v. *Powell* followed *Reg.* v. *Justices of Liverpool*, but decided that the occupier of premises who had obtained a licence under 9 Geo. 4, c. 61, s. 14, at a special transfer session, and who had not applied for a renewal of the licence, was not entitled after the expiration of the licence to obtain a grant of a licence at another special transfer session.

I entirely agree with what has been said by the Master of the Rolls and Bowen, L.J., on the question as to the proper person to be made respondent.

Solicitors for the appellant, *Few & Co.*, for *Bythway & Son*, Pontypool.

Solicitors for the respondent, *T. White & Son*, for *Gustard*, Newport.

High Court of Justice.

Chan. Div. Stirling, J. } May 17, 24, 1892.

In re GREY.

GREY *v.* EARL OF STAMFORD. (*a.*)

Will—Specific devise of English real estate—Children—Child legitimated by subsequent marriage—Domicil—Foreign law.

The testator specifically devised a share of real estate, and also a share of personalty, to trustees upon trust for his son, Harry Grey, for life, and then for his children. Harry Grey, who afterwards became Earl of Stamford, acquired a domicil at the Cape of Good Hope, and died there, leaving one son, John, born before marriage, and other children born in wedlock. According to the law of the Cape, John was legitimated by the subsequent marriage of his father and mother.

Held (following the cases of In re Goodman's Trusts, 29 *W. R.* 586, 17 *Ch. D.* 266, *and* Andros *v.* Andros, 32 *W. R.* 30, 24 *Ch. D.* 637), *that John Grey was entitled to share in the personalty, and that the rule laid down in* Doe d. Birtwhistle *v.* Vardill, 2 *Cl. & Fin.* 57, 7 *Cl. & Fin.* 895, *that an* ante natus *son could not inherit English land, related only to the descent of land on an intestacy, and did not affect the case of a devise to children, and that John was, consequently, entitled to share in the specific devise of real estate.*

Originating summons.

(*a.*) Reported by W. A. G. WOODS, Esq., Barrister-at-Law.

The Rev. Harry Grey, by his will, dated the 10th of April, 1847, gave, devised, and bequeathed "all that my messuage, farm, and lands called Great Heatley Heath Farm, in the parish of Lynn, in the county of Chester, with all the rights and appurtenances thereto belonging, subject to, and charged nevertheless with, a certain mortgage debt of £4,000 now secured thereon, together with the interest thereof, if any, which shall be due at the time of my decease unto my seven children," by name, including Harry Grey, "their heirs and assigns, equally to be divided between them as tenants in common." The testator gave the residue of his real and personal estate to trustees upon trust for sale, conversion, and investment, and "to pay and divide all the said trust moneys, stocks, funds, and securities in equal shares between and amongst all and every my present and future born children and child who, being a son or sons, shall respectively attain the age of twenty-one years, or, being a daughter or daughters, shall respectively attain that age or be married under that age with the consent of the trustees for the time being acting in the execution of this my will; the same shares to be paid or transferred to or for the benefit of my said sons and daughters respectively at the respective times aforesaid."

On the 5th of September, 1848, the testator made a codicil to his will, and it was on the words of that codicil that the question in dispute arose. He directed that "as to the share of my property bequeathed by my will to my eldest son Harry, I vary the bequest thereof as follows: First, I declare that the word share in this codicil shall be understood to mean all real and personal property which my said son may at any time after my decease be entitled to claim or receive under my will. I hereby direct my executors forthwith to transfer the share of my said son Harry to the Rev. T. G. Clerk, Vicar of Woodmancote, Hampshire, and my son George Grey, who shall stand possessed of the same upon the following trusts—namely," for investment and for his son Harry during his life, and after his death and subject to an annuity to his widow "in trust for all his children, to be paid to them respectively when and as they shall respectively attain the age of twenty-one years, and to be divided between them in equal shares, the class of children to include those born after my decease as well as those born previously, their shares to vest at the expiration of six months after the decease of my said son."

By a subsequent codicil the testator revoked the gift of an annuity to Harry Grey's widow, but did not otherwise alter the will or first codicil.

The testator died on the 26th of March, 1860.

Harry Grey went to the Cape of Good Hope in 1856, and resided there till his death, on the 19th of June, 1890, having, as his lordship held on another branch of the case, acquired a domicil in that country. In 1883 he succeeded to the Earldom of Stamford. He had married three times, but by his first two wives he had had no issue. By his third wife, whom he had married in 1880, he had had a son, John Grey, born in 1877, and other children born since the marriage.

According to the Roman Dutch law of the Cape, John Grey was legitimated by the subsequent marriage of his father and mother.

The question which arose upon this summons was whether John Grey ought to be included in the class of "children" of Harry Grey so as to take a share of the real estate specifically divided, and the proceeds of sale of real estate and the personalty.

Buckley, Q.C., and *A. Young*, for Lady Mary Grey, daughter of the Earl of Stamford, and born after

marriage.—John Grey is not entitled to a share of the real estate. As his father was domiciled at the Cape and subsequently married his mother he is legitimated by the law of the country, and under ordinary circumstances would have a right to share in the personalty: *Boyes* v. *Bedale*, 12 W. R. 232, 1 H. & M. 798; *In re Goodman's Trusts*, 29 W. R. 586, 17 Ch. D. 266. That rule, however, does not apply to real estate, for to share in it a child must be legitimate according to the law of England: *Doe d. Birtwhistle* v. *Vardill*, 7 Cl. & Fin. 895. Although that case had reference to the right to inherit land where there was an intestacy, the principle applies to land specifically devised. The will must consequently be read as if it contained a declaration that the real estate was to go to children legitimate according to the law of England; and so, the word "children" having been already construed in a particular way, the same construction must be applied to the bequest of personalty instead of the ordinary rule, and as, under these circumstances, John Grey does not come within the description of "children," he takes nothing at all under the will.

Hastings, Q.C., and *Rolt*, for John Grey.—The rule with regard to personalty is well settled, that children means children legitimate by the law of the domicil, and it cannot be set aside in the way suggested. We are clearly entitled to a share, and as we agree that the word "children" must receive the same construction throughout the will we are also entitled to a share of the real estate. The *ratio decidendi* of the cases cited is applicable to a specific devise of land as well as to a bequest of personalty: *Skottowe* v. *Young*, 19 W. R. 583, L. R. 11 Eq. 474. *Doe d. Birtwhistle* v. *Vardill* deals only with the case of descent on an intestacy. Where personalty is concerned the court can look at the law of the domicil to ascertain the class who are to take as children. The testator can never have intended that, merely because he had real estate as well, that class was to be cut down to children legitimate according to the law of England.

Buckley, Q.C., replied.

Monnington, for the trustees.

F. Mackarness, for the executors of Lord Stamford's will.

STIRLING, J.—The question I have now to dispose of arises in this way. [His lordship referred to the will and codicil and continued:] The question arises on the meaning of the word "children" in the codicil. I have held that Harry Grey, otherwise Earl of Stamford, became domiciled at the Cape of Good Hope. By a lady whom he married there he had a son born before marriage, and the question is whether he is to be included in the "children," the evidence being that by the law of the Cape of Good Hope he was legitimated by the subsequent marriage of his parents. The question has been considered in several cases of late years. Amongst others I will refer to *Andros* v. *Andros*. [His lordship read the headnote to that case, and proceeded:] Kay, J., went through all the authorities, and that fact renders an examination of them by me unnecessary, and the *ratio decidendi* appears from the following passage in 24 Ch. D., at p. 639:—"A bequest in an English will to the children of A. means to his legitimate children, but the rule of construction goes no further. The question remains, Who are his legitimate children? That certainly is not a question of construction of the will. It is a question of *status*. By what law is that *status* to be determined? That is a question of law. Does that comity of nations which we call international law apply to the case or not? That may be a matter for consideration, but I do not see how the construction of the will has anything to do with it. The matter may be put in another way. What did the testator intend by this gift? That is answered by the rule of construction. He intended A.'s legitimate children. If you ask the further question, Did he intend his children who would be legitimate according to English law, or his actual legitimate children? how can the rule of construction answer that?" Then after considering the authorities he says, at p. 642: "The law, as I understand it, is that a bequest of personalty in an English will to the children of a foreigner means to his legitimate children, and that, by international law, as recognized in this country, those children are legitimate whose legitimacy is established by the law of the father's domicil. Thus *ante nati* whose father was domiciled in Guernsey at their birth, and subsequently married the mother so as to make the *ante nati* legitimate by the law of Guernsey, are recognized as legitimate by the law of this country, and can take under such a gift." That case lays down the rule with regard to a gift of personalty. In *Skottowe* v. *Young* the Vice-Chancellor dealt with a gift of land in England upon trusts to sell and apply the proceeds as personalty, and the same rule was applied by him to that gift as was adopted by Kay, J., in *Andros* v. *Andros*. *Skottowe* v. *Young* is recognized as an authority in *In re Goodman's Trusts*, therefore, so far as this case refers to a gift of pure personalty or land devised upon trust for sale, the point is covered by authority.

There remains the case of a specific devise of real estate. As to that there is no authority in point, and I have taken time to examine more carefully the case of *Doe d. Birtwhistle* v. *Vardill* to see if there is anything in that case which conflicts with the decision in *Andros* v. *Andros*, and I have satisfied myself that there is nothing. I adopt the rule in *Doe d. Birtwhistle* v. *Vardill*, which is recognized by James, L.J., in *In re Goodman's Trusts*, 17 Ch. D. 266. He says at p. 298: "In that case we have the careful and elaborate judgment of the judges summoned to advise the House of Lords, and in that judgment or advice there are two distinct propositions clearly and distinctly enunciated. The first was that the claimant was for all purposes and to all intents legitimate. The second was that such legitimacy did not necessarily, and did not in fact in that case, include heirship to English land. The first proposition was accepted by the law lords without any doubt or question; the second was questioned. After further reference to the judges and further hearing, the case was at last determined in accordance with the second proposition; but the first proposition has never been really questioned." Now, it seems to me upon examination of *Doe d. Birtwhistle* v. *Vardill* that the rule there laid down relates only to the descent of land on an intestacy, and does not affect the case of a devise in a will to children. In my opinion, therefore, the son, John Grey, is entitled to share both in the gift of real estate to Harry Grey and also to the proceeds of sale of the realty.

Solicitors, *Flux, Son, & Co.; Gamlen & Burdett.*

Chan. Div.
Vaughan Williams, J. } Nov. 9.

In re LAXON & CO. (LIMITED). (*a*.)

Company—Winding up—Examination—Official receiver—Report—Suggestion of fraud—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 8, *sub-sections* (1), (2), (3).

To obtain an order under section 8, *sub-section* (3), *of the Companies (Winding-up) Act*, 1890, *the official receiver need not state in his further report in terms that, in his opinion, fraud has been committed by persons in the promotion or formation of the company, but it is sufficient if the facts mentioned in the report* (a) *suggest fraud by some person or persons who have taken part in the formation, or been directors, of the company, and* (b) *that the persons to be examined come within the category of a person who has taken part in the promotion or formation of the company, or has been a director or officer of the company.*

The object of section 8, *sub-section* (3), *in such a case is to find out whether such fraud as the facts suggest has or has not been committed.*

In re Trust and Investment Corporation of South Africa *and* In re Bertram Luipaards Vlei Gold Mining Co., 40 *W. R.* 689, *discussed.*

Applications had been made in the winding up of the above-mentioned company for the public examination of certain persons, when Vaughan Williams, J., reserved judgment.

The question arose under section 8 of the Companies (Winding-up) Act, 1890, which enacts—

Sub-section (1). "Where the court has made an order for winding up a company the official receiver shall, as soon as practicable after receipt of the statement of the company's affairs, submit a preliminary report to the court—(*a*) as to the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities; and (*b*) if the company has failed, as to the causes of the failure; and (*c*) whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof."

Sub-section (2). "The official receiver may also, if he thinks fit, make a further report, or further reports, stating the manner in which the company was formed, and whether in his opinion any fraud has been committed by any person in the promotion or formation of the company, or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which, in his opinion, it is desirable to bring to the notice of the court."

Sub-section (3). "The court may, after consideration of any such report, direct that any person who has taken any part in the promotion or formation of the company, or has been a director or officer of the company, shall attend before the court on a day appointed by the court for that purpose, and be publicly examined as to the promotion or formation of the company, or as to the conduct of the business of the company, or as to his conduct and dealings as director or officer of the company."

The facts are stated in the judgment.

VAUGHAN WILLIAMS, J., now delivered judgment to the following effect:—These are two applications for an order for examination under section 8 of the Companies (Winding-up) Act, 1890. The Court of Appeal decided in *In re Trust and Investment Corporation of South Africa* and *In re Bertram Luipaards Vlei Gold Mining Co.*, 40 W. R. 689, that the decision in *Ex parte Barnard, In re Great Kruger Gold Mining Co.*, 40 W. R. 625, did not mean that the official receiver must, in order to obtain an order under section 8, sub-section 3, state in his report that some fraud had been committed by the person to be examined, but only that a report that some fraud has been committed is necessary, and that it is further necessary that the official receiver shall make a report that X. Y. Z., or whoever the people in his schedule may be, are persons who fill the characters enumerated in clause 3—that is to say, that they are persons having taken part in the promotion or formation of the company or have been directors or officers of the company. Lindley, L.J., goes on to say:—"In each of these cases we have two reports which are plain enough—not only a report under sub-section 1, that further inquiry is desirable as to the promotion, formation, or failure of the company, or the conduct of the business thereof, for these companies appear to be swindles; but a further report under sub-section 2, which shows that in the opinion of the liquidator frauds have been committed in the promotion or formation of the company." Then Lopes, L.J., says:—"There must be a report that, in the opinion of the official receiver, a fraud has been committed by somebody; but that the particular person or persons who were parties to it need not be named in order to apply this section." A. L. Smith, L.J., says that, in his judgment, there must be a report of the official receiver showing that in his opinion a fraud has been committed by some person or persons who has or have taken part in the promotion of the company, or has or have been a director or officer of the company, and that the person to be examined comes within the category of a person who has taken part in the promotion or formation of the company or has been a director or officer of the company.

It will be observed that in these cases the official receiver did not by his report say in so many words that in his opinion any fraud had been committed, but the Court of Appeal nevertheless made the order. I infer from this that the Court of Appeal did not mean that the official receiver need, in his report, say in terms that in his opinion fraud had been committed by persons in the promotion or formation of the company; but that it is sufficient if the facts mentioned in the report suggest fraud by some person or persons who have taken part in the promotion of the company or have been directors of the company, and that the persons to be examined come within the category of a person who has taken part in the promotion or formation of the company, or has been a director or officer of the company. Now, I have to see whether these two conditions have been complied with in the present case. There is no statement in the report that in the opinion of the official receiver fraud has been committed in the promotion or formation of the company, or as to the conduct of the business of the company; but there is a statement of facts which is suggestive that some fraud may have been committed, and as the object of the section manifestly is to find out whether such fraud as the facts suggest has been committed, I think that I ought to make the order asked for.

I will now deal with the reports in the present case—the first report and the final report. In the first report, of the 13th of August, 1892, not only is there no statement that fraud has been committed, but there is no statement of facts suggestive even of fraud. Of the second report, of the 23rd of August, for the most part the same may be said, but paragraphs 9, 10, and 12 are as follows:—"(9) The business purchased was an old-established one, but if the bank overdraft—

(*a*.) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

£4,345 15s. 3d.—had been included among the liabilities it was insolvent at the time of the negotiations for sale. An arrangement was, however, made by which this item was to be omitted, and, in consideration of the bank agreeing to the proposed transfer, C. Laxon, who was to receive debentures to the nominal amount of £1,500, as the vendors' nominee, undertook to guarantee the bank to a similar amount. (10) William Laxon admits that the whole of the liabilities of the business were paid by the company, and that they exceeded by about £300 (the amount of one week's purchase) the amount entered as owing, but stated that this omission was accidental. (12) It is stated that entries have been made in the books of the company in order to conceal its true position, and that moneys have been improperly drawn by one of the directors." As I understand the judgment of the Court of Appeal when it is stated that the report must show that fraud has been committed in the promotion or formation of the company, or, I presume, in the conduct of the business of the company, it did not mean that the report must state in terms that fraud had, in the opinion of the official receiver, been committed, but only that the facts should be stated which suggested fraud. It was not intended to say that the official receiver must state the fact of fraud, the existence of which it is one object of the examination to ascertain.

Official receiver in person.

Q. B. Div.
(Bruce and Kennedy, JJ.) Nov. 3.

MALLEY *v.* SHEPLEY. (*a.*)

Practice—Appeal from county court—Notice of motion, service of—Service upon London agent of country solicitor—Remitted action—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 65—*County Court Rules,* 1889, *ord.* 33, *r.* 1.

An action was commenced in the High Court, and upon the writ, the address of the plaintiff's solicitor, who carried on business in the country, as well as that of the London agents, were indorsed as addresses for service.

The action was remitted to a county court under section 65 of the County Courts Act, 1888, *and upon the particulars lodged by the plaintiff with the registrar under ord.* 33, *r.* 1, *of the County Court Rules,* 1889, *the address of the country solicitor alone was indorsed as the address for service.*

After the trial of the action the defendant served a notice of appeal from the judgment of the county court judge upon the London agents of the solicitor for the plaintiff.

Held, that the address for service indorsed upon the plaintiff's particulars was substituted for the addresses for service indorsed upon the writ, and that, therefore, the service of the notice of appeal upon the London agents was bad.

The appeal was ordered to be heard under ord. 59, *r.* 16, *as there had been a slip, and the point was a fresh one, but the court felt considerable difficulty in making the order.*

This was an appeal from a decision of his Honour Judge Sir R. Harington, sitting at the county court of Worcester holden at Stourbridge. The question was whether, after an action had been remitted from the High Court to the county court, a notice of appeal from the decision of the county court judge could be served on the London agents of the plaintiff's solicitor.

The plaintiff's solicitor carried on business in the country. Upon the writ, which was issued in the High Court, was indorsed the name of the London agents of the plaintiff's solicitor, and their address was mentioned as well as that of the country solicitor as addresses for service.

The action was remitted to the Worcester County Court, and a few days later the plaintiff lodged with the registrar the documents and statements required by ord. 33, r. 1, of the County Court Rules, 1889, which provides that "where by order of the High Court of Justice any action or matter is remitted or transferred to a county court, the plaintiff shall lodge with the registrar thereof the order, or a duplicate thereof, and the writ, together with the pleadings, affidavits, and other documents filed in the High Court, or copies thereof; and also a copy or copies of any affidavit or affidavits on which the order was made, and also a statement of the names and addresses of the several parties to the action or matter, and their solicitors, if any, and a concise statement of the particulars of claim, such as would be required upon entering a plaint, signed by the plaintiff or his solicitor, and the registrar shall thereupon enter the action or matter for trial, and give notice to the parties of the day appointed for such trial, by post or otherwise, ten clear days before such day, and shall annex to the notice to the defendant a copy of the particulars."

The registrar thereupon, in accordance with the rule, gave notice to the parties of the day appointed for the trial and annexed to the notice to the defendant a copy of the plaintiff's particulars. Upon the plaintiff's particulars was indorsed the name of the country solicitor, and his address alone was mentioned as the address for service.

The action having been tried, the defendant served notice of appeal from the judgment of the county court judge on the London agents of the plaintiff's solicitor.

Macaskie, for the respondent.—There is a preliminary objection to the hearing of this appeal. The service of notice of appeal upon the London agents of the plaintiff's solicitor was bad: *Powell* v. *Thomas*, 39 W. R. 224, [1891] 1 Q. B. 97; *Bowles* v. *Drake & Co.*, 30 W. R. 333, 8 Q. B. D. 325. The court has a discretion to hear the appeal, but this is not a case in which they will do so. The mistake has arisen through ignorance of the effect of section 65 of the County Courts Act of 1888: *Reg.* v. *Sir Rupert Kettle and Brown*, 17 Q. B. D. 761, 34 W. R. Dig. 50.

Ernest Pollock, for the appellant.—*Powell* v. *Thomas* does not apply. If there is any irregularity the respondent has waived it by appearing. [BRUCE, J.—He was quite right to appear.] The court has an absolute discretion to hear the appeal: *Cusack and Another* v. *London and North-Western Railway Co.*, 39 W. R. 244, [1891] 1 Q. B. 347.

BRUCE, J.—The question is whether the notice of appeal was properly served. No doubt if the action had remained in the High Court service of the notice upon the London agent would have been proper. But the action was remitted to the county court. Thereupon, under section 65 of the County Courts Act, 1888, all the proceedings were sent down to the county court. The plaintiff was bound by the County Court Rules to file the proceedings in the county court with the registrar. This had been done. At the bottom of the particulars was the name of the country solicitor. The registrar had to forward a copy of the particulars to the defendant. When the

(*a.*) Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

address of the country solicitor was given in the particulars, this was the address for service. After the notice was given, in this way, of a fresh address for service, I think that the service of notice of appeal upon the London solicitors was bad.

It is said that this point has not arisen for decision before. I do not think it requires any case. The Act is plain enough. It says that all proceedings shall be taken in the county court. There has been a slip, and we will hear the appeal. But we have felt some difficulty. It is important that rules should be observed.

KENNEDY, J.—I concur.

The appeal was then heard.

Solicitors, *Charles Robinson & Co.*, for *W. Waldron*, Brierley Hill; *A. H. Arnould & Son*, for *J. Higgs*, Brierley Hill.

Q. B. Div.
(Grantham and Charles, JJ.) June 22, 1892.

WILLIS *v.* WELLS. (*a.*)

Friendly society—Dispute—Member—Friendly Societies Act, 1875 (38 & 39 *Vict. c.* 60), *s.* 22.

A dispute does not come within the rules of a friendly society as to the settlement of disputes between members and the society if the dispute relates to a claim made by a party to be a member of the society, which claim is denied by the trustees of the society.

Application by the plaintiff for an *interim* injunction to restrain the members and officers of a friendly society called the New Union Society from excluding the plaintiff from the meetings and benefits of the society, and from refusing to accept his subscriptions.

The defendants were the trustees of the society, and the plaintiff by his writ claimed a declaration that he still was a member of the society, and an injunction in the terms set out above. The plaintiff had been a member of the society for fifty years. From November, 1889, to February, 1891, he had been in receipt of sick pay, being prevented through illness from working. In February, 1891, the plaintiff gave notice to the society that he was sufficiently recovered from his illness to be able to resume work, and he therefore declined the acceptance of further relief. A short time afterwards the plaintiff received a notice from the society informing him that he had been fined £14 for infringing the rules of the society by not procuring a medical certificate before returning to work, and that a resolution had been passed that he would be expelled the society if he did not pay the fine. The plaintiff refused to pay the fine. On the 2nd of March the plaintiff attended a quarterly meeting of the society and tendered his subscription, which he was told would not be accepted unless the fine of £14 was paid. Some correspondence then ensued, which the defendants refused to consider, because, as they stated in their affidavits, in their opinion the plaintiff had ceased to be a member of the society. The plaintiff accordingly brought this action.

Rule 27 of the society's rules was as follows: "All disputes which may arise between any member, or person claiming under or on account of any member, and the trustees, treasurer, or other officer of the committee thereof, shall be referred to and decided by justices of the peace pursuant to 13 & 14 Vict. c. 115, s. 24."

Section 22, sub-section (*c*), of the Friendly Societies Act, 1875, provides that where the rules of a society direct that disputes shall be referred to justices, the dispute shall be determined by a court of summary jurisdiction.

Scott Fox, for the plaintiff.—This is not a dispute between a member and the society. The plaintiff is no longer a member of the society, for he has been expelled. The case is not, therefore, a dispute within the rules and section 22 of the Friendly Societies Act, 1875, and the plaintiff has a right to bring this action in the High Court: *Prentice* v. *London*, L. R. 10 C. P. 679, 24 W. R. Dig. 8.

He also cited *In re Royal Liver Friendly Society*, 36 W. R. 7, 35 Ch. D. 332.

C. C. Scott, for the defendants.—This is a dispute between a member and the society. It is the contention of the plaintiff that he is still a member, and he cannot argue that he is not a member.

He referred to *The Municipal Permanent Investment Building Society* v. *Kent*, 32 W. R. 681, 9 App. Cas. 260.

GRANTHAM, J.—The question for our decision in this case is whether the plaintiff is justified in taking proceedings against the defendant in the way that he has done, and it is not necessary for us to inquire into the merits of the case. The Friendly Societies Act, 1875, provides a cheap and expeditious method of settling disputes between members of these societies, but persons cannot be precluded from exercising their right of coming to the High Court unless that right has been in terms taken away by statute. In cases of disputes between members and the society, it is common ground that the cheaper tribunal is to be resorted to, but in the present case the question is, Is the plaintiff a member of this society? I have come to the conclusion that under the circumstances he is not now a member. The case of *Prentice* v. *London*, which was cited during the argument, seems to me to be exactly in point. In that case Lindley, L.J., said: "The object of the provision in question was the easy settlement of internal disputes between the trustees and officers of the society and its members. That assumes the parties both to be members of the body. If the matter in controversy is whether the party is a member or not, that clearly is not a matter of internal judgment." Coleridge, C.J., used language to the same effect. Being of opinion, then, that the plaintiff is not a member of this society, I think that this is not the kind of dispute which was intended to be confined to a court of summary jurisdiction, and that the plaintiff is right in bringing this action in the High Court.

CHARLES, J.—I agree.

Order accordingly.

Solicitors for the plaintiff, *Pitman & Sons*, for *Lane*, Kettering.

Solicitors for the defendants, *Iliffe, Henley, & Sweet*, for *Thurnall*, Kettering.

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Kay, L.JJ.) — Nov. 7.

OPPENHEIM v. SHEFFIELD, (a.)

Practice — Interrogatories — Exhibited unreasonably — Prolix or unnecessary — Power to set aside or strike out part of a set — Ord. 31, *r.* 7.

Ord. 31, *r.* 7, *deals with two cases—first, where interrogatories are exhibited which are in themselves unobjectionable, but, by reason of the circumstances of the case, it would be unreasonable or vexatious to call upon the party interrogated to answer them; secondly, where interrogatories are in themselves objectionable by reason of being prolix, oppressive, unnecessary, or scandalous. In the first case, all or any of the interrogatories may be set aside by a judge's order; in the second case, all or any may be struck out.*

Where any party objects to answer interrogatories on any of the grounds mentioned in rule 7, *he is entitled to apply for an order under the rule, and cannot be required to take his objection in his affidavit in answer.*

The fact that leave has been obtained to administer interrogatories is not a bar to an application under either part of the rule.

If the judge considers a set of interrogatories to be as a whole prolix, oppressive, or unnecessary, he has power to strike them all out, though some of them may be unobjectionable.

McIlroy *v.* Duncan, *W. N.*, 1884, *p.* 48, *and* Sammons *v.* Bailey, 38 *W. R.* 605, 24 *Q. B. D.* 727, *overruled.*

Appeal by the defendant from an order of a divisional court affirming an order of a judge at chambers setting aside certain interrogatories.

The action was brought in respect of money alleged to have been paid by the plaintiffs as stockbrokers for the defendant at his request and commission. The defendant said that the plaintiffs did not pay the money for him or at his request, and that no commission was due; and by way of counter-claim he alleged that he employed the plaintiffs as his stockbrokers to buy and sell various stocks and shares for him; that the plaintiffs from time to time rendered him accounts which included various overcharges and omitted various sums received by the plaintiffs for his use, and that he, on the representation of the plaintiffs, paid them large sums of money in respect of such accounts, and he claimed an account of all the purchases and sales made by the plaintiffs on his behalf, and payment of the amount found to be due from the plaintiffs to him on taking such account.

The defendant obtained leave to administer interrogatories for the examination of the plaintiffs, and after the delivery of the plaintiffs' reply, which stated that the accounts referred to in the counter-claim had been agreed to and settled, a set of seventeen interrogatories were exhibited by the defendant. These interrogatories were directed to the support of the defendant's counter-claim, and inquired in great detail into the particulars and circumstances of the purchases and sales effected by the plaintiffs, and the manner in which the sums charged to the defendant were arrived at, and suggested that the plaintiffs had dealt with the defendant as principals and not as stockbrokers.

The plaintiffs took out a summons under ord. 31, r. 7, asking that the interrogatories might be set aside or struck out. The master dismissed the summons, saying that any objection to answer any of the interrogatories might be taken in the plaintiffs' affidavit in answer; but, on appeal, Day, J., made an order setting aside the interrogatories. The Divisional Court (Lord Coleridge, C.J., and Cave, J.) affirmed the judge's order, being of opinion that the interrogatories were prolix, oppressive, and unnecessary.

The defendant appealed.

H. D. Greene, Q.C., and *Morten*, for the defendant.—The master's order ought to be restored. The proper course is for the plaintiffs to take their objection in their affidavit in answer, under rule 6, which alone applies where, as here, leave has been obtained to interrogate. Rule 7 is divided into two parts. Under the first part a set of interrogatories may be set aside on the ground that it has been exhibited unreasonably or vexatiously. But that only applies where interrogatories should not have been exhibited at all, and then only in cases where leave has not been obtained to exhibit them. This was expressly decided by Field, J., at chambers in *McIlroy* v. *Duncan*, W. N., 1884, p. 48: see also *Gay* v. *Labouchere*, 27 W. R. 413, 4 Q. B. D. 206. The second part of the rule provides for striking out interrogatories which are prolix, oppressive, unnecessary, or scandalous. The settled practice now is to strike out all or none. It has been held in *Sammons* v. *Bailey*, 38 W. R. 605, 24 Q. B. D. 727, that there is no power to strike out part of a set. In *Allhusen* v. *Labouchere*, 27 W. R. 12, 3 Q. B. D. 654, the principle is laid down that it is the duty of the party who objects to interrogatories to specify which particular interrogatories he objects to. Here the plaintiffs could not have successfully objected to all the interrogatories, for some are clearly admissible. Therefore the judge at chambers ought to have let all the interrogatories stand and left the plaintiffs to take their objection in their answer, in accordance with the decision in *Sammons* v. *Bailey*. Otherwise those interrogatories which are perfectly admissible will be struck out as well as those which are objectionable.

Horne Payne, Q.C., and *McIntyre*, for the plaintiffs, were not called upon to argue, but cited *Cawley* v. *Burton*, 32 W. R. 33.

Lord ESHER, M.R.—In this case the defendant, having set up a counter-claim, obtained leave to administer interrogatories; and a set of interrogatories were accordingly delivered to the plaintiffs. The judge at chambers either set aside or struck out the whole of them. The Divisional Court have affirmed the judge's order, and the question for us is whether we agree with their decision. They acted under ord. 31, r. 7. They knew what the issue between the parties was, and they had before them the interrogatories which had been delivered by the defendant. They had to consider what burden was put on the plaintiff by the delivery of these interrogatories. They thought that there was thereby put on him the burden of answering a prolix, oppressive, and unnecessary set of interrogatories. Therefore, without inquiring whether a few of them might not have been answered, they said as a whole they were prolix and unnecessary, and ordered them to be set aside.

Ord. 31, r. 7, seems to me to contemplate two cases. The first case is where there are interrogatories, which may be in themselves unobjectionable, but by reason of some of the circumstances of the case, as, *e.g.*, the stage in which the proceedings are, it would be unreasonable or vexatious to order the party to answer them. It is contended that where there are any such interrogatories included in a set you cannot set them aside unless you set aside all the

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law

others. Is there any ground for that contention? The words of the rule are:—"Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously." I am of opinion that the meaning of that is, all or any that are exhibited unreasonably or vexatiously may be set aside. The second case is where interrogatories are objectionable in themselves. The section proceeds—"or struck out on the ground that they are prolix, oppressive, unnecessary, or scandalous." The nominative case is the same in both cases, viz., "any interrogatories." This part of the section, as well as the first, must apply to all or any. If as a whole the interrogatories are prolix or unnecessary, you may strike them all out. If some are prolix or unnecessary you may strike out those that are so. But a narrow construction is sought to be put on this part of the section; it is said that unless each individual interrogatory is prolix and unnecessary there is no power to strike out the set. I see no reason for that construction. If one interrogatory is enough, and a great number are asked, is not the set as a whole prolix?

It is said that objection ought to be taken in the affidavit in answer. But this rule has nothing to do with the answer. It is clear that under this rule objection may be taken before any answer is given.

Two cases were cited. The first was a decision of Field, J., at chambers. I do not agree with that decision. It seems to me that the learned judge construed the new rule as though it were in the form of the old rule. The other case was *Sammons* v. *Bailey*. There the Divisional Court thought that on an application such as the present the judge must strike out either all the interrogatories or none, and that, unless all were bad, any objection might be taken in the answer. I see no reason for that. The true construction seems to be that if the judge thinks the interrogatories as a whole are prolix, oppressive, or unnecessary, he may strike out the whole of them. I do not say he must do so, but he may if he thinks right. On the other hand, I think he may go through the interrogatories one by one, striking out those which he thinks ought not to be allowed, and leaving those which he thinks ought to be answered.

Perhaps the two parts of the rule may overlap one another, and there might be a case which came within both. In such a case I think the judge may act under either part of the rule.

The Divisional Court had a right to look at these interrogatories as a whole, and say whether, as a whole, they were prolix or unnecessary. They thought they were, and set aside the whole set. I think they were right.

The case of *Allhusen* v. *Labouchere* seems to me to draw the very distinction which I have drawn. There is nothing in that case which says you may not look at a set of interrogatories as a whole and set them aside on the ground of being prolix, although some of them may be admissible.

LOPES, L.J.—This case comes within rule 7 of order 31. It does not come within rule 6, which has nothing to do with an application to a judge. Rule 7 requires careful consideration, as it is not very easy to interpret. I am of opinion that it applies to two states of things, two sets of circumstances. The first part deals with the exhibition of interrogatories; the judge has to consider whether, having regard to the stage in which the action is, and looking at the interrogatories which have been exhibited, it would or would not be unreasonable or vexatious to order them to be answered. The second part deals with a different state of things—viz., where objection is taken to the nature or character or effect of the interrogatories themselves. The judge is authorized to set aside the interrogatories where they are unreasonably or vexatiously exhibited; he is authorized to strike them out where they are prolix, oppressive, unnecessary, or scandalous. The rule begins with the words "any interrogatories"; that means all or any individual interrogatories. The first part contemplates the setting aside of all or any of the interrogatories, and the second part, which refers to the same nominative, contemplates the striking out of all or any of the interrogatories. In this case the judge ordered the interrogatories to be set aside *en bloc*. The Divisional Court thought they were so prolix and unnecessary that they ought to be struck out, and they affirmed the judge's order. I am of opinion that they were right in so doing. It is said there is no power to set aside or strike out a set of interrogatories where leave to administer interrogatories has been obtained. But I cannot see in the rules any suggestion of such a distinction. When leave is obtained, the only thing the judge decides is that the case is a proper one in which to allow interrogatories to be administered, but he has no idea what the interrogatories will be.

As to the cases, I agree with the Master of the Rolls in thinking that *McIlroy* v. *Duncan* cannot be supported. I also disagree with the judgment of Grantham, J., in *Sammons* v. *Bailey*. He thought that where a judge is asked to strike out interrogatories, he is bound either to strike out all or none. I cannot read the rule in that way.

KAY, L.J.—I also think that rule 7 is intended to deal with two things—viz., first, an unnecessary or vexatious exhibition of interrogatories, and, secondly, interrogatories themselves, when they are prolix, oppressive, unnecessary, or scandalous. In the first case, the rule says they may be set aside, in the second they may be struck out. That in either case the rule applies to all or any of the interrogatories is made clear by the history of the rule. In the original rules under the Judicature Act, rule 5 of order 31 provided for striking out interrogatories on certain specified grounds, "or on any other ground." Then in the rules of 1878 a distinction was drawn between an application "to set aside the interrogatories"—that is, the whole set—"on the ground that they have been exhibited unreasonably or vexatiously," and an application "to strike out any interrogatory or interrogatories on the ground that it or they is or are scandalous." Then came the present rule, in which I think the language has been designedly altered in order to give the judge a larger discretion. The judge may now, if he is acting under the first part of the rule, set aside all or any of the interrogatories; if he is acting under the second part of the rule, he may strike out all or any of the interrogatories. Here the judge's order was to set them all aside. The application was in the alternative, and he might well have thought that it was vexatious to exhibit them at that stage of the proceedings. The Divisional Court seems to have thought that they were prolix, oppressive, and unnecessary, and that on that ground they had been rightly disallowed. It was decided in *Allhusen* v. *Labouchere* that where a judge can see that a set of interrogatories taken as a whole are an abuse of the process of the court, he may disallow them all. I cannot dissent from the view taken in this case by the Divisional Court. I think it was no answer to this application to say there were some interrogatories here and there in the set to which an answer might have been allowed.

Appeal dismissed.

Solicitors for the appellant, *Duffield & Bruty*.

Solicitors for the respondents, *Morley, Shirreff, & Co.*

From Q. B. Div. (Lord Esher, M.R., and Bowen and Kay, L.JJ.) — Aug. 2, 1892.

HESELTINE v. SIMMONS. (a.)

Bill of sale—Validity—Form in schedule—Untrue statement of consideration—"Term for the defeasance of the security"—Agreement to have prior recourse to other securities—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 8, 9; *Form in Schedule.*

A bill of sale, given by way of security for an advance, was expressed to be made in consideration of a sum of money paid by the grantee to the grantor. At the time of the execution of the bill of sale an agreement was made between the grantor and the grantee that the grantee would not enforce the bill of sale until certain other securities in the hands of the grantee were first realized or attempted to be realized. This agreement was not inserted in the bill of sale. In an action by the grantor to have the bill of sale declared void and delivered up to be cancelled, upon the ground that it was void under section 9 of the Bills of Sale Act, 1882, *as not being in accordance with the form in the schedule, the grantee counter-claimed for the principal sum and interest under a covenant for repayment by the grantor contained in the bill of sale. At the trial it was proved that the consideration was not truly stated.*

Held, first, that the untrue statement of the consideration did not make the bill of sale void under section 9, *as not being in accordance with the form, but only made it void within section* 8 *in respect of the personal chattels comprised therein; and, secondly, that the agreement that the bill of sale should not be enforced until the other securities were realized or attempted to be realized was not a "term for the defeasance of the security" within the meaning of those words in the form, and that, therefore, the non-insertion of this agreement in the bill of sale did not make the bill of sale void under section* 9.

Held, therefore, that the covenant for repayment by the grantor remained unaffected, but that, as the other securities had not been exhausted, the counter-claim was premature.

Appeal from the judgment of Denman, J., at the trial of the action without a jury.

The action was brought by the grantor of a bill of sale given by way of security for the repayment of £400 and interest thereon, against the grantee to restrain the latter from seizing the goods comprised in the bill of sale, and to have the bill of sale declared void and delivered up to be cancelled. The defendant counter-claimed for the principal money and interest due under the covenant by the grantor to repay contained in the bill of sale. The bill of sale was stated to be given in consideration of a sum of £400 paid by the defendant to the plaintiff. The learned judge found as a fact that the £400 was advanced to the plaintiff's father and not to the plaintiff, the plaintiff being merely a surety, and that therefore the consideration was not truly stated. An agreement was also made between the plaintiff and the defendant at the time of the execution of the bill of sale that the defendant would not enforce the bill of sale until certain other securities then given to him for the same debt were first realized or attempted to be realised. This agreement was not inserted in the bill of sale. No attempt had been made to realize these securities at the time this action was brought.

The learned judge held that the bill of sale was absolutely void under section 9 of the Bills of Sale Act, 1882, as not being in accordance with the form in the schedule upon two grounds:—(1) That the consideration was not truly stated, and (2) that the agreement not to enforce the bill of sale until the other securities were realized was a "term for the defeasance of the security," and ought to have been inserted in the bill of sale. He accordingly gave judgment for the plaintiff upon the claim and counter-claim.

The defendant appealed.

Bosanquet, Q.C., and *Holmes Poulter*, for the defendant.

Carrington and *Avory*, for the plaintiff.

The arguments sufficiently appear in the judgment. The following authorities were cited:—Upon the first point: *Swift* v. *Pannell*, 31 W. R. 543, 24 Ch. D. 210; *Thomas* v. *Kelly*, 37 W. R. 353, 13 App. Cas. 506; *Parsons* v. *Brand*, 38 W. R. 388, 25 Q. B. D. 110; *Simmons* v. *Woodward*, 40 W. R. 641, [1892] A. C. 100; *Charlesworth* v. *Mills*, [1892] A. C. 231, 40 W. R. Dig. 27. Upon the second point, *Counsell* v. *London and Westminster Loan and Discount Co.*, 36 W. R. 53, 19 Q. B. D. 512; *Sharp* v. *McHenry*, 38 Ch. D. 427, at p. 453; 37 W. R. Dig. 26.

Cur. adv. vult.

Aug. 2. — The judgment of the COURT (Lord ESHER, M.R., and BOWEN and KAY, L.JJ.) was read by

KAY, L.J.—This action is brought by the grantor of a bill of sale seeking to have it cancelled. The defendant counter-claims for the amount due upon the covenant in the bill of sale. Judgment has been given for the plaintiff upon the claim and counter-claim. The defendant, the grantee of the bill of sale, appeals. The contention of the plaintiff is that the bill of sale is wholly void under section 9 of the Bills of Sale Act, 1882, because it is not in accordance with the form given in the schedule to that Act. On the face of the bill of sale no deviation from that form can be pointed out. But it is said that is not enough. Although apparently in complete accordance it is shown by evidence—(1) that the consideration is not truly stated because the amount was not lent to the plaintiff, but to his father, and (2) that the bill of sale omits a condition upon the faith of which it was executed—viz., that it should not be enforced until all other securities and remedies of the grantee had been exhausted. The question, therefore, is whether section 9 of the Act of 1882 contains anything requiring accuracy of statement of the consideration, or requiring a statement of the whole bargain. I will deal with the two objections separately.

First, does the untrue statement of the consideration avoid the bill of sale under section 9? Section 8 of the Act of 1882 expressly deals with an untrue statement of consideration, and provides that the consequence of this shall be that "such bill of sale shall be void in respect of the personal chattels comprised therein." If the bill of sale, as in this case, contains a covenant to pay in addition to an assignment of chattels, the covenant would not be avoided by this section. Section 9 avoids a bill of sale "given by way of security for money," if not made in accordance with the form in the schedule to the Act. That form, so far as relates to the consideration, runs thus:—"In consideration of the sum of £ now paid to A. B. by C. D., the receipt of which the said A. B. hereby acknowledges"; and then follow in brackets these words:—"[or whatever else the consideration may be]."

Those last words in brackets, it is argued, show that the consideration must be truly stated But it must

(a.) Reported by W. F. BARRY, Esq., Barrister-at Law.

be remembered that section 9 deals only with form: *Thomas* v. *Kelly;* and the bracketed words may be satisfied by treating them as making the form flexible enough to allow the statement of some consideration other than a mere payment of money, as, for example, the delivery to the grantor of goods the price of which was to be secured by the bill of sale. Any larger meaning, such as that suggested by the argument, would make the provision in section 8, that the consideration must be truly stated or that the bill of sale should be void as to the personal chattels comprised in it, not only useless, but inconsistent. There would on that construction be two sections, 8 and 9, one immediately following the other, the former making the bill of sale partially void, and the latter making it wholly void for the same reason—that is, the untrue statement of the consideration. It is suggested that section 8 of the Act of 1882 applies to bills of sale of all kinds, whether given as security for money or not, and that section 9 applies only to bills of sale given as security for money, and that the apparent inconsistency may thus be reconciled. But I think that a careful consideration of the two Acts of 1878 and 1882 shows that this is not the case. The former of these statutes only avoided bills of sale against execution creditors and trustees in bankruptcy of the grantors if not duly registered. But it included all bills of sale, whether for security of money or absolute transfers. That statute did not affect their validity as between grantor and grantee. The statute of 1882 avoided the bills of sale to which it refers, even as between grantor and grantee. But it only refers to bills of sale given as security for money. Section 3 expressly provides that "this Act shall not apply" to other bills of sale. Consequently the repeal by section 15 of sections 8 and 20 of the previous Act, though in terms absolute, must be confined to a repeal of those sections only as to bills of sale given as a security for money. The repeal does not apply to other bills of sale. The result is that bills of sale not given as security for money are still governed by sections 8 and 20 of the former Act. It follows that section 8 of the Act of 1882 only applies to bills of sale given as security for money, and the supposed distinction in this respect between sections 8 and 9 does not really exist. This was so held by Fry, L.J., in *Swift* v. *Pannell*, and I see no reason to doubt the correctness of that decision.

The other objection is that there was a condition agreed on which is not stated in the bill of sale, and this omission, it is argued, deviates from that direction in the form which requires the insertion of "terms . . . which the parties may agree to for the . . . defeasance of the security." The omitted term here was not, in my opinion, for defeasance. It was an agreement by the grantee to exhaust other securities given him for the same debt before resorting to this. It is argued that if he did so that would defeat this security to the extent of the payment so made. That is a complete misapprehension of the word defeasance. A debt is not defeated by being paid. A security is not defeated by payment of the debt. There is nothing in the alleged agreement which defeats any of the provisions of this deed. It is a mere condition by which the grantee for the benefit of the grantor arranges the order in which he will realize his securities. Then it is argued that even if it is not a defeasance, but only a condition, it is within the word "defeasance" as used in the form. But in section 10, sub-section 3, of the Act of 1878, which is to be read with the Act of 1882, "defeasance" is contradistinguished from "condition," and it is provided that every defeasance, condition, or declaration of trust, subject to which the bill of sale is given, shall be written in it, or the registration shall be void. Therefore, whatever may be the consequence of omitting the condition, it does not seem to me to be a breach of section 9 of the Act of 1882. If it is only a breach of section 10 of the Act of 1878, the consequence would seem to be that the registration is void—that is, the bill of sale must be treated as an unregistered bill of sale, the effect of which under section 8 of that Act would be that it would be void "so far as regards the property in or right to the possession of any chattels" comprised therein, and in the possession of the grantor at the time of execution, as against execution creditors or trustees in bankruptcy of the grantor, but valid as to everyone else. Apparently that section would not make void the covenant for payment of the debt. But as section 8 of the Act of 1878 is repealed as to bills of sale for securing money, such a bill of sale is now to be treated as though it were unregistered under section 8 of the Act of 1882. The consequence is that it is void against everyone as to the chattels comprised in it, but no further, and the covenant for payment which it contains is unaffected by this section.

The difference between sections 8 and 9 of the Act of 1882 is that section 8 avoids bills of sale which do not comply with its provisions only in respect of the personal chattels comprised therein; section 9 altogether avoids bills of sale which are not made in accordance with the form in the schedule. This difference was recognized in *Davies* v. *Rees*, 34 W. R. 573, 17 Q. B. D. 408, where it was held by the Court of Appeal that a covenant in a bill of sale for security of money which did not comply with section 9 was avoided, as well as the rest of the bill of sale. In *Woodward* v. *Heseltine*, 39 W. R. 405, [1891] 1 Ch. 464, the Court of Appeal was of opinion that the description of the grantee on the face of the bill of sale was so ambiguous that it was uncertain whether the grantee was a corporation or an individual, and that this was not in accordance with the form, which certainly requires a clear and definite description of a grantee upon the face of the document. The House of Lords dissented from this, construing the bill of sale to mean that the grantee was an individual whose name and address were distinctly given—*Simmons* v. *Woodward*, 40 W. R. 641, [1892] A. C. 100. Some of the language of the learned lords, detached from the context, has been used on both sides in this case to support the opposite arguments. I think that the point we have now to decide was not decided or intended to be decided by the House of Lords, and that their judgments do not assist either side in this controversy. The result is that the covenant in this deed is not invalidated by the Bills of Sale Acts.

But there is another consideration which makes the counter-claim in this action improper. The learned judge has found that the grantor executed this bill of sale "upon a complete understanding between the parties at the time that this document should not be made available against him or his goods until all the other documents, many of which were at that time handed over to the defendant, were realized, or attempted to be realized, and realization should have failed"; and he finds that this was "a substantial part of the bargain between the parties at the time." The point is distinctly taken by the fifth paragraph of the defence to the counter-claim. The agreement so pleaded seems to me not inconsistent with the bill of sale. It is strictly a collateral agreement. There is no statute requiring it to be in writing, and if there were it would probably be considered fraudulent to insist upon it after the whole contract had been partly performed by executing the bill of sale upon the faith of this agreement by the grantee: *Morgan* v. *Griffith*, 19 W. R. 957, L. R. 6 Ex. 70:

Erskine v. *Adeane*, 21 W. R. 802, L. R. 8 Ch. App. 756. The judgment must therefore be varied by declaring that the bill of sale is void in respect of the personal chattels comprised therein. This leaves the covenant unaffected, but as it appears from the evidence that the other securities were not exhausted, the counter-claim is premature, and the appeal must be dismissed, with costs.

Appeal dismissed.

Solicitors for the plaintiff, *Leggatt, Rubinstein, & Co.*

Solicitor for the defendant, *H. S. Simmons.*

From Lancaster Palatine Court of Chancery. (Lindley, Bowen, and A. L. Smith, L.JJ.) Nov. 3.

In re CLOWES. (*a.*)

Will—Construction—Devise in fee—Subsequent sale of devised property—Mortgage to testator—Wills Act (1 *Vict. c.* 26), *ss.* 23, 24—*Conveyancing Act*, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 30.

A testator, by a codicil to his will, devised as follows:—"I devise the cottage and garden walled round, bought by me from John Lewis Parry Evans, to the said J. H. absolutely." At the date of the codicil he was seised in fee of the property so devised. He subsequently sold the property, taking a mortgage of it from the purchaser to secure part of the purchase-money. He died during the continuance of the mortgage.

Held, that the benefit of the mortgage debt did not pass to J. H. under the devise.

Decision of Bristowe, V.C., *reversed.*

Decision in Moor *v.* Raisbeck, 12 *Sim.* 123, *approved, though* dicta *therein not approved.*

Appeal from a decision of the Vice-Chancellor of the County Palatine of Lancaster.

By his will, dated the 24th of September, 1878, Thomas Clowes devised as follows:—"I give, devise, and bequeath all those two dwelling-houses and the vacant land adjoining, situate at Llandrillo-yn-Rhos, near Colwyn, in North Wales, recently bought by me from Benjamin Sugden, to James Hudson and Edward Hudson, sons of my sister, Ellen Hudson, as joints tenants, absolutely." The will contained a devise and bequest of "all the rest, residue, and remainder of my real estate and personal estate" to trustees upon trust for sale and conversion and distribution among his sisters' nephews and nieces. By a codicil, dated the 7th of April, 1883, the testator declared as follows:—"I revoke the devises in my said will contained to James Hudson and Edward Hudson of the two dwelling-houses at Llandrillo-yn-Rhos, and devise the same, and also the cottage adjoining thereto and garden walled round, bought by me from John Lewis Parry Evans, to the said James Hudson absolutely."

By an indenture, dated the 11th of July, 1888, the testator conveyed by way of sale, in consideration of the sum of £1,220, the cottage and garden comprised in the devise to James Hudson to Herbert Bliss Hill in fee simple.

By an indenture of the 12th of July, 1888, H. B. Hill conveyed the premises to the testator by way of mortgage to secure the sum of £900 and interest.

The testator died on the 6th of October, 1889, and the will and codicil were duly proved.

After the testator's death the mortgage debt was paid off to the testator's executors and the property had been reconveyed by them to the mortgagor.

James Hudson claimed that the benefit of the mortgage had passed to him on the testator's death by virtue of the devise in the codicil, and that he was entitled to the money secured thereby.

The executors and trustees of the will and codicil of the testator applied by way of originating motion before the Vice-Chancellor for determination of the question whether, in the events which had happened, any, and what, interest passed to James Hudson under the devise.

The Vice-Chancellor held that James Hudson was entitled to the principal money secured at the date of the testator's death on the cottage and garden devised to him by the codicil.

The residuary legatees appealed.

By section 23 of the Wills Act it is provided that "no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death."

By section 24 it is provided that "every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

Hopkinson, Q.C., and *Bather*, for the appellants.—James Hudson takes nothing under the devise. Even before the Conveyancing Act, 1881, it is questionable whether the legal estate going to the devisee would have carried the right to the money with it. The devisee would have taken the estate, but only as trustee for the person entitled to the money. It is the mortgagor, not the mortgagee, who is really the owner of mortgaged land; the mortgagee only has the money. *Moor* v. *Raisbeck*, 12 Sim. 123, is a strong case in the appellants' favour.

They also referred to *Saxton* v. *Saxton*, 28 W. R. 294, 13 Ch. D. 359.

Farwell, Q.C., and *Astbury*, for the respondent, James Hudson.—The question turns on the true reading of sections 23 and 24 of the Wills Act. You are to read the will as if made on the day of death. You inquire what property the testator had on the day of his death, and it is immaterial what took place between the actual time of making the will and the death. If it had been a question before the Conveyancing Act, it might have been that the testator meant to give merely the legal estate; but since that Act, unless the devise passes the money to the devisee it passes nothing at all, which would be giving no effect at all to the devise; and some effect must, if possible, be given to it. In *Woodhouse* v. *Meredith*, 1 Mer. 450, a devise of "all my freehold, copyhold, and leasehold messuages, farms, lands, and tenements in the town of Kensington," when the testator was only mortgagee, was held to pass the mortgage money. A mortgagee has, in fact and in law, an interest in the land. Money advanced on mortgage is an interest in land. A general devise of land will not pass a mortgage debt, but a particular devise, as here, will: Theobald on Wills, 3rd ed., 160. [BOWEN, L.J.—A mortgage debt is not, I think, an interest in land, though it is made so for certain purposes. If it were so universally, a general devise of land would pass it.] The case of *Airey* v. *Bower*, 35 W. R. 657,

(*a.*) Reported by ARTHUR LAWRENCE, Esq., Barrister-at-Law.

12 App. Cas. 263, shows that *Moor* v. *Raisbeck* was not rightly decided.

They also referred to *Cox* v. *Bennett*, L. R. 6 Eq. 422, 17 W. R. Ch. Dig. 183; *Saxton* v. *Saxton*; *In re Russell*, *Russell* v. *Chell*, 30 W. R. 454, 19 Ch. D. 432; *Moor* v. *Raisbeck*; *Bowen* v. *Barlow*, 21 W. R. 149, L. R. 8 Ch. 171; and *Castle* v. *Fox*, 19 W. R. 840, L. R. 11 Eq. 542.

Norris, for the trustees, was not called on.

Hopkinson, *Q.C.*, in reply.—*Farrar* v. *Earl of Winterton*, 5 Beav. 1, is on the same lines as *Moor* v. *Raisbeck*, so that case does not stand alone. The testator was never in possession as mortgagee. The word "absolutely" is quite inapt to pass such an interest as that which a mortgagee has in the land. You are not at liberty to strain the Wills Act so as to say it does not matter what has happened between the date of the will and the death: *In re Lane*, *Luard* v. *Lane*, 28 W. R. 764, 14 Ch. D. 856. *Moor* v. *Raisbeck* is supportable, not only as an authority of long standing, but also on principle, leaving out what Shadwell, V.C., says as to the will being revoked by "an act as aforesaid" under section 23 of the Wills Act.

He further referred to *In re Gibson*, *Mathews* v. *Foulsham*, 14 W. R. 818, L. R. 2 Eq. 669, per Wood, V.C.

LINDLEY, L.J.—In my opinion the view taken by the learned Vice-Chancellor was wrong. The short ground upon which I think the case should be decided is this, viz., that under a devise of land money does not pass. Any attempt to get out of this proposition must be an ingenious attempt to read the 23rd and 24th sections of the Wills Act and section 30 of the Conveyancing Act in a particular way to suit such attempt.

The testator, by a codicil, devised "the cottage adjoining" certain premises which he gave to the same devisee, "and garden walled round, bought" by him "from John Lewis Parry Evans to the said James Hudson, absolutely." Now suppose that at the time of making the codicil the testator had not been seised in fee as owner, as he in fact was, but had been only mortgagee of the property devised—I leave out for the present any question of the effect of the Conveyancing Act—, could any one then say that the mortgage money would have passed? In my opinion, certainly not, notwithstanding the reliance placed by the respondent's counsel on *Woodhouse* v. *Meredith*. That is plain and not to be disputed. But, of course, the determination of a matter may depend on circumstances, and that was the case of *Woodhouse* v. *Meredith*. In that case it would have been ridiculous to say the testator was passing only the legal estate.

When the testator in the present case made the codicil he was seised in fee of the property in question. He then subsequently sold it and took a mortgage of it for a portion of the purchase-money. Again, I leave out of sight any question as to the Conveyancing Act, and I ask, What is the effect of the 23rd and 24th sections of the Wills Act in these circumstances? That Act is to apply to the state of things existing at the time of the death. The effect is, in my opinion, to make Hudson devisee of the land, but as a trustee for the person beneficially entitled. That, as it seems to me, is the true effect of the Wills Act. If authority is wanted, it is to be found in the case of *Moor* v. *Raisbeck*, which covers the present case; the decision there was right, though some of the observations in the judgment, as to revocation, may not be supportable. Then there was the case of *Farrar* v. *Lord Winterton* to a similar effect.

But then the respondent says that the Conveyancing Act comes in, and that the effect of that is that if the money does not pass, nothing at all passes to the devisee, inasmuch as by section 30 of the Act the legal estate, notwithstanding the devise, goes to the legal personal representatives; and that so the devise would be inoperative, whereas you must, if possible, give effect to every part of a will. That argument might be all very well if the testator had been mortgagee at the time he made the codicil, but not under the circumstances which really existed in this case.

The appeal must be allowed.

BOWEN, L.J.—I am of the same opinion.

A. L. SMITH, L.J.—I entirely agree with the view Lindley, L.J., has expressed.

Appeal allowed.

Solicitors, *Crofton & Craven*, Manchester; *T. C. P. Gibbons*, Manchester.

High Court of Justice.

Chan. Div. Stirling, J. — Oct. 25, 29.

In re BOURNE.
MARTIN *v.* MARTIN. (*a.*)

Inland revenue—Probate duty—Estate duty—Residuary devisee—Specific legatee—Residuary legatee—Incidence of duties—Customs and Inland Revenue Act, 1881 (44 *Vict. c.* 12), *ss.* 27, 41—*Customs and Inland Revenue Act*, 1889 (52 *Vict. c.* 7), *s.* 5.

A testatrix, who died in 1891, *by her will, made in* 1870, *after making certain pecuniary bequests and specific gifts of real and leasehold property, and disposing of the residue of her real property and certain specified sums of stock and investments, gave the residue of her personal property to A. B. absolutely.*

Held, that the stamp duty payable under section 27 *of the Customs and Inland Revenue Act*, 1881, *and the estate duty payable under section* 5 *of the Customs and Inland Revenue Act*, 1889, *were not payable in part out of the property specifically given, but must be borne entirely by the general residuary personal estate.*

The principle of the decision in In re Croft, Deane v. Croft, 40 *W. R.* 425, [1892] 1 *Ch.* 652, *not applicable as between specific and residuary legatees.*

Originating summons.

This was an originating summons taken out by the Rev. Richard Martin, one of the executors and trustees of the will and codicil of the testatrix, Anne Sturges Bourne, for the determination by the court of the following questions:—(1) Whether the stamp duty, which under section 27 of the Customs and Inland Revenue Act, 1881, had become payable in respect of the estate of the testatrix, ought to be paid by the defendant, George Edward Martin, alone, as the residuary legatee under the will and codicil, or whether such stamp duty ought to be paid rateably by the defendant, George Edward Martin, and by such of the children and issue of the Rev. George Martin and the Rev. Wm. Martin respectively as take a share under the trusts of the will and codicil; (2) the like question as to the estate duty payable under section 5 of the Customs and Inland Revenue Act, 1889.

(*a.*) Reported by W. A. G. WOODS, Esq., Barrister-at-Law.

The testatrix, who died on the 9th of December, 1891, by her will, dated the 18th of March, 1870, after appointing the defendant, George Martin, and William Martin executors and trustees thereof, and after certain pecuniary bequests and specific gifts of real and leasehold estates, devised and bequeathed all other her real estate whatsoever and wheresoever situate, and certain specific sums of Reduced and New Three Per Cents., and all other moneys and investments representing the residuary personal estate and the proceeds of sale of the real estate of her late father, and also a certain sum of Consols to which she was entitled under the marriage settlement of her late father, to her executors upon trust for sale and conversion, and upon trust to divide the moneys arising therefrom equally between the children and issue of the Rev. George Martin and the Rev. William Martin as in the said will mentioned. And the testatrix gave all the residue of her personal estate and effects to George Edward Martin absolutely. By a codicil dated the 10th of September, 1890, the testatrix revoked the appointment of William Martin as executor and trustee, and appointed the plaintiff a trustee and executor in his place.

Badcock, for the residuary legatee.—The Customs and Inland Revenue Act, 1881, by section 27 imposed a new duty in place of the duties imposed by the Act of the preceding year, but did not declare by whom the duty was to be borne. The present case is therefore governed by *In re Croft, Deane* v. *Croft*, 40 W. R. 425, [1892] 1 Ch. 652, where Kekewich, J., decided that in the absence of any express direction it was to be assumed that each part of the estate should bear its aliquot part of the duty. By section 41 of the Act of 1881 the Legislature relieved certain persons of certain duties, and that section must have been meant to relieve the person who, under the old law, would have been charged. The old probate duty would no doubt have been borne by the residuary personal estate: *Trethewy* v. *Helyar*, 4 Ch. D. 53, 25 W. R. Dig. 324. The Act now excepts debts and funeral expenses from the inventory and alters the order of administration. The estate duty under the Act of 1889 stands on exactly the same footing as the probate duty, and is not payable out of the residue.

C. Gurdon, for the specific legatees and specific and residuary devisees.—*In re Croft, Deane* v. *Croft* has no bearing on the present case, for there the duty was payable under a settlement and not under a will, and the contest was not between specific and residuary legatees, but between persons who were entitled to a fund which must bear the duty in any event. *Trethewy* v. *Helyar* and *Fenton* v. *Wills*, 26 W. R. 139, 7 Ch. D. 33, show that the costs of administration are payable out of the general residuary personal estate, and not out of lapsed shares in exoneration of the general residue. The probate duty, or rather the affidavit duty, is a testamentary expense included in the costs of administration; it is a necessary payment which the executor or administrator must make before he obtains administration. The estate duty is in the same category, and is intended only to be an increase of the duty on the inventory. [STIRLING, J.—Is there any decision as to the incidence of the old probate duty?] No. Section 41 of the Act of 1881 merely grants a cesser of the legacy duty at one per cent. The duty should in each case be paid out of the general residue, and not apportioned among the specific legatees.

Badcock replied.

Cur. adv. vult.

Oct. 29.—STIRLING, J.—The will is of the simplest character. [His lordship read the will, and continued:—] The residuary devise is in fact, according to the well-known decision in *Heneman* v. *Fryer*, 16 W. R. 162, L. R. 3 Ch. App. 420, a specific devise. The will, therefore, amounts to a specific gift of property partly realty and partly personalty, followed by a gift of the residue of the testatrix's personal estate. The question simply is whether the duties are payable in part out of the property specifically given, or whether they must be paid entirely out of the residuary personal estate. Now let us consider how the law stood before the passing of the Acts mentioned in the summons. Down to 1880 there was payable by the executor or administrator a probate duty, which was a stamp duty imposed by the Act 55 Geo. 3, c. 184, and certain other Acts incorporated therein by reference. The general effect was that the executor was compelled to stamp the probate or letters of administration with a stamp which denoted payment of duty upon property of a certain value subject to the probate: see 41 Geo. 3, c. 86, s. 3. Then how, under the old law, was that paid? The Acts which impose the duty contain no directions as to the property out of which it is payable. In that respect they are very different from the Legacy Duty Act, 36 Geo. 3, c. 52, ss. 6 and 24, which contains elaborate provisions which show that the duty is to fall upon the legatee. There is no question as to how probate duty was in fact paid under the old law. According to the regular practice it was paid out of the general residuary personal estate. It was a testamentary expense which had to be incurred by the executor in order to obtain a valid probate, which was the root of his title, and the burden of it did not fall upon the specific legatees, and still less upon the specific devisees. Counsel have not been able to find any authority which shows that the practice was not the right one, and I am not surprised that that should be so, as upon principle it is clear that it was right. The principle on which it was based was laid down by Lord Selborne in *Robertson* v. *Broadbent*, 32 W. R. 205, 8 App. Cas. 812. He says this: "The principle of the exemption of personal estate specifically bequeathed is that it is necessary to give effect to the intention apparent by the gift. If the bequest is of a particular chattel, such as a horse or a ship, it is manifest that the testator intended the thing itself to pass unconditionally, and *in statu quo*, to the legatee; which could not be if it were subject to the payment of funeral and testamentary expenses, debts, and pecuniary legacies."

I may mention as an illustration of that, what we know to have been the law as to specific bequests charged with incumbrances. Before Locke King's Act the specific devisee was entitled to have the incumbrance upon the property devised to him, discharged out of the testator's personal estate. That has been altered as regards incumbrances upon real estate subsisting at the death of the testator, but the Act does not apply to personal estate, as to which the old law still applies, as is shown by the judgment of the late Master of the Rolls in *Bothamley* v. *Sherson*, 23 W. R. 848, L. R. 20 Eq. 304, 314. If the general personal estate is insufficient, the executor or administrator would be entitled to be indemnified out of such funds as come to his hands by virtue of the probate, and in such a case and in this way, the specific legatee might be called upon to pay or contribute to the payment of the probate duty, but unless the general personal estate fails, the specific legatees are not chargeable with it.

The law was first altered by the Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), which simply altered the scale of duties, section 9 substitut-

ing new duties for old ones. Then came the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), section 27 of which imposed new duties upon probates of wills and letters of administration in substitution for those payable under the former Act. Section 28 gave to the executor or administrator a power which he had not before, to deduct the aggregate amount of the debts and funeral expenses from the value of the estate in estimating the amount chargeable with duty. Section 29 makes provision as to the affidavit required from the person applying for the probate or letters of administration. Section 30 provides that the probate or letters of administration are to bear a certificate showing that the affidavit has been delivered, and if liable to duty, duly stamped, and stating the gross value of the estate. Section 38 imposed fresh stamp duties upon property passing under voluntary settlements and by *donationes mortis causâ*. Section 41 provides that "in respect of any legacy, residue, or share of residue payable out of or consisting of any estate or effects according to the value whereof duty shall have been paid, on the affidavit or inventory or account in conformity with this Act, the duty at the rate of one per cent. imposed by the Act 55 Geo. 3, c. 184 shall not be payable. And in respect of any succession to property according to the value whereof duty shall have been paid, on the affidavit or inventory or account in conformity with this Act, the duty at the rate of one per cent. imposed by the Succession Duty Act 1853 (16 & 17 Vict. c. 51), shall not be payable."

In this Act there is not to be found, any more than in the Probate Act, any intimation as to how the probate duty is to be paid, and it seems to me that the principle which governed the incidence of the old duties must govern these new ones which are substituted for the old duties by the modern Act, section 26 of which makes the old principle applicable to them. It is contended, however, that the present case is governed by *In re Croft, Deane* v. *Croft*. If I thought that that case were in point, I should consider it my duty to follow it, but in my opinion it is not in point. It relates to the duty imposed by section 38 upon voluntary settlements. It does not relate to the incidence of the duty as between specific and residuary legatees in the ordinary sense, but between appointees of various parts of a specific fund. In that case Kekewich, J., come to the conclusion that, in the absence of any provision by the Legislature as to the incidence of the duties, regard must be had to the intention of the testator. It seems to me that that general principle is not applicable as between specific and residuary legatees, and that the general principle laid down by Lord Selborne in *Robertson* v. *Broadbent* governs the case, and the specific legatees are entitled to their property free from the duty.

Reliance was placed upon section 41 of the Act of 1881, and it was said that that section indicates that the legacies are to bear their share of the duty because in some cases it releases legacies from the legacy duty formerly borne by them on the ground of their being liable to the increased probate duty imposed by the Act. That is a section of a limited application; it only applies in cases where the duty is payable at one per cent.—*i.e.*, when the persons who take the benefits under the will are the testator's family. No doubt the Act relieves the specific legatees as well as the residuary legatee, but I apprehend that I cannot infer from that, that it was the intention of the Legislature that the incidence of the duty should be altered. If the estate were insufficient the specific legatees might be called upon to bear the duty, and if they were persons who were liable to pay one per cent., then the intention of the Legislature seems to be that they should be relieved. I think that the incidence of the duty remains as under the old Acts, and no part of it ought to fall upon the specific legatees so long as there is any general residue.

The second question is as to the estate duty which is payable under section 5 of the Customs and Inland Revenue Act, 1889 (52 Vict. c. 7). Sub-section 5 of that section provides that the duties imposed by the section "are to be in addition to the stamp duties charged on the affidavit required from persons applying for probate or letters of administration in England or Ireland . . . and in addition to the stamp duties charged on such accounts of personal and movable property as are specified in section 38 of the Customs and Inland Revenue Act, 1881, as amended by this Act." That is simply an addition to the stamp duty, and it was admitted at the Bar, that for the purpose of the present application no distinction could be made between the duties chargeable under section 27 of the Act of 1881 and those chargeable under section 5 of the Act of 1889. I think the same rule applies in the case of this duty, and it must be paid by the residuary legatee alone.

Solicitors for all parties, *Frere, Forster, & Co.*

Chan. Div.
Romer, J. } Aug. 3, 1892.

EASTON *v.* PENNY. (*a.*)

Landlord and tenant—Customary freehold—Lease—Notice to determine—Surrender by operation of law—Settled Estates Act, 1877—*Settled Land Act,* 1882—*Licence of lord.*

A testator, being entitled to a customary freehold held of a manor, according to the custom of which tenants could not grant leases for longer than a year and a day without the licence of the lord, devised the tenement by will to trustees upon trust for his widow for life, with remainder to his son. The testator died in December, 1877, *having on the* 15*th of June,* 1877, *with the licence of the lord, let the premises in question to the two defendants, T. P. and T. S. P., on a repairing lease for twenty-one years from the* 20*th of December,* 1876, *at a yearly rent of* £130, *determinable at the end of fourteen years by one year's notice to the lessor, his representatives or assigns, expiring with that year.*

On the 21*st of December,* 1889, *T. S. P., one of the defendants, gave the testator's widow, who had been permitted by the trustees to receive the rents directly, notice of the defendants' intention to quit the premises on the* 25*th of December,* 1890; *and on the* 13*th of August,* 1890, *the widow purported to lease the premises for a term of seven years to the defendants, but without the licence of the lord, at a rent of* £100, *and with less onerous covenants. The widow died, and the trustees of the will brought this action, claiming that the original lease of the* 15*th of June,* 1877, *had never been duly determined, and that the new lease of the* 13*th of August,* 1890, *was inoperative.*

Held, that the notice of the 21*st of December,* 1889, *was bad, not having been served on the "representatives or assigns" of the lessor, and that the widow, the life tenant, had not in any way been constituted the agent of the trustees to receive such notice.*

Held, also, that there had been no surrender of the old lease by operation of law by the purported grant of the new lease, the rule as to surrender not applying where the new lease is void or voidable; and that neither the Settled Estates Act, 1877, *or the Settled Land Act,* 1882, *applied.*

(*a.*) Reported by J. W. GREIG, Esq., Barrister-at-Law.

as no trustees had been appointed to perfect the transaction under the latter Act; and, lastly, that, in any event, section 56 of the Settled Estates Act rendered necessary the licence of the lord to the grant of a new lease.

Trial of action.

This was an action brought by the trustees of the will of Robert Herniman for a declaration that an indenture of lease of the 15th of June, 1877, had not been determined, and was a subsisting lease and binding on the defendants; and for a declaration that another lease of subsequent date—namely, the 13th of August, 1890—was inoperative, and for an order to have the same delivered up to be cancelled.

The point in dispute was whether the lease of the 15th of June, 1877, had been duly determined by the defendants, and a new lease of the same premises properly granted.

Robert Herniman was entitled to the freehold and inheritance, according to the custom of the manor of Taunton Deane, in Somerset, of a dwelling-house and yard, the subject of this action. According to the custom of that manor tenants had power to grant leases for one year and a day, but not for a longer term without the licence of the lord. By an indenture dated the 15th of June, 1877, with the licence of the lord of the manor, and made between Robert Herniman of the one part and the defendants, Thomas Penny and Thomas Stubbs Penny, of the other part, the customary freehold premises were demised to the defendants for a term of twenty-one years from the 25th of December, 1876, determinable as therein mentioned, at a yearly rent of £130. The defendants jointly and severally covenanted amongst other things to pay the rent, and to repair, paint, support, uphold, and maintain, both externally and internally, all buildings of every kind then standing or built upon, or thereafter during the said term to be erected upon the premises, or any part, and all the roofs, fences, and gates belonging to the premises in a good, substantial, and workmanlike manner. The lease also contained a covenant "that if the said lessor or the said lessees, or their respective heirs, executors, administrators, or assigns, shall be desirous to determine the said term of twenty-one years at the expiration of the fourteenth year thereof, then and in such case it shall be lawful for him or them, or his or their representatives or assigns, so to do, on giving to the other of them, or his or their representatives or assigns, one year's notice in writing of such, his, or their desire, and thereupon, at the expiration of such fourteenth year; and upon due performance of the covenants herein contained up to the expiration of such fourteenth year, these presents, and all and singular the covenants and clauses herein contained, shall cease and determine and be utterly void."

Robert Herniman died on the 16th of December, 1877, and by his will, bequeathed his residuary freehold, customary freehold, and leasehold estates to the use of the plaintiffs Richard Easton and Henry Barker and of one Alfred Herniman, their heirs, executors, and administrators, in trust for the testator's wife, M. A. Herniman, during her widowhood, and after her death or remarriage for Alfred Herniman, his heirs, executors, administrators, and assigns. The plaintiffs R. Easton and H. Barker and A. Herniman were admitted tenants of the customary freehold premises on the 28th of April, 1879. Alfred Herniman died on the 20th of March, 1880, having by his will, dated the 4th of December, 1878, devised and bequeathed all his residuary real and personal estate, including the said customary freehold, to the plaintiffs C. E. Herniman and E. Dyer.

Mrs. M. A. Herniman, the widow of Robert Herniman, as the life tenant under the will of Robert Herniman, was permitted by the trustees of the will to receive the rents of the property directly, without the intervention of the trustees, but did not otherwise exercise any control or management of the property.

On the 21st of December, 1889, the defendant Thomas Stubbs Penny alone gave Mrs. M. A. Herniman notice of his intention to quit the premises on the 25th of December, 1890. The plaintiffs alleged that this notice was bad, on the ground that Thomas Stubbs Penny was not the agent of the other defendant, Thomas Penny, for the purpose of giving such notice, nor was M. A. Herniman the representative or assign of Robert Herniman within the meaning of the covenant.

On the 16th of June, 1890, T. S. Penny sent to the plaintiffs R. Easton and H. Barker another notice in the following terms:—

"To Messrs. R. Easton and H. Barker, trustees of the will of the late Mr. R. Herniman.

"Gentlemen,—I hereby give you notice of my intention to quit and yield up possession of the yard, shop, cottages, &c., which I now rent, situate in East Reach, Taunton, at Christmas next. I sent a similar notice to Mrs. H. prior to Christmas last.

"Kindly acknowledge receipt of this notice and oblige."

By an indenture of the 13th of August, 1890, expressed to be made (but without the licence of the lord of the manor) between the said M. A. Herniman of the one part and the defendant T. S. Penny of the other part, after reciting that under the will of the said R. Herniman the said M. A. Herniman was entitled to possession or to the receipt of the rents and profits of the hereditaments thereby demised, for her life (determinable by her future marriage), it was witnessed that in consideration of the rent thereby reserved and of the lessee's covenants thereinafter contained, the said lessor, in exercise of the power for that purpose given to her by the Settled Estates Act, 1877, and of all other powers (if any) her thereunto enabling, demised the said customary freehold premises unto the said lessee to hold from the 25th of December, 1890, for the term of seven years at the yearly rent of £100 thereby reserved, and at the further rent in respect of insurance thereby also reserved, and under and subject to the covenants by the lessee, and the conditions therein contained. And the defendant T. S. Penny thereby covenanted, amongst other things, to pay the said rent of £100 and the further rent, and to repair, support, uphold, and maintain the interior of all buildings of every kind then standing or built upon, or thereafter during the said term to be erected upon the said premises, or any part thereof. And M. A. Herniman covenanted to repair and keep in good repair and condition the roofs of all the buildings upon the said premises, and the windows and outer doors thereof.

M. A. Herniman died on the 6th of October, 1890.

Neville, Q.C., and *MacSwinney*, for the plaintiffs.—The original lease has not been determined by the notice given for the following reasons:—(1) The estate for widowhood of Mrs. M. A. Herniman is not an estate for life within the meaning of the Settled Estates Act, 1877. (2) There has been no licence by the lord of the manor for this lease, and by section 56 of the Settled Estates Act, 1877, it is enacted that "nothing in this Act shall authorize the granting of a lease of any copyhold or customary hereditaments not warranted by the custom of the manor without the consent of the lord, nor otherwise prejudice or

affect the rights of any lord of a manor." (3) There has been no surrender of the lease by operation of law. (4) There has been no express surrender of the lease under section 13 of the Settled Land Act, 1882, because Mrs. Herniman was not a tenant for life within that Act.

Haldane, Q.C., and *Badcock*, for the defendants.—There has here been surrender of the old lease by operation of law, the grant of the new one in effect so operating. A surrender need not be by deed, as the Statute of Frauds has not altered the old law in this respect. The acts from which the surrender has arisen are that the parties have agreed to the term being put an end to, and on that basis their position has been altered: *Davison* v. *Gent*, 5 W. R. 229, 1 H. & N. 74. The life tenant has the power of accepting surrenders under section 13 of the Settled Land Act, 1882, and of granting a new lease under the Settled Estates Act. But it is said M. A. Herniman was not a tenant for life within the words "any person entitled to the possession or to the receipts of the rents and profits of any settled estates for an estate for any life" within section 46 of the Settled Estates Act. Lord Coke, however, in 42*a*, lays down that an estate during widowhood is an estate for life. Blackstone, vol. 2, cap. 8, p. 121, says the same thing. [ROMER, J.—Under which Act, assuming she is a tenant for life, can she accept surrenders?] Under both Acts, and it is not necessary that under the latter Act there should be trustees appointed. Again, it is said the property is copyhold, and that a licence from the lord is necessary. The absence of such a licence only gives a right of forfeiture, and the lease is good until forfeiture is effected: Scriven, 5th ed., p. 338. Further, in 1842 the manor was severed, and hence the lord's rights over the severed part, in which this property is, are extinguished.

Neville, Q.C., in reply.—What cannot under the Settled Land Act, 1882, be done directly cannot be done indirectly. The life tenant is in a fiduciary position, and must obtain the best price possible for any interest disposed of by him, but instead of doing so here a new lease was granted with less burdensome covenants and a lower rent. The expression "good faith" in section 45, sub-section (3), of the Act of 1882 means good faith under the Act, and in accordance with its provisions. This dealing was not in good faith. Finally, M. A. Herniman was not a tenant for life within section 46 of the Settled Land Act, as she was not entitled to the possession.

ROMER, J.—This is a hard case for the defendants, but I do not see how I can free them from their liability under the lease of June 15, 1877. The first point to be considered is whether that lease was determined by notice, under the power contained in it. The notice of December 21, 1889, was not, in my judgment, a good notice, as it was not served on the lessor's "representatives or assigns," and on the evidence I am satisfied that Mary Ann Herniman was not the agent of the trustees under the lessor's will, to receive such notice, nor was she held out to the defendants by the trustees as the person to whom such notice should be sent; and I need scarcely say that because under the Settled Land Act Mary Ann Herniman as tenant for life could take a surrender of the lease, that did not make her the person who, under the power to determine contained in the lease, had to receive the notice to determine. Moreover, I may add that as under the power to determine, the notice was to be in writing, I think that any such notice (though no special form was necessary) ought on the face of it to have fairly stated that it was intended by or on behalf of both lessees to determine the lease, whereas the notice of December 21, 1889, merely stated on the face of it an intention of one of the lessees to quit and yield up "possession" at the Christmas of 1890. I need not refer to the notice of June 16, 1890, as that was clearly out of time. The result is that the defendants remained liable to pay for another seven years from Christmas, 1890, the full rent of £130, and that this was a liability which Mary Ann Herniman and the lessees were bound to have taken into consideration if and when she, as equitable tenant for life, and they or one of them, as lessees or lessee, were contemplating under the Settled Land Act or under the Settled Estates Act a new lease and a surrender of the old. What happened was this, M. A. Herniman and the defendant T. S. Penny appear to have been under the impression that the old lease had been determined by the notice of December 21, 1889, and accordingly arranged terms for a new lease to be granted to T. S. Penny for seven years from December 25, 1890, at the rent of £100 per annum. But before any binding contract is entered into or any new lease granted, T. S. Penny is informed in substance by Mr. Easton, one of the trustees, and the solicitor generally acting for the trustees, and those interested under the will that the old lease is not determined, and Mr. Easton accordingly declined to prepare the proposed new lease. Nevertheless, though he has this knowledge, the defendant T. S. Penny obtains from M. A. Herniman a lease for the seven years at the rent of £100 purporting to be made by her under the provisions of the Settled Estates Act, 1877, and I cannot help thinking that M. A. Herniman (who had died before this trial) when she executed this new lease, was still under the impression that the old lease had been determined, especially as the new lease, which was prepared by the solicitor of T. S. Penny, says nothing about the old lease or its surrender.

The question I have to consider is whether under these circumstances the old lease has been determined. The defendants in the first place say a surrender of the old lease has been effected by operation of law by the grant of the new lease. I think this position is untenable. The trustees, who were the landlords under the old lease, were not parties to the new lease, nor was one of the lessees under the old lease a party to the new lease. But beyond this, even assuming that M. A. Herniman was for this purpose to be regarded as the lessor and T. S. Penny as the lessee under the old lease, I think there would be no surrender here by operation of law. The rule as to implied surrender of an old by a new lease does not apply when the new lease is void or voidable. Now, seeing that when this new lease was taken its sole effect was, to the knowledge of T. S. Penny, at the time merely to relieve him from a liability of £30 a year for seven years, and that the grantor was to his knowledge only a tenant for life acting on behalf of all interested in the settled estate, then, whether T. S. Penny tries to support the lease as an exercise of the powers conferred by the Settled Estates Act, 1877, or of those conferred by the Settled Land Act, I think that in either case the new lease, even if not void, was certainly voidable, and ought now to be voided at the instance of the plaintiffs.

But then the defendants put their case in another form, and say that under the Settled Land Act M. A. Herniman could have taken a surrender of the lease, and that what has taken place has amounted to an agreement by her with the defendants to take a surrender of, to determine the old lease, which, being followed by the new lease and by the defendant T. S. Penny remaining in or taking possession under that new lease, operated as a surrender of, or deter-

mination of, the old lease. Now, no doubt, if a lessor and a lessee agree, even verbally, to determine a lease, and that is acted upon and followed up by the lessor taking possession of the demised premises, or doing that which amounts to his taking possession, then the lease is determined. But in the present case, even assuming that for the purpose of the point I am considering M. A. Herniman is to be regarded as the lessor and T. S. Penny as the lessee, yet I cannot come to the conclusion that there ever was an agreement come to by M. A. Herniman to determine the old lease, or that M. A. Herniman did anything which amounted to her taking possession as against the lessee of the demised premises. There was no change of possession, and I have already indicated my view as to how M. A. Herniman came to grant the new lease. I do not believe she was thinking of or at all contemplating any surrender of the old lease. I may add that the only Act under which M. A. Herniman was authorized to take a surrender was the Settled Land Act, for section 7 of the Settled Estates Act, 1877, which forms part of the sections in that Act which refer to leases by the court, does not, in my opinion, authorize a merely equitable tenant for life, not being a lessor, to take a surrender not sanctioned by the court.

Now M. A. Herniman was not authorized by the Settled Land Act as tenant for life to take a surrender of the old lease merely to free T. S. Penny and his co-lessee from their liability to pay the rent of £130 a year, and to take in lieu thereof T. S. Penny's liability under a new lease for £100 a year. Had she purported to do so she would have done that which was equivalent to a breach of trust on her part, and I decline to hold as against this dead lady that she was guilty of any such improper act. There was no surrender, in fact, and I do not see that any, in fact, was contemplated, and I do not think I am at liberty to imply one, or any agreement for one. I need not, further, decide whether or not, if the old lease had been out of the way, the new lease could have been supported under either the Settled Estates Act or the Settled Land Act. For the old lease was, in fact, existing when the new lease was granted, and, that being so, it appears to me clear that the new lease was not justified under either Act. Part of the argument submitted on behalf of the defendants appears to me to assume in effect the following circular form :—"If the old lease was out of the way, the new lease being justified, it operated as a surrender of the old. The old lease being surrendered, the new lease is justified and good." I may, however, point out that there are difficulties in the way of the defendants in supporting the new lease under either Act. First, as to the Settled Estates Act. The demised premises were customary freeholds. Whatever may have been the effect of the deed of 1842 (which was put in), it did not, in my opinion, turn the premises for all purposes into ordinary freeholds, or prevent them from being customary freeholds held of a manor or reputed manor, nor did it enable the tenants to say that they could thereafter lease the premises for any term without the consent of the lord. Defendant's own witness, the steward, proved that these premises have up to the present time been always treated by their owners and the lord of the manor or reputed manor as customary freeholds, and that such a lease as that of the 13th of August, 1890, was not warranted by the custom of the manor without the consent of the lord. Then section 56 of the Settled Estates Act applies, and shows that M. A. Herniman, even assuming she is to be treated as tenant for life entitled to lease under section 46 (which I need not decide), was not employed to grant this new lease. The reason for section 56 being put in the Act may have been the protection of the lords of manors; but the section does not simply provide that the rights of any lord of the manor shall not be prejudiced or affected—the earlier part is imperative and binds all persons, and the reason for it may well have been to prevent the possibility of any liability to forfeiture. At any rate, it is there; the court ought to act upon it. Then as to the Settled Land Act, 1882. At the time the new lease was executed no trustees under that Act had been appointed, and section 45, sub-section (1), applies, and for reasons before appearing I could not hold T. S. Penny protected by sub-section (3). The lease, therefore, could not be justified under this Act, as the later amending Act of 1890 was not in operation on the 13th of August, 1890.

Solicitors for the plaintiffs, *Surr, Gribble, Bunton, & Gribble.*

Solicitors for the defendants, *Freeman & Bothamley*, for *Sweet & Son*, Taunton.

Chan. Div. (Vaughan Williams, J.) July 23, 25, 1892.

In re NEW MASHONALAND EXPLORATION CO. (*a*.)

*Company — Winding up — Directors — Misfeasance or breach of trust—Liability of directors—*Ultrà vires*—Negligence—Form of summons—Evidence required from applicant—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.

A summons in the voluntary winding up of a company under section 10 *of the Companies (Winding-up) Act*, 1890, *directed the respondents to attend on the hearing of an application by the liquidator for a declaration that all persons, being directors of the company, who in any manner authorized, sanctioned, or participated in the two payments to G. out of the company's moneys therein specified, were jointly and severally liable to repay to the liquidator the amount so paid, with interest at five per cent.*

The grounds of the liquidator's application not being sufficiently defined thereby, this form of summons is not correct. A summons like this, with the affidavits in support, should show the nature of any misfeasance thereby charged.

In order to make directors liable under the section for negligence, the court must be satisfied that they did not really exercise their judgment and discretion as agents of the company in the transaction complained of.

The directors of a financial company having, in exercise of their powers, resolved to lend money of the company to A. against his promissory note and a deposit of shares by him, the resolution was immediately acted upon by handing over a cheque to the solicitor of the company.

Held, that this was not in itself an act of misfeasance.

Summons.

This was an application by the liquidator, under section 10 of the Companies (Winding-up) Act, 1890, in the voluntary winding up of the company, seeking to make liable for alleged misfeasance or breach of trust, as directors of the above company, Major-General Sir J. W. Campbell, Mr. W. Adams, the Earl of Mayo, Mr. F. Buchanan, and Colonel H. J. Willett, who were named as respondents to the summons. The application was heard before Vaughan Williams, J., sitting as an additional judge of the Chancery Division. The summons directed the

(*a*.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

respondents to attend on the hearing of an application by the liquidator that it might be declared that all persons being directors of the company who in any manner authorized, sanctioned, or participated in the payment to Mr. A. M. Green of the sum of £250 of the company's money on the 5th of August, 1891, and in payment to Mr. A. M. Green of the sum of £1,000 of the company's moneys on or about the 26th of August, 1891, were jointly and severally liable to repay to the liquidator the amount so paid with interest at five per cent., and for an order that an inquiry might be made what persons were directors when such payments were made, and which of them in any way authorized, sanctioned, or participated in the making of such payments.

The company was registered in May, 1891, and went into voluntary liquidation in April, 1892. On the 30th of April, 1892, an order was made in the Chancery Division for continuing the voluntary winding up, subject to the supervision of the court. The memorandum of association authorized the directors, *inter alia*, "to negotiate loans for the company or other persons or bodies, to lend moneys, securities, and other properties, to discount and accept bills and deal in all kinds of securities and negotiable instruments, to become securities and guarantors for any purpose, and generally to carry on the business of capitalists, financiers, bankers, merchants, and money-dealers," and "to promote and form, and to assist in promoting and forming any company, and to guarantee the issue of, take, or otherwise acquire, hold, and dispose of shares, debentures, or other securities in any company, and to pay and contribute, either in cash or shares, to the expense of promoting or establishing any company or association."

On the 5th of August, 1891, a resolution was passed at a board meeting, "that, Mr. A. M. Green having requested an advance of £250 against his promissory note at one month's date, and a deposit of 1,000 ordinary shares of this company, paid up, his request be granted, and that a cheque be and is hereby drawn in his favour for £250," the respondents Willett, Adams, and Buchanan being the directors present; and the cheque was thereupon drawn and signed by these respondents.

The minute book for the 5th of August was signed by the respondent Lord Mayo, who was present with all the other respondents at a board meeting on the next day, when he first heard of the transaction, but he proved that he had not only not acquiesced therein by such signature of the minute book or otherwise, but had strongly objected to what had been done. Willett's evidence satisfied the court that he had used due discretion in the matter.

On the 26th of August, 1891, there was another board meeting, and Green having applied for an advance of £2,000 for twenty-one days upon the security of his interest in a contract, and offered for such advance a bonus of £300, it was resolved to advance Green £1,000 upon a first charge upon the contract, and also the deposit of 2,000 ordinary shares of the company, the bonus for the loan to be £150, and to be included in the charge, and a cheque was therefore drawn accordingly and signed by the respondents Campbell, Buchanan, and Adams. The respondent Willett was not present at the passing of the resolution, but was present at the transaction of subsequent business at the board meeting. He also showed that he had protested against this loan to Green both before and after it was made. The names of the parties to the above-mentioned contract were left in blank in the resolution of the board, and the date was not given, but there was evidence that Green was engaged in bringing out a company which was to be called "The Pioneers of Mashonaland Syndicate (Limited)" at this time, and that the directors present at the meeting knew the nature of the contract, which related to the promotion of this company, and believed that its promotion would be beneficial to their company, and made the advance to assist in bringing it out.

The respondent Lord Mayo attended none of the board meetings between the 7th of August and the 5th of November, 1891, when he first became aware of this loan to Green, and expressed his entire disapproval thereof.

There was evidence that the cheques were handed to the solicitor of the company, with instructions to hand them to Green on his giving the agreed security.

Both cheques were handed to Green, and he received the proceeds of them. On the 6th of August, 1891, he gave to the company the promissory note mentioned in the resolution of the previous day, but he never deposited any shares with the company, or gave them any charge or security. He never repaid any part of the money advanced.

Judgment was subsequently obtained against Green by the company, but nothing was recovered by the company under the judgment.

In March, 1892, a receiving order was made against Green, and there was evidence that his creditors were not likely to receive any dividend from his estate. Under these circumstances such negligence in their undertaking and conduct of these transactions as would make the respondents respectively alleged to be concerned therein liable under the 10th section of the Act, was charged against them by the liquidator.

Cozens-Hardy, Q.C., and *Shearman*, for the liquidator.—These directors were trustees for the company, with power, no doubt, to lend money and conduct financial business under the company's memorandum of association, but under an obligation to act as trustees in using the power. [VAUGHAN WILLIAMS, J.—There are two separate questions here. First, were the directors acting within their powers or not? Secondly, if acting within their powers, did they so conduct these transactions as to make them honest exercises of their powers?] The question here is surely one of negligence rather than honesty. [VAUGHAN WILLIAMS, J.—I do not think that you could sue the respondents Willett and Lord Mayo at law, for such negligence as is alleged against them here.] At any rate, as regards the other respondents, the evidence shows that they have been guilty of such negligence in the conduct of these transactions as would render them liable under section 10 of the Companies (Winding-up) Act, 1890, which is now substituted for section 165 of the Act of 1862.

H. Terrell, for Willett, referred to *Speight* v. *Gaunt*, 32 W. R. 435, 9 App. Cas. 1.

Rowden, for Lord Mayo.

Bradford, for Buchanan.—The directors have only shown imprudence here at most, and directors can only be made liable for gross negligence. The evidence is not sufficient to charge them with fraud or misfeasance: see *Overend & Gurney Co.* v. *Gibb*, L. R. 5 H. L. 480, at p. 495, and *Cavendish-Bentinck* v. *Fenn*, 36 W. R. 641, at p. 644, 12 App. Cas. 652, at p. 662. The loss was occasioned by the solicitor handing over the cheques without having received the securities. The solicitor is not the agent of the directors, but of the company.

Eve, for Campbell.

Swinfen Eady, for Adams.—The directors were justified in relying on the solicitor's advice. There

must be *crassa negligentia* to make directors liable for negligence, *In re Faure Electric Accumulator Co. (Limited)*, 37 W. R. 116, 40 Ch. D. 141. [VAUGHAN WILLIAMS, J.—*Crassa negligentia* represents a rule which is worthless for practical application. He referred to the opinion expressed by Lord Esher, M.R. (then Brett, L.J.), in *Marzetti's case*, 28 W. R. 541, that a director, to be held liable, must be "guilty of such negligence as would make him liable in an action."]

Cozen-Hardy, Q.C., in reply.—We do not allege *ultrà vires*, or fraud or dishonesty, but such negligence as would make the directors liable at law. They are consequently liable under section 10 of the Act of 1890.

VAUGHAN WILLIAMS, J.—I do not think that this application can succeed as against Lord Mayo and Colonel Willett for the reasons which have already been stated by me in the course of the argument.

Before going any further I must say a few words with regard to the form of this summons, though my decision does not rest on this. [His lordship read the summons, the substance of which is set out above.] This form is not convenient, and does not seem to be correct. It is not in accordance with the form (No. 758) in Palmer's Company Precedents, 5th ed., p. 847, or with that given in Emden's Winding-up Practice, 4th ed., p. 708. The summons does not sufficiently define the grounds upon which the liquidator's application is based. It does not go on to say on what grounds it is suggested that the payment was wrongful, or an act of misfeasance, so as to make the directors responsible. It may, perhaps, be said that it is not correct to state the grounds in a summons like this. The summons might have been so framed as to give some sort of information as to how the payment was tainted. It might be sufficient if this was shown by the affidavit. But no one reading the affidavits in support, could learn whether the liquidator meant to say that the directors had acted *ultrà vires* or were guilty of fraud, or what was the nature of the misfeasance charged against them. I wish to point out that the summons, with the affidavits, leaves it too much in the dark as to what is charged, but I am not going to decide the case on this.

The court knows now from Mr. Cozens-Hardy what the liquidator's charge is. He does not say that the directors have done something *ultrà vires* the company, or been guilty of fraud or dishonesty, but that they have been guilty of negligence of such a character as to bring themselves within the scope of section 10 of the Companies (Winding-up) Act, 1890.

To answer the question whether that was so or not, one must first look at the section to see what cases come within it, and then see what is the nature of the acts complained of here, and whether they are covered by any of those cases. The section enables the court in a winding up to order directors and others to pay money or compensation when they have "misapplied, or retained, or become liable or accountable for any moneys or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company." Mr. Cozens-Hardy did not say that what was charged was within any of these words except "misfeasance or breach of trust." It has been said that you could not charge a director under the section unless you could show misfeasance in the nature of a breach of trust. However that may be, it is plain that if a director is guilty of such negligence that it cannot be truly said that in doing what he has done he has attempted to perform the duties of a director, then such director is guilty of misfeasance. To use Mr. Cozens-Hardy's words, if the directors did not *bonâ fide* exercise their discretion and judgment as agents of the company, that was misfeasance within the section. I adopt that construction, except with regard to the words *bonâ fide*, and say that, in order to make the directors liable, you must be able to find that they did not really exercise their judgment and discretion in this way.

What is complained of? This is important, because, whatever is the definition of misfeasance, a director cannot be made liable under this section unless damage has resulted from what he did. If there was an earlier act which did the damage and lost the money, you could not make a director liable merely because he was guilty of later acts of misfeasance from which no damage resulted. However you might inquire into later conduct, as throwing light upon earlier acts. [His lordship then read the resolution of the 5th of August, and decided that, in view of the very wide terms of the memorandum of association, the mere passing of this resolution was not an act of misfeasance.]

But it is said that there was misfeasance because a cheque was drawn and the resolution was immediately acted on by handing over the £250 to the solicitor of the company for the purpose of its being at once handed to Green. If I had arrived at the conclusion that that had been done, I should have said that the directors who advanced on security, without waiting for the security to be given, could not have used any discretion or judgment at all. For to do so would be so unbusinesslike an act, that it could not be called a mere error of judgment or imprudent conduct. It is such an act that, to apply the test of Lord Esher, M.R., in *Marzetti's case*, referred to in *Re Faure Electric Accumulator Co.*, it is plain that an agent so acting would incur a common law liability. But the affidavits do not make out that the directors did act in that way. I do not think the directors did direct the solicitor to hand over the cheque without getting the deposit of shares, though I have had doubts about this, having regard to some of their subsequent conduct. The absence for a long time of any complaint, although the directors knew that the shares had not been deposited, goes a long way to show that the directors did not mean that this cheque should be withheld in the meantime.

As to the transaction of the 26th of August, there is more to be said in favour of the directors having exercised their discretion. When one looked at the affidavits it was plain that this advance was made in the interests of the company, as it was to help Green in bringing out a second company, the existence of which would be for the benefit of this company. As to the contract, the directors knew the nature of it, and, though there were the blanks showing that the directors did not know the parties to the contract, the way in which a contract is carried out is a matter of detail rather than substance, for which the directors might fairly rely on their solicitors.

On the whole, the liquidator, on whom the *onus* is, has failed to make out that the directors did not really exercise their judgment and discretion, and the matters being *intrà vires*, the application accordingly fails. It must be dismissed as against Lord Mayo and Colonel Willett, with costs to be paid to them, and as against the other respondents, without costs.

Summons dismissed.

Solicitors for the liquidator, *W. H. Smith & Son.*

Solicitors for the respondents: for Willett, *Garnett & Harrison*; for Lord Mayo, *R. C. Ponsonby*; for Campbell, *T. H. Gibson*; for Adams, *H. Stanley Jones*; and for Buchanan, *Vallance & Co.*

Q. B. Div.
(Pollock, B., and Hawkins, J.) } Oct. 26.

CORPORATION OF LEICESTER v. FRANK BROWN. (a.)

Public Health (Buildings in Streets) Act, 1888 (51 & 52 *Vict. c.* 52), *s.* 3—"*Building*"—*Meaning of term*—*Jurisdiction of magistrates*—*Jurisdiction of High Court.*

In a proceeding before justices under section 3 *of the Public Health (Buildings in Streets) Act*, 1888, *for erecting a building in any street beyond the front main wall of the house or building on either side thereof in the same street, the question whether the thing erected is a "building" within the meaning of the section is a question of fact to be determined by the justices, provided the thing erected is of such a nature that it is capable of being a building, and in such a case the High Court has no jurisdiction to review their decision.*

A photographer erected a wooden structure, 9 *feet* 6 *inches long,* 3 *feet wide, and* 7 *feet high. It was roofed over, and had a glass front and a door to enter by at one end. It was fastened into the ground by four posts, forming part of the structure, and let into the ground to the depth of nine to twelve inches. It was used for the purpose of exhibiting photographs therein, but there was no approach to it for the public.*

Held, that the structure was of such a nature that it was capable of being a building.

The justices having decided that the structure was a building within the meaning of section 3 *of the Public Health (Buildings in Streets) Act*, 1888,

Held, by Hawkins, J., *that the court had no jurisdiction to review their decision.*

This was a case stated by the justices of the Borough of Leicester.

The appellant Frank Brown was a photographer carrying on his business in a house fronting a street called the London-road and at the corner of a street called Saxe Coburg-street, within the district of the Urban Sanitary Authority of the Borough of Leicester. He had erected a wooden structure in front of his house and fronting to the London-road and at a spot 30 feet beyond the front main wall of the house on one side and 27 feet beyond the front main wall of the house on the other side. The structure was 9 feet 6 inches long, 3 feet wide from back to front, and 7 feet high. It was roofed over, had a glass front, and a door to enter by at one end. It was fastened to the ground by four posts forming part of the structure, and let into the ground to the depth of 9 to 12 inches. It was used by the appellant for the purpose of exhibiting photographs therein, but there was no approach to it for the public. The appellant's house had no shop window fronting the London-road, and the structure served the purpose of a shop window. The structure had been erected by the appellant without the written consent of the urban sanitary authority.

An information had been preferred by John Storey, town clerk, on behalf of the Urban Sanitary Authority of the Borough of Leicester, against the appellant under section 3 of the Public Health (Buildings in Streets) Act, 1888, for erecting a building beyond the front main wall of the house without the written consent of the urban sanitary authority. The justices had convicted the appellant, being of opinion that the structure was a "building" within the meaning of section 3 of the Act.

The justices had also convicted the appellant upon an information for building an addition to his house without the written consent of the urban sanitary authority, and there was an appeal from this conviction, but it was not argued, and is not material to this report.

Section 3 of the Act enacts that ". . . it shall not be lawful in any urban district without the written consent of the urban authority to erect or bring forward any house or building in any street, or any part of such house or building, beyond the front main wall of the house or building on either side thereof in the same street. . . ."

J. F. P. Rawlinson, for the appellant.—This is not a building. The line must be drawn somewhere. A building must be permanent, not a mere show case: *Hibbert* v. *Acton Local Board*, 5 T. L. R. 274; *Stevens* v. *Gourley*, 8 W. R. 85; *Slauyhter* v. *Mayor of Sunderland*, 60 L. J. M. C. 91, 39 W. R. Dig. 113; *Brown* v. *The Local Board for Health of Holyhead*, 11 W. R. 71; *Moir* v. *Williams*, 40 W. R. 69, [1892] 1 Q. B. 264.

Toller, for the respondents.—The object of the statute was to have a fairly regular front of houses. *Hibbert* v. *Acton Local Board* is distinguishable. That was a decision under a bye-law which had not for its object preserving the line of houses, it was aimed against erecting new buildings. This structure is to be used as long as the owner resides there, and is fastened into the ground. The court will not interfere with the decision of the magistrates that this is a building; it is a question of fact: *Vestry of St. George's, Hanover-square* v. *Sparrow*, 12 W. R. 832; *Bowes* v. *Law*, 18 W. R. 640, L. R. 9 Eq. 636; *Richardson* v. *Brown*, 49 J. P. 661.

Rawlinson replied.

POLLOCK, B.—The conviction must be confirmed. No authority has been cited that in any way fetters us. In *Hibbert* v. *Acton Local Board* there was an expression of opinion that a conservatory attached to a house was not a building, but that was on the construction of a bye-law which provided for the solidity of buildings which should be erected, and provided that they should be solidly built of brick or stone. Such a provision if construed to apply to conservatories would make them useless and prevent their being erected. That bye-law had a very different object to this statute. The case in which a wooden movable pay-box was held not to be a building, was decided on the ground of the movable character and nature of the pay-box. In the present case, the building is not movable, but its object is to assist in the carrying on of the business of the photographer.

The statute does not say "house or other building," it is "house or building," and it may well contemplate such a structure as this unless there is some reason to the contrary. The Act was passed to prevent the erection of buildings in such a position as to be injurious to the access of light and fresh air. One has often seen in urban districts some small erection in a courtyard, such as cages for keeping animals or birds, and these might possibly not be buildings, but a structure of the dimensions of this one might be. What is this particular thing? It is 30 feet beyond the front of the house, 9 feet 6 inches long by 3 feet wide, and 7 feet high; there is a door to enter at one end, and it is fastened to the ground. It is to be there permanently for the purpose of trade. It seems to me that it is of such a nature that it may properly be called a building.

HAWKINS, J.—I think there would have been a good deal in the argument addressed to us on behalf of the appellant if we had been jurors. My mind is not altogether clear as to whether this is a building.

(a.) Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

If the structure were larger and used for taking photographs, I think it would be a building. But on the whole I think it is a building. There may be circumstances where it is quite impossible as a point of law that a structure could be a building. But where it is a question of fact whether it is intended to be permanent so that it can be a building, two people may take different views, and, if so, the question whether it is a building is a question of fact, and the magistrates are invested by the Legislature with the power to decide. They have exercised their discretion. As they have jurisdiction to determine the fact, and they have determined it, we have no jurisdiction to review their decision.

Appeal dismissed.

Solicitors for the appellant, *Morse & Simpson*, for *Parsons, Wykes, & Davis*, Leicester.

Solicitors for the respondent, *Field, Roscoe, & Co.*, for *Storey*, Leicester.

Q. B. Div.
(Lord Coleridge, C.J., and Cave, J.) — Aug. 8, 1892.

REG. *v.* JUSTICES OF SURREY AND BELL. (*a.*)

Criminal law — Conviction by magistrate — Appeal to quarter sessions on ground of excessive punishment — Practice — Respondent not appearing — Jurisdiction of justices to quash conviction.

A person was convicted and sentenced by a magistrate for ill-treating a horse. Upon his appealing in due form to the court of quarter sessions upon the ground only of excessive punishment, the prosecutor failed to appear, and the justices quashed the conviction altogether.

Held, that, since the prosecutor failed in his duty to adduce evidence upon the appeal in order to justify the sentence, the justices had no materials before them to enable them to decide that any punishment was proper, and that they were bound to quash the sentence; and that, as, upon the authority of R. *v.* Vipont, 2 *Burr.* 1163, *a conviction without a sentence was bad, the justices had jurisdiction to quash the whole conviction.*

Rule *nisi* for a writ of *certiorari* to bring up in order that it might be quashed an order of the Surrey Court of Quarter Sessions of the 5th of April, 1892, quashing a conviction made by a metropolitan police magistrate, upon the ground that the court of quarter session had no jurisdiction to make such order. The grounds alleged for such want of jurisdiction were that the notice of appeal served upon the prosecutor set forth that the ground of appeal was that the punishment was excessive only, and no appeal against the conviction was before the court, and, further, that the said notice of appeal was bad on the face of it.

The defendant, Philip Henry Bell, was convicted on the 25th of November, 1891, of having cruelly ill-treated a horse, and was sentenced by the magistrate to fourteen days' imprisonment with hard labour.

The defendant duly served his notice of appeal, which was, so far as material, in the following form: "Take notice that the above-named Philip Henry Bell intends to appeal against the decision of Montagu Williams, Esq., who this day sentenced him to fourteen days' imprisonment for cruelty to a horse, upon the ground that the punishment is excessive. Dated this 25th day of November, 1891. To the chief clerk and to the prosecutor. G. F. Bell, solicitor for the appellant."

The appeal came on for hearing at the January Surrey Sessions, and by consent of the counsel for the parties stood over to the April sessions.

At the April sessions no one appeared on behalf of the prosecutor, and the court, upon the application of counsel for the defendant, quashed the conviction altogether.

The prosecutor then obtained this rule, which now came on for argument.

Poland, Q.C., and *Elliott*, for the defendant, showed cause against the rule.—The whole case was before the court of quarter sessions for rehearing; it was therefore incumbent upon the prosecutor to appear in order to prove the facts which justified the conviction. As he did not appear the court was bound to quash the whole conviction: *R.* v. *Purdey*, 13 W. R. 75, 5 B. & S. 909; *Ex parte Hopwood*, 15 Q. B. 121; *R.* v. *The Justices of Surrey*, L. R. 5 Q. B. 466, 18 W. R. Dig. 48; *R.* v. *Chantrell*, 23 W. R. 707, L. R. 10 Q. B. 587; *R.* v. *The Justices of Middlesex*, 25 W. R. 510, 2 Q. B. D. 516.

Colam, for the prosecutor, in support of the rule.—The jurisdiction of the court of quarter sessions was limited by the defendant's notice of appeal. That notice stated the ground of appeal as excess of punishment, and the sessions, therefore, could only modify or increase the punishment. They had no power to quash the conviction altogether, for that was not asked by the notice of appeal. [CAVE, J.—But a conviction without a sentence is bad upon the authority of *R.* v. *Vipont*, 2 Burr. 1163, therefore if the justices could not come to the conclusion that any punishment was proper, they were obliged in effect to quash.] It lay upon the defendant to show that the punishment was improper, and this he did not do. Besides, the notice of appeal was bad for not stating to what court the appeal was to be made: *R.* v. *Recorder of Liverpool*, 15 Q. B. 1070. This misled us into thinking that the appeal was to be to the London Sessions, and was the cause of our not being at the Surrey Sessions.

Lord COLERIDGE, C.J.—Our decision in this case must not be taken as applying in any way to the merits of this case, for they are not before us. We have to determine a point of law, and nothing else. In my opinion this writ of *certiorari* ought not to go. The practice pursued at an appeal to quarter sessions is thus laid down in Dickinson's Quarter Sessions, p. 642, "When the appeal is brought before the sessions by the proof, or on the admissions above-described" (*i.e.*, proof or admission of the service of the notice of appeal), "and is not adjourned, the leading counsel for the respondent, as being the party sustaining the order or other act complained of, opens his case on the merits and adduces evidence in support of it without being confined to the witnesses examined before the magistrates below." Now, in this case the prosecutor, the respondent to the appeal, was the person who wished to sustain the punishment which had been awarded by the magistrate, and which was undoubtedly called in question by the notice of appeal. It was, therefore, incumbent upon him to appear in support of the punishment. The reason of the practice is well stated by Lord Kenyon in *R.* v. *Newbury*, 4 T. R. 475, and Buller, J., assents to his view, "where the appeal comes on to be heard naked and destitute of all evidence before the court, those who have done the act ought to establish the propriety of it by evidence." On this occasion, it appears to me, the practice was rightly followed. The magistrates might

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

have altered the conviction in the amount of the punishment, but there was no one to say either that the punishment awarded was right or what punishment would have been right, therefore the court had nothing to go upon in attempting to amend the punishment. Or they might have quashed the sentence altogether and left the conviction standing; but if they had done that the case would have come within the decision in *R.* v. *Vipont*, that a conviction without a sentence is bad. So that if they had touched the conviction in that way they would in effect have quashed it, which is what they have in fact done. The points upon which this decision rests are technical legal points, but I think they are founded upon good sense and substantial reasons. In my opinion this writ of *certiorari* ought not to go.

CAVE, J.—I am of the same opinion. I think, when one considers the practice which is observed at quarter sessions, that the magistrates adopted the only course that was open to them. A conviction consists of two parts—the verdict and the judgment or sentence, and a man may appeal against the whole conviction or either part of it. Here the defendant appealed against the judgment, not against the verdict. At the sessions he put himself right by proving the service of his notice of appeal, and the prosecutor did not appear.

Now upon appeals to this court the evidence which was given in the court below is put before us, and it lies upon the appellant to prove that the judgment in the court below upon that evidence was wrong. But upon an appeal from magistrates to quarter sessions the court has no evidence at all before it of what passed in the court below, and it cannot form a judgment upon the words of the conviction itself. Therefore, where the verdict is objected to the respondents have to begin and prove the facts upon which they rely, and they are not confined to matters which was proved in the court below. Again, when the adjudication and not the verdict is appealed against the court has no materials upon which to form an opinion that this or that sentence ought to have been imposed; the respondents must establish the facts which justify the judgment. In this case the respondents were not there to do that, and the defendant naturally did not attempt to show what sentence would have been right: he only said that the sentence of fourteen days was not right: there was no one who could satisfy the justices that any punishment was right, and, therefore, they could only say that this adjudication was wrong. If they had simply struck out the sentence the conviction would have been bad; and I think that the justices were right in going to the full legal consequences of what they were bound to do, for if they had taken away the sentence, the conviction could certainly have been brought up to us to be quashed, and the justices only did at once what it would have been necessary for us to do at a later stage.

Rule discharged.

Solicitor for the defendant, *G. F. Bell.*

Solicitor for the prosecutors, *A. Leslie.*

C. C. R.
(Lord Coleridge, C.J., A. L. Smith, L.J., Pollock, B., and Cave and Bruce, JJ.) — Aug. 6, 1892.

REG. v. WAITE. (*a.*)

Criminal law—Carnal knowledge of girl under the age of thirteen—Prisoner infant under the age of fourteen—Incapacity—Presumption of law—Criminal Law Amendment Act, 1885 (48 & 49 *Vict. c.* 69), *s.* 4.

A male person under the age of fourteen years is presumed by the law to be incapable of having carnal knowledge, and cannot be convicted under section 4 *of the Criminal Law Amendment Act*, 1885, *of having carnal knowledge of a girl under the age of thirteen years.*

Case stated by Wright, J., on July 29, 1892, as follows:—

Enos Waite, aged thirteen, was convicted before me at the last assizes for the county of Warwick of the felony of carnal knowledge of a girl under thirteen years of age, namely, of eight years of age. The offence was fully proved. I passed sentence of two months' imprisonment and whipping, but I reserved this case on the question of law which arose at the trial whether a male of less than fourteen years of age can be guilty of an offence against section 4 of the Criminal Law Amendment Act.

See as to rape:—*Reg.* v. *Groombridge*, 7 C. & P. 582; *Reg.* v. *Phillips*, 8 C. & P. 736, 1 Hale P. C. 631.

He is also sentenced to a concurrent term of imprisonment for two months upon an indictment for a common assault upon another girl of eight years of age. The sentence of whipping will not be executed unless before the expiration of the two months the conviction for the felony is affirmed by the court.

If the conviction for felony is wrong, the punishment of whipping (which seems most appropriate to such cases) cannot be inflicted.

The prisoner was not represented.

Stubbins, for the prosecution, mentioned, in addition to the authorities referred to in the case, *R.* v. *Eldershaw*, 3 C. & P. 396; *Reg.* v. *Brimilow*, 9 C. & P. 366, 2 Moody C. C. 122, 1 Hale P. C. 25.

Lord COLERIDGE, C.J.—Hale states the law (at p. 630 of his Pleas of the Crown) as follows:—"An infant under the age of fourteen years is presumed by law unable to commit a rape, and therefore, it seems, cannot be guilty of it, and though in other felonies *malitia supplet ætatem* in some cases as hath been shown, yet it seems as to this fact the law presumes him impotent as well as wanting discretion." Unless there is some clear reason for thinking that the Criminal Law Amendment Act, 1885, has altered the law in this respect, we must hold that this question is governed by the common law as stated by Hale in this passage. Although, as Hale says, in the case of other felonies it may be possible to show the existence of malice in an infant under the age of fourteen years, yet in the case of rape the law presumes an incapacity which is physical and not mental, and judges have very properly refused to admit evidence tending to show that the physical capacity existed in individual cases. There is a *presumptio juris* which cannot be got over; the law is so laid down by Hale, and has remained the same ever since his time, and there is nothing in the Criminal Law Amendment Act to remove the presumption. The case of *Reg.* v. *Brimilow* is an authority that an infant under fourteen

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

years may upon an indictment for rape be convicted of an assault, but it does not alter the law as to a conviction for rape or attempted rape. Here there is no question as to the attempt; that did not come before the jury.

There is the second conviction for a common assault, to which no objection is taken; that conviction, therefore, stands, but the conviction under section 4 must be quashed.

A. L. SMITH, L.J.—The authorities upon this point are uniform from the time of Hale downwards. This conviction is for the full offence, no question arising as to the attempt. The conviction for a common assault is not objected to, the result is that the prisoner must suffer the sentence of two months' imprisonment which has been imposed for that offence, but he cannot suffer the punishment of whipping to which he was sentenced for the graver offence.

POLLOCK, B., CAVE and BRUCE, JJ., concurred.

Conviction under section 4 of the Criminal Law Amendment Act, 1885, *quashed.*

Solicitor for the prosecution, *Solicitor to the Treasury.*

Court of Appeal.

From Chan. Div. (Lindley, Bowen, and A. L. Smith, L.JJ.) — Nov. 11.

In re HOYLE.
HOYLE *v.* HOYLE. (*a.*)

Guarantee—Parol—Recital in will—"Note or memorandum in writing"—Statute of Frauds (29 *Car.* 3, *c.* 3), *s.* 4.

A testator, being in partnership with the two defendants, and his son being indebted to the firm, verbally agreed to "guarantee" such indebtedness. By his will he recited that his son was indebted to the firm, and that he had "guaranteed" the firm against loss in respect of such debt, and he directed that his son should stand released from all personal liability for it. By a codicil he confirmed the "guarantee."

Held, that, if there was such a guarantee as the 4th section of the Statute of Frauds referred to at all, there was in the will and codicil a sufficient note or memorandum in writing within the meaning of the section to take the case out of the operation of it.

Semble, *that a promise to pay made by a person to himself and others was not a guarantee at all within the Statute of Frauds.*

Decision of Kekewich, *J., reversed.*

Appeal from a decision of Kekewich, J.

The question was whether a recital in a will was a sufficient "note or memorandum in writing" of a parol guarantee or indemnity within the meaning of the 4th section of the Statute of Frauds.

From February, 1877, till his death in December, 1885, John Theodore Hoyle, the testator, was a member of the firm of Hoyle, Shipley, & Hoyle, which carried on business as solicitors at Newcastle-upon-Tyne.

From the year 1871 till his death in September, 1879, Savile Richard Hoyle, the testator's son, was practising as a solicitor in London, and acted as agent for the firm of Hoyle, Shipley, & Hoyle. He having become indebted to his father and to the firm, it was arranged that he should execute and give to his father, J. T. Hoyle, certain mortgages to secure the amount due from him to his father and the firm, and that J. T. Hoyle should guarantee to the firm whatever balance might ultimately be found due from S. R. Hoyle to the firm. Pursuant to the arrangement S. R. Hoyle executed and gave to J. T. Hoyle certain mortgages, and J. T. Hoyle thereupon verbally agreed to guarantee to the firm S. R. Hoyle's indebtedness. This guarantee was described in an affidavit of the defendant Joseph Aynsley Davidson Shipley, one of the two surviving partners of the firm, as a guarantee "to our said firm" of "whatever balance might ultimately be found due from the said Savile Richard Hoyle to our said firm." In the affidavit of the defendant Theodore Hoyle, the other surviving partner, it was described as a guarantee to "the said Joseph Aynsley Davidson Shipley and myself against any loss in respect of the indebtedness of my said brother to our said firm, and that my father could either pay the amounts which might be found due from my said late brother, S. R. Hoyle, or that my father's account with the firm should be debited therewith."

By his will, dated the 20th of August, 1879, subsequently to the guarantee, J. T. Hoyle recited (paragraph 14) that his son, Savile Richard Hoyle, was indebted to him and to the firm of Hoyle, Shipley, & Hoyle in divers sums of money for loans and otherwise, and might become further indebted, and that the testator had guaranteed the firm against loss in respect of the same indebtedness. And he directed that the aggregate amount of interest in which the said S. R. Hoyle should be indebted at the testator's death to him alone, or to him along with his partners in the said firm, should be brought into hotchpot in ascertaining the amount or value of his share, to be held upon trust for his wife and children under his will, and that the said S. R. Hoyle should stand released from all personal liability for or in respect of the same debts.

By a codicil to his will, dated the 31st of August, 1881, the testator (clause 7) confirmed the guarantee mentioned in the 14th paragraph of his will.

The testator died on the 23rd of December, 1885, and his will and codicil were duly proved on the 6th of January, 1887.

The present action was commenced for administration of the testator's estate, the two defendants being the testator's executors as well as being his surviving co-partners. Upon an application made by Annie Hanson Nelson, who then had the conduct of the action, for the judge's opinion under ord. 55, r. 69, of the Rules of the Supreme Court, 1883, an inquiry was ordered, on the 12th of April, 1892, on the point of law whether the testator was liable at his death under any, and what, guarantees or indemnities to the firm of which he was a member in respect of any debt due to such firm by Savile Richard Hoyle.

The chief clerk by his certificate dated the 9th of May, 1892, found that the testator was liable under his verbal guarantee to the firm in respect of the debt due to the firm from S. R. Hoyle.

Upon a summons taken out to vary the chief clerk's certificate, on the 9th of July, 1892, Kekewich, J., being of opinion that there was no promise or note or memorandum in writing of an agreement by the testator to answer for the debt, default, or miscarriage of S. R. Hoyle within the provisions of the Statute of Frauds, ordered that the certificate be varied by finding that the defendants were not entitled to the benefit of any such guarantee or indemnity as in the order of the 12th of April, 1892, mentioned.

(*a.*) Reported by ARTHUR LAWRENCE, Esq., Barrister-at-Law.

The defendants appealed.

Renshaw, Q.C., and *H. Greenwood*, for the appellants.—(1) If there is here such a guarantee as the Statute of Frauds applies to, the recital in the will is a sufficient note or memorandum to satisfy the statute, which merely touches the evidence of the contract, not the contract itself: *Sievewright* v. *Archibald*, 17 Q. B. 103 (*per* Erle, J., at p. 107); *Barkworth* v. *Young*, 5 W. R. 156, 4 Drew. 1; *Jones* v. *Victoria Graving Dock Co.*, 25 W. R. 348, 2 Q. B. D. 314 (*per* Lush, J., at bottom of p. 323); *Millington* v. *Thompson*, 3 Ir. Ch. Rep. 236. (2) But it was not a guarantee at all, but a primary debt.

They also referred to *Wildes* v. *Dudlow*, 23 W. R. 435, L. R. 19 Eq. 198, and *Welford* v. *Beazeley*, 3 Atk. 503.

Warmington, Q.C., and *Warrington*, for the respondents.—(1) There was a debt owing from the son to the firm, and the testator gave an indemnity for this debt; the testator's debt was a secondary, not a primary, one. [BOWEN, L.J.—Was it not this, that the testator practically said to his two partners, that, if they would give his son time, and there should eventually turn out to be a loss, he would indemnify the two for that loss?] It was a promise to pay such part of the debt as the son should not pay. (2) There is no sufficient memorandum to take it out of the statute. If the matter had arisen in the testator's lifetime, the will would have been no evidence. It was not meant to be such a memorandum as the statute requires. A will is an ambulatory instrument. [LINDLEY, L.J.—*Leroux* v. *Brown*, 1 W. R. 22, 12 C. B. 801, shows plainly enough that the statute does not touch the contract, only the evidence of the contract.] [BOWEN, L.J., referred to *Lucas* v. *Dixon*, 37 W. R. 370, 22 Q. B. D. 357.] It is not a note or memorandum of the same thing as is shown to have taken place by parol. An entry in a diary may be sufficient, because there the person making it could have no other motive in doing so than as evidence of its truth; but it is not so in the case of a will. [BOWEN, L.J.—Your mistake seems to be that you make out intention to have something to do with the matter; it is a mere matter of evidence, not of intention.]

LINDLEY, L.J.—This case is a curious one. The testator was in partnership with the defendants, and the son being indebted to the firm, and not being able to pay, an arrangement was come to that the son should place securities with his father, and that the father should guarantee the firm against the son's indebtedness. The father having died, the benefit of the guarantee is claimed, but the answer is made, No, there is no sufficient memorandum to take the case out of the Statute of Frauds. The fourth section of that statute says that "no action shall be brought whereby to charge the defendant upon any special promise to answer the debt, default, or miscarriages of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." That section has been the subject of discussion for generations, and the construction of it has been to a certain extent settled. For one thing, it is settled that it does not touch the contract itself, it merely affects the evidence of the contract. *Leroux* v. *Brown* shows that plainly enough. Again, the evidence in writing must exist at the time of action brought: *Sievewright* v. *Archibald*. Bearing these facts in mind, there is this further consideration to be remembered, that the contract must be such a contract as, if it were in writing, would be valid. Now supposing that the present contract had been one in writing, could an action have been brought upon it at all? I think not, and for the reason, that an action cannot be brought upon a promise made by a man to himself and others. If the promise was made to the firm, then the Statute of Frauds does not apply. Let us look and see what the promise in the present case was. On the evidence it does not appear to me that such a guarantee is disclosed as is within the Statute of Frauds at all. But, if it is, it is said that a recital of a contract in a will is not a note or memorandum thereof within the statute. I cannot accede to that. Whether one looks at it from the point of view of principle, or whether one scans the words of the statute, I think that argument is equally untenable.

The object of the statute, as was explained in *Welford* v. *Beazeley* and *Barkworth* v. *Young*, is to avoid perjury on the one hand and fraud on the other. It seems to me that any document signed as the statute requires is sufficient. If we look into decided cases we find that the idea of the contract need not be present to the mind of the person making the note or memorandum. Affidavits sworn for other purposes have been held sufficient, and so have all kinds of other documents. I cannot see why a will should not be sufficient if it contains a note or memorandum of the subject-matter in question. That is my view as a matter of law. The statement in paragraph 14 of the will is all important. It says this: [His lordship stated the provisions of the paragraph to the effect set forth above, and proceeded:—] That is as plain an admission as possible, by the testator that he had guaranteed the firm against loss, and I think it is amply sufficient to take the case out of the statute, if the Statute of Frauds applies to it at all; but for the reasons I have given I do not consider the case comes within it at all, and the appeal in either case must be allowed.

BOWEN, L.J.—I think this appeal must be allowed. Both points must be decided in favour of the appellants. I think there is here an original promise, and not a guarantee within the Statute of Frauds; but if it is within the statute, I think the recital in the will is a sufficient note or memorandum. First, is the case within the statute? In my opinion it was an original debt of the testator's, and not a guarantee at all. A man cannot, in the eye of the law, promise to himself and other people. What the testator did was to promise to his partners in such a way as to make the debt an original one. A promise which a man makes with himself is not within the statute. But if it is, I think there is ample evidence to take it out of the statute. A catena of cases down to *Gibson* v. *Holland*, 14 W. R. 86, L. R. 1 C. P. 1, and *Lucas* v. *Dixon*, 37 W. R. 370, 22 Q. B. D. 357, support this view. The court looks for evidence, not for intention. The question whether the person making the evidence means it to be evidence or not, has nothing to do with it from the point of view of the statute. Whether it be a letter to an agent or to a friend, or even a letter from a man to himself, provided it be signed, it would be sufficient, if the terms of the contract can be conclusively proved from it. But the case is to be decided, in my view, on the first ground—*i.e.*, that it does not come within the statute at all.

A. L. SMITH, L.J.—There are two points: (1) whether the case comes within the Statute of Frauds at all, and (2) whether, if it does, there is any sufficient note or memorandum to take it out. But it is not necessary in the view I take to decide the first point, although I do not wish to be taken to differ as

o it from the other Lords Justices. On the first point, the question is whether the promise here was an original or a secondary one. It seems to me to be on the border line, but I will assume it to be a secondary one. If, then, it is, a secondary promise, is there a sufficient note or memorandum in writing to take it out of the statute? A letter written to a third party is sufficient; it has been held that an affidavit in answer under order 14 is sufficient; an entry made in a diary is sufficient against, though not in favour of, the person making it. The question is not one of intention; but it is, Is the note or memorandum *de facto* drafted and signed by the person to be charged? In the present case the fact is expressly recited in the will; why should that not be sufficient? It seems to me to be ample.

Appeal allowed.

Solicitors for the appellants, *Nash, Field, & Withers*, for *Hoyle, Shipley, & Hoyle*, Newcastle.

Solicitors for the respondents, *Patersons, Snow, Bloxam, & Kinder*, for *Ransom, Nelson, & Mesnard*, Sunderland.

From Q. B. Div. (Lord Esher, M.R., and Bowen and Kay, L.JJ.) — July 22, 1892.

ASSICURAZIONI GENERALI AND SCHENKER & CO. *v.* STEAMSHIP "BESSIE MORRIS" CO. (LIMITED) AND BROWNE. (*a.*)

Ship—Charter-party—Contract of carriage—Exception of perils of the sea—Obligation to complete voyage where damage to ship reparable.

The exception of perils of the sea contained in a charter-party will not relieve the shipowner from his obligation to complete the voyage by carrying the cargo to the port of destination in the chartered ship if the damage caused by such perils is capable of repair within a reasonable time and at a cost not exceeding the value of the ship when repaired.

This was an appeal from the judgment of Collins, J., in an action by the charterers against the owners and the master of the steamship *Bessie Morris* upon two instruments signed by the master, by which he promised to pay to the order of the charterers the sum of £124 received by him for necessaries, and the sum of £272 for difference of freight and for advance disbursements forty-eight hours after arrival of his vessel at London.

By the charter-party entered into between the plaintiffs and the defendants it was agreed that *The Bessie Morris* should proceed to Fiume and to one, two, three, or four Adriatic ports and there load a cargo, and proceed to a safe port in the United Kingdom and deliver the cargo, unless prevented by any of the excepted perils, including perils of the sea. The charterers nominated London as the port of destination. In accordance with the charter-party the vessel proceeded on her voyage from Fiume to London. When near Gibraltar, however, on the 2nd of March, she went ashore. A contract was made with salvors to get the ship off at an expense of forty per cent. of her value when delivered in Gibraltar. The salvors got the ship off, and received £2,900 as their remuneration. The ship was then temporarily repaired at Gibraltar at an expense of £750. Of the cargo, part had been jettisoned, part washed out, part was damaged and sold at Gibraltar under the advice of surveyors, and the remainder was sent on to London on two other steamers at a cost of £66. When the temporary repairs were completed, on the 25th of April, *The Bessie Morris* proceeded with a cargo of esparto grass to Garston, near Liverpool, earning a freight of £572. At Liverpool considerable sums were expended in completing the repairs; but it was not proved that the total expenditure exceeded the value of the ship.

At the trial, before Collins, J., without a jury, the learned judge found that the defendants might have repaired the ship so as to carry forward a substantial part of the cargo to its destination in London without unreasonable sacrifice and without unreasonable delay; and he held that they, consequently, were not absolved from their obligation under the charter-party to proceed with the cargo to London; that having, without necessity and without the consent of the plaintiffs, broken up the voyage at an intermediate point, they could not pray in aid their own act in not proceeding to London as an answer to the action; and that the plaintiffs were, therefore, entitled to the benefit of the defendants' promise just as though the ship had reached London in fact ([1892] 1 Q. B. 571, 40 W. R. Dig. 238).

From this judgment the defendants appealed.

Bigham, Q.C., and *Hurst*, for the defendants.

Sir Walter Phillimore, Q.C., and *Joseph Walton*, for the plaintiffs, were not called upon.

Lord ESHER, M.R.—By the charter-party in this case it was agreed that the shipowners would carry the cargo offered by the charterers safely to a port to be nominated by the latter. The charterers did nominate a port—viz., London—and there was, therefore, an absolute contract on the part of the shipowners to carry the goods to London. The charter-party contained the ordinary exception as to perils of the sea. The shipowners did not bring the cargo to London. The question is whether they were prevented by the perils of the sea. The vessel took the ground at Gibraltar. If it had been impossible to get her off, obviously she would have been prevented from completing her voyage by perils of the sea. But she was got off. If again she had been got off at a place where she could not have been repaired, or in such a condition that she could not have been repaired within such a reasonable time as not to break the continuity between the voyage before and after repairs, and, therefore, not so as to leave the voyage the one specified in the contract, she would have been prevented from fulfilling the contract by perils of the sea. But nothing of the sort happened here. The vessel was at Gibraltar, where it could be repaired. It was the shipowners' duty to repair if they could possibly do so. That must be a business possibility, however, and, as Maule, J., says in *Moss* v. *Smith*, 19 L. J. C. P. 225, in matters of business a thing is commonly treated as impossible when it is impracticable, and as impracticable when it cannot be done without laying out more money than the thing is worth. He goes on to say that, according to the ordinary measure which has been adopted, repairs to a ship are impossible if, when the ship is repaired, her value will not be so great as the money expended to put her into repair. But this vessel was in fact repaired at Gibraltar sufficiently to carry her to Liverpool, a longer distance than to London, at a cost of £750, far less than the value of the vessel when repaired, even after deducting the £2,900 salvage expenses from that value. The vessel, therefore, could be repaired at a cost at which no reasonable man would have failed to repair it. Consequently the owners were not prevented from

(*a.*) Reported by JOHN P. MELLOR, Esq., Barrister-at-Law.

completing the voyage by perils of the sea. They ought to have brought the cargo to London, and they broke their contract by not doing so. The case is a perfectly clear one. We have nothing to do here with any question of constructive total loss, which can only arise where the question is one of insurance. As to damages, the freight here was a lump sum; and the effect of that is that if the vessel arrives with any part of the cargo the shipowner is entitled to the lump freight; but where the voyage is not performed at all, and the performance is not prevented by perils of the sea, no freight at all is due. That was the case here. Therefore, whether the money which has been advanced by the charterers to the master of the ship is regarded as a mere loan or as prepaid freight is immaterial. If it is regarded as prepaid freight, the freight has never been earned, and the money must be repaid. If it is regarded as a mere loan, it has been advanced for payments which the shipowners were bound to make, for payments, consequently, for which the master had authority to borrow. The charterers are entitled to recover that money from the shipowners. They are also entitled to recover any damages naturally resulting from the non-completion of the voyage. If, in consequence of the goods being taken to another port, the charterers have not received them, they are entitled to their full value and to any profits they would have made on the sale of them. The judgment at the trial was quite right, and this appeal fails.

BOWEN, L.J.—I am of the same opinion. There was in this case a contract to perform a particular voyage unless prevented by perils of the sea, and the only excuse made by the shipowner for not performing that voyage is that she was prevented by perils of the sea. Now his vessel undoubtedly went aground, and he had then to consider whether he could complete the voyage. She was bound to complete the voyage if she could do so at an expense that was not unreasonable. She was got afloat and was repaired in time to have completed the voyage. As the vessel was in fact repaired and did proceed upon a voyage, it is clear that it was not impossible for her to do so, that she was not a constructive total loss, therefore, and that the performance of the voyage contracted for was not prevented by perils of the sea. In *Moss* v. *Smith* Maule, J., says:—"The ordinary measure which has been adopted is, if when the ship is repaired her value will not be so great as the money expended to get her into repair, the repairs are, practically speaking, impossible, and the ship irreparably damaged; and a ship irreparably damaged is totally lost." In the same case Cresswell, J., says:—"Now, when is a shipowner said to be prevented by the perils of the sea from fulfilling his contract? Why, when the ship is so much damaged by perils of the sea as to be rendered incapable of performing the voyage. That is the case when perils of the sea are the only exception introduced into the contract. When a ship has sustained sea damage to a certain extent, she is not, therefore, incapable of performing the voyage because she wants repairs; otherwise the most casual injury, as the loss of the rudder, without which a ship could not navigate in safety a single mile, would render her incapable. If a ship sustains so much sea damage that she cannot be repaired; if she is at a place where she cannot be repaired and rendered competent to navigate, then she is prevented from fulfilling the voyage by perils of the sea. If the ship is totally lost, sunk, submerged, destroyed, she is again prevented by perils of the sea. The courts have also engrafted this further qualification, that, if the owner can show that the damage sustained by the perils of the sea is so great that he could not prudently and reasonably be called upon to repair the damage, he is then prevented from fulfilling his contract by perils of the sea, and he may treat such damage as a total loss." In the present case, however, there is no questtion as to whether the ship might not reasonably have been repaired. The repairs were actually done. Even if the shipowner would have been justified in treating this ship as incapable of being repaired, he did not do so. He cannot say that the ship was not worth the cost of repair after he has repaired. The completion of the voyage, therefore, was not prevented by perils of the sea; and the lump freight which was paid in advance by the charterers to the master must be repaid by the shipowner. The appeal must be dismissed.

KAY, L.J.—This action may be treated as one by the charterers of a ship to recover damages from the shipowner for non-completion of the voyage specified in the charter-party. The defence is that the completion of the voyage was prevented by perils of the sea. But a voyage to a port beyond the one specified in the charter-party was in fact completed; so that the voyage to the specified port was not prevented at all. The contention that the vessel might have been treated as a constructive total loss, on the ground of the cost of repairing her, becomes immaterial in view of the fact that she was repaired and made a voyage to Liverpool. The ship was taken from Gibraltar to Liverpool and there a large outlay was made upon her, which the defendants seek to add to the expenses incurred at Gibraltar in order to make out that the cost of repair was more than the value of the ship. There is no evidence, however, that the total expenditure on the ship was more than its value. As to the other point, whether the money borrowed by the master from the charterers for disbursements is considered as a loan or as advanced freight, the shipowner is bound to repay it. The appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Field, Roscoe, & Co.*, for *Bateson, Warr, & Bateson*, Liverpool.

Solicitors for the respondents, *Stokes, Saunders, & Stokes.*

(1904) 2 Ch. 279

High Court of Justice.

Chan. Div. } Oct. 28, 29.
Chitty, J. }

HOOPER *v.* WESTERN COUNTIES AND SOUTH WALES TELEPHONE CO. (LIMITED). (*a.*)

Company—Voluntary winding up—Sale of business to another company—"Reorganization or reconstruction" of a company—Meaning of words—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 161.

Certain debentures were issued by the W. Company, securing payment of principal in 1896, *and containing covenants respectively to pay the same in accordance with the conditions indorsed thereon; and in each case condition* (1) *was that the defendant company might, after one year from the date thereof, redeem the debenture by giving three months' notice and paying to the holder* £105 *for every* £100 *capital secured, with interest up to the date of payment; and condition* (4) *was that, "if the company commenced to be wound up otherwise than for the purposes of reorganization or reconstruction," the*

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

principal should become immediately payable. In 1892 the W. Company proceeded to wind itself up for the purpose of carrying out an agreement for its amalgamation with the N. Company, an existing company on a larger scale.

Held, that the principal secured by the debentures became payable when the resolution for winding up took effect under the 4th condition, and that the W. Company were, therefore, entitled to pay off the debentures at par, with interest only up to the date of the commencement of the liquidation.

The meaning of the expressions "reconstruction" and "reorganization" of a company, considered.

Motion.

This was a motion by the plaintiff to restrain the division of any assets of the defendant company amongst the shareholders without making due provision for the fulfilment to the plaintiff of the whole obligations and liabilities undertaken by the defendant company to the plaintiff in nine debentures for £100 each issued by the defendant company to, and then held by, the plaintiff.

It appeared that the defendant company was a provincial telephone company, incorporated in 1884, with a capital of £400,000 divided into 20,000 preference shares of £5 each and 300,000 ordinary shares of £1 each. The defendant company had subsequently issued debentures to the amount of £69,000 in all. The plaintiff was, as stated above, the holder of nine debentures of the defendant company of £100 each.

The plaintiff's debentures were issued at different dates in the year 1889, and secured payment of the principal at corresponding dates in 1896, with interest at five per cent per annum. Each of them contained a covenant to pay the principal in accordance with certain conditions indorsed thereon and for payment of interest. The important conditions were those numbered 1 and 4, the terms of which, so far as material, were as follows:—

"1. This debenture is one of a series of debentures issued, or about to be issued, by the company, for securing principal moneys not exceeding in the aggregate £50,000 . . . subject to the condition that the company may at any time after the expiration of one year from the date of any debenture redeem such debenture by giving three calendar months' notice to the holder thereof of their intention to redeem, and paying to such holder £105 for every £100 capital secured, with all interest up to the day of payment."

"4. If the company makes default for three calendar months in the payment of any interest hereby secured, the registered holder hereof may at any time thereafter, before such interest is paid, call in the principal money hereby secured by notice in writing to the company. . . . And in case any such notice is given, then upon the expiration thereof, *or if the company commences to be wound up otherwise than for the purposes of reorganization or reconstruction*, then on the day of such commencement the principal money hereby secured shall become immediately payable."

In June, 1892, a provisional agreement was entered into between the defendant company and the National Telephone Co. (Limited) for the sale to the latter company of the defendant company's entire assets, with certain specified exceptions, in consideration of the allotment by the National Telephone Co. of certain shares therein to the defendant company or its nominees in exchange for shares in the defendant company, and also in consideration of a provision for the exchange at par of the debentures of the defendant company for debentures of the National Telephone Co., and of a sum in cash equal to the par value of the preference shares and debentures held by persons not consenting to exchange.

The following special resolutions were shortly afterwards duly passed and confirmed at extraordinary general meetings of the defendant company, namely:—

(1) That the agreement . . . expressed to be made between this company and the National Telephone Co. (Limited) for the amalgamation of the two companies by a transfer of the business and property of this company (with certain exceptions) to the National Telephone Co. (Limited) be and the same is hereby approved.

(2) That with the view of giving effect to the agreement, and in order to enable the shares to be allotted thereunder as part of the purchase consideration to be distributed among the members of this company, this company be wound up voluntarily under the Companies Acts, and that Mr. Welton, chartered accountant, be and he is hereby appointed liquidator for the purpose of winding up its affairs and distributing its property.

(3) That pursuant to the 161st section of the Companies Act, 1862, the liquidator be, and he is hereby authorized to carry the said agreement into effect, and to receive the shares agreed to be allotted and the cash payable thereunder, and to distribute the same among the members of this company.

The evidence showed that the defendant company was solvent and prosperous, and that the National Telephone Co. was another telephone company with wider operations and a larger capital.

The plaintiff, in August, 1892, received a circular from the liquidator stating that, under the said agreement, the holders of debenture stock (*i.e.*, of the defendant company) had the option of taking up preference shares of the National Telephone Co., or might receive instead a payment in cash equal to the nominal or par value of their debentures, and requesting him to signify his choice in the matter. A majority of the debenture-holders consented to the proposed exchange, and the remainder accepted the full par value of their debentures, with the exception of the holders of debentures to the amount of some £1,800, amongst whom was the plaintiff. The question raised by this motion, and the only point in the action, was whether the plaintiff was entitled, in the events which had happened, to be paid a premium of £5 per cent. on each debenture, with interest on the amount thereby secured to date of payment, or was bound to accept the amount of the debenture, with interest only up to the date of the commencement of the liquidation. The hearing was treated by consent as the trial of the action.

Upjohn, for the plaintiff.—The contract by the defendant company to pay a premium of £5 for each £100 on redemption before 1896 is not rendered null and void by the liquidation, the whole transaction amounting in effect to a reorganization or reconstruction of the defendant company. [He referred to the text-writers mentioned in the judgment.] Moreover, if I am wrong as to this, the 1st and 4th conditions are for my benefit, and the company cannot wind itself up under condition 4 to my prejudice.

He referred to the observations of the judges in *Gooch* v. *London Banking Association*, 32 Ch. D. 41, 34 W. R. Dig. 38, on the effect of the special terms of redemption in condition 1.

Farwell, Q.C., and *Kirby*, for the defendants.—It is not a reconstruction of a small company, where a large company swallows it up, as the National Telephone Co. has swallowed up our company. A new company, formed to take over the old company, is of the essence of reconstruction. Reorganization, like

reconstruction, supposes the continuance in substance of the old company. The question is, What is the substance of the transaction? It was not a mere form here; what was really intended was a sale. The text-writers are in our favour.

They referred also to section 161 of the Act of 1862.

Upjohn, in reply, referred also to Mr. Chadwyck Healey's book on Companies, p. 378. [CHITTY, J.—Mr. Kirby argues that there is a known form of reconstruction which no lawyer would say is not reconstruction, and that may be the true view, though the word does not occur in any Act. If the word is not used as strictly, it, at any rate, involves something which is not out and out sale.] This transaction was not a sale.

CHITTY, J.—The question which I have to decide turns upon the true construction of the 4th condition in these debentures, and particularly on the meaning of the words "if the company commences to be wound up otherwise than for the purposes of reorganization or reconstruction." The debenture was by the earlier conditions (see in particular condition 1) not payable till 1896. There is power under condition 1 for the company to redeem on certain terms, the chief of which is payment of £105 for every £100 secured. So stands the contract apart from the 4th condition. The plaintiff's case is that the principal secured by the debentures is not now payable; the defendants' that it became payable when the resolution for winding up took effect. A special resolution for winding up was passed in July last. At that time the company, far from being insolvent, was, as far as its assets and business were concerned, a prosperous company. The resolution shows on the face of it that the winding up was for the purpose of carrying out the agreement which had been entered into for the amalgamation of the company with the National Telephone Company. I have to look at the substance of the agreement and see whether this transaction was an amalgamation or whether the transaction fell within the words of exception in the 4th condition, and was a reconstruction or reorganization of the company. On looking at the agreement I find that, with the exception of a sum of cash and the Postmaster-General's licence, the whole undertaking of the defendant company was agreed to be sold to the National Telephone Co., and the consideration was chiefly shares of the latter company, which were to be delivered to the liquidator of the defendant company for distribution among its shareholders. [His lordship then referred to the second and third of the special resolutions of the defendant company for giving effect to the agreement and to section 161 of the Act of 1862, and continued:—] Does that transaction fall within the words "reorganization or reconstruction" in the 4th condition? The words in question are not words of art. They have no technical meaning in law.

Mr. Upjohn asks the court to consider what meaning a layman of ordinary understanding would give to the words. That would be a dangerous course for the court to follow. I take it that an ordinarily prudent member of the public unacquainted with company law would, if he were also ordinarily modest, hesitate before putting a meaning to these words. The better course is to refer to persons acquainted with the subject. Reference was made in argument to text-writers on company law who, although, of course, not authorities, are nevertheless persons conversant with the subject, and who have made it a special study, in order to show in what sense these words are taken by those conversant with the subject. Mr. Upjohn had to admit that he could find no text-writer on company law who, when writing on the reconstruction of companies, uses the word "reconstruction" in a sense which would include this transaction. It is plain from the form of the 4th condition that it contemplates reconstruction after a winding up, including a voluntary winding up.

What is included in "reconstruction" by persons conversant with company law? There is one mode of reconstruction which may perhaps be said to be within the strict sense of the term. That is when there is a winding-up order, an arrangement with creditors sanctioned by the court under the Joint-Stock Companies Arrangement Act, 1870, and a stay of the winding up, upon which the old company, having reconstructed itself according to the arrangement, would recommence business and go on as the old company. That would certainly be reconstruction within the condition. The company would still continue to exist. But that, and that alone, would be too narrow a meaning to give to "reconstruction" here. The usual mode of reconstruction is when a company resolves to wind itself up, and proposes the formation of a new company, which is to consist of the old shareholders, and to take over the old undertaking, the old shareholders receiving shares in the new company. In that case the old company ceases to exist in point of law, and there is in form a sale to the members of a new corporation. But the company is in substance, and may be fairly said to be reconstructed. It may no doubt be said that there is no power in such a case to compel dissentient members to come in, but such a scheme is not put on foot until it has been ascertained practically that the old shareholders will come in.

Mr. Palmer's well-known book was the first referred to, and it deals elaborately with reconstruction (5th ed., pp. 640-660). He uses the term throughout as only applicable when a new company is started to take over the business of the old company, and he treats it as essential to a scheme of reconstruction that a new company should be formed. The same writer, in subsequently dealing with "amalgamation" (pp. 661-671), includes under that head the case of a sale by a liquidating company of its assets to another existing company for shares in the latter company. Mr. W. F. Hamilton ventures on a definition of reconstruction as a transfer of the undertaking and assets of one company to a new company formed for the purpose of acquiring the same (Manual of Company Law, p. 260). Reconstruction is mentioned in Mr. Buckley's book as sale and transfer of the assets to a new company (6th ed., p. 391), but that is obviously not intended to be exclusive. Lindley, L.J., in his treatise says that "reconstruction differs from amalgamation in that, as a rule, there is only one transferring company, and the company to which the property in question is transferred is practically the same company with some alterations in its constitution" (Law of Companies, 5th ed., p. 900); that appears to me to afford a clue to the meaning of the word as used in a clause like the present. The question to be asked is, whether the new company is practically the same as the old, even though in law it is a separate corporation? According to the text-writers reconstruction does not include amalgamation, or a sale by a company of its undertaking to another existing company. I cannot, then, so read the 4th condition as to make the word reconstruction there, include this transaction. The clause is for the benefit of both parties to the contract, it is not unilateral, and it might have been for the debenture-holder's advantage that his debenture should have become immediately payable. It may not be so in the events which have happened, but it is con-

ceivable that it might have been. In my opinion there was not a reconstruction.

Reorganization, though a less familiar term, can have no wider meaning than reconstruction. Though it is not necessary to express an opinion, I think that the two terms are used as alternative expressions.

The present case is that of a comparatively small company joining with a large company, and the transaction might be compared with the case of a large railway company buying up a small railway company on terms that the shareholders of the small company should receive shares in the larger company. Would any reasonable person call that a reconstruction or reorganization of the small company? The view I take is that the defendant company has not undergone reconstruction or reorganization, and the action must be dismissed, with costs.

Motion refused, and action dismissed.

Solicitors for the plaintiff, *Woodcock, Ryland, & Parker.*

Solicitors for the defendants, *Ashurst, Morris, Crisp, & Co.*

Chan. Div. Kekewich, J. } Oct. 26.

In re BARING.
JEUNE *v.* BARING. (*a.*)

Will—Lease—Rent—Covenants—Fine on renewal—Liability—Trustees—Cestui que trust—*Income or capital.*

Trustees of a will held a renewable lease upon trust for successive life tenants, with remainders over, and the residuary personal estate of the testator upon trust out of the income to pay all the costs, charges, and expenses of executing the trusts of the will, with divers trusts of the residue.

Held, that the trustees, and not the life tenants, were the persons liable to observe the covenants and to pay the rent and outgoings which, on the true construction of the will, should be paid by them out of the income, and that the fine and expenses of renewal of the lease should be borne by the beneficiaries rateably, according to their enjoyment of the lease.

Originating summons.

T. C. Baring by his will bequeathed to his trustees and executors (*inter alia*) his leasehold house in Grafton-street upon trust to permit his wife to occupy the said house during her life, and thereafter upon trust for his son for life, with remainders over; and he bequeathed all his personal estate not otherwise disposed of by his will or any codicil to his trustees upon trust for sale, and out of the net proceeds to pay his funeral and testamentary expenses and debts and pecuniary legacies and the legacy duty thereon, and to hold the residue upon trust for investment as therein mentioned, and upon trust out of the income thereof to pay all the costs, charges, and expenses of carrying into execution the trusts of his will. The testator also directed that the trustees should be entitled to retain for their own use a commission on the net amount of his residuary personal estate received by them in each year after deducting all rates, taxes, insurances, and other outgoings and expenses payable by them under any of the trusts therein contained.

The Grafton-street house was held under two leases for a term of sixty-one years at ground-rents, and both were renewable on payment of a fine.

The testator was assignee of the leases, and covenanted to indemnify the assignor against the rent and covenants.

This was an application by the trustees and executors asking whether the rent, &c., and expenses of repairing the Grafton-street house ought to be paid by the tenant for life or by the trustees, and, if the latter, out of what part of the testator's estate, and whether the trustees ought to renew the leases under which the said house was held, and, if so, out of what part of the estate the expenses of renewal ought to be paid.

Sir Horace Davey, Q.C., and *Ingle Joyce*, for the applicants.—Mrs. Baring, as equitable tenant for life, should pay the rent, repairs, and other outgoings, and also the fines on renewal of the lease: Trustee Act, 1888 (51 & 52 Vict. c. 59), ss. 10, 11; *Ainslie* v. *Harcourt*, 28 Beav. 313; *In re Courtier, Coles* v. *Courtier*, 35 W. R. 85, 34 Ch. D. 136; *In re Fowler, Fowler* v. *Odell*, 29 W. R. 891, 16 Ch. D. 723.

Hornell, for Mrs. Baring.—The trustees must pay the rent and perform the covenants and repairs and pay the insurance and rates, taxes, and outgoings. This case is governed by *In re Courtier, Coles* v. *Courtier*. There is no direction in the will for Mrs. Baring to renew the lease: *Nightingale* v. *Lawson*, 1 Bro. Ch. Cas. 440.

Swinfen Eady, for the next tenant for life.

Davey, Q.C., replied.

KEKEWICH, J.—The testator has given his house in Grafton-street to the trustees of his will upon trust to permit his wife to occupy it during her life, thus making her an equitable tenant for life. I should have thought, but for the case of *In re Courtier, Coles* v. *Courtier*, that she, being tenant for life, ought to keep down those periodical payments which were necessary to her occupation. In that case there was an equitable estate for life as here, and the Court of Appeal expressed the opinion that the tenant for life was not bound to do anything. Cotton, L.J., says: "There is no rule of law that the tenant for life is bound to do these repairs out of the rents and profits," the repairs being necessary in order to perform the covenants in the lease. The case derives additional weight because the appellants relied on *In re Fowler, Fowler* v. *Odell*, and all the Lords Justices distinguished that case on the ground that it was not intended to decide questions between the tenant for life and remaindermen, as was the case in the one before them.

I think, therefore, that Mrs. Baring, while tenant for life, is under no obligation to do any of those things which the trustees as lessees (whether under direct covenant or not is immaterial) are liable to do in order to maintain the property. If she is not bound to do that, still less is she bound to pay any fines for renewals, which is a different matter. It is an *à fortiori* case. Similarly, if she is not liable, the next tenant for life, having a like gift, is also not liable.

Under these circumstances are the trustees liable? I am not called upon to decide this question, as the trustees merely want to know what they ought to pay. I think there is an indication on the will that income charges are to be paid out of income, and that so completely accords with what I think is right on general principles that I hold such was the testator's intention. He directs his whole residuary personal estate to be got in and converted, and then out of the net proceeds his funeral and testamentary expenses, debts, legacies, and legacy duty to be paid. After that the residue is to be held on trust out of the income to pay all the costs, charges, and expenses of carrying into execution the trusts of the will. This

(*a.*) Reported by FRANCIS T. DUKA, Esq., Barrister-at-Law.

must refer to those costs, charges, and expenses which will be of a periodical though variable character. I think, therefore, I have a distinct indication that these income charges must come out of income, and that seems to me to be right on principle, and not that these moneys should be paid out of the *corpus* of the trust estate.

As regards the renewal, once in fourteen years the obligation arises of renewing the lease, and there is a considerable sum to pay. That ought to be distributed over the estate according to the enjoyment of the estate—that is, the persons who have the enjoyment ought to bear the burden in proportion to that charge. That ought to be ascertained by an actuarial valuation.

Solicitors, *R. T. Wragg; Markby, Stewart, & Co.*

Q. B. Div.
(Lord Coleridge, C.J., and Wills, J.) Nov. 24.

PAXTON *v.* BAIRD. (*a.*)

Practice—Writ—Specially-indorsed writ—Appearance—Amendment of indorsement—Summons for judgment—R. S. C., 1883, *ord.* 3, *r.* 6; *ord.* 14, *r.* 1.

A plaintiff commenced an action by serving upon the defendant a writ indorsed with a claim for a sum of money lent, and for interest in the nature of unliquidated damages. The defendant entered an appearance to this writ. On a summons for judgment under ord. 14, *r.* 1, *unconditional leave to defend was granted. The plaintiff then by leave amended his indorsement by striking out the claim for interest, so as to make his writ specially indorsed within ord.* 3, *r.* 6, *and afterwards obtained leave to enter final judgment upon a new summons under ord.* 14, *r.* 1.

Held, that the defendant's appearance to the original writ must stand as an appearance to the amended writ, and that, the defendant having appeared to a specially-indorsed writ, the master had jurisdiction to give leave to enter final judgment.

Gurney *v.* Small, [1891] 2 *Q. B.* 584, 40 *W. R. Dig.* 192, *discussed.*

Appeal from chambers.

The writ of summons in this action, issued on the 24th of September, 1892, was indorsed as follows:—

"The plaintiff's claim is £675 14s. 1d., balance for money lent and interest.

Particulars.	£	s.	d.
1890, Sept. 25, to cash	800	0	0
Interest on £800, Sept. 25, 1890, to Dec. 31, 1890, 97 days at £6 per cent. per annum . .	12	15	1
Interest on £702, Jan. 1, 1891, to Sept. 30, 1891, 273 days at £6 per cent. per annum . .	32	3	5
Interest on £595 15s., Oct. 1, 1891, to Sept. 24, 1892, 358 days at £6 per cent. per annum	35	0	7
	879	19	1

Credit.	£	s.	d.			
1890, Dec. 31, by cash on account . .	98	0	0			
1891, Sept. 30, ,, .	106	5	0			
				204	5	0
Balance . .				675	14	1

The plaintiff also claims interest at the rate of £6 per cent. per annum on £595 15s., part of the above amount, from the date of the writ until payment or judgment."

On October 21, on the plaintiff's summons for judgment under ord. 14, r. 1, unconditional leave to defend was granted. That order was never appealed from.

The plaintiff then applied in chambers for leave to amend the indorsement on the writ, and on November 1 the master ordered: "That the plaintiff be at liberty to amend the writ of summons in this action and the copy thereof filed at the Central Office by striking out the claim for interest in the indorsement of claim on the said writ, and substituting £595 15s. for the figures £675 14s. 1d., and striking out the figures £879 19s. 1d. And it is ordered that the appearance entered herein by the defendant do stand as an appearance to the said writ as amended, and that the writ and other documents herein already served be taken as amended accordingly, and that the costs of and occasioned by the amendment, and this application be defendant's in any event."

This order was not appealed from.

The plaintiff then took out a new summons for judgment under ord. 14, r. 1, and on November 12 the master gave leave to enter final judgment for the amount indorsed on the writ as amended, and on November 17 Charles, J., in chambers, confirmed the decision of the master.

From that order the defendant now appealed.

F. M. Abrahams, for the defendant.—A plaintiff cannot obtain judgment under order 14 unless his writ was in the first instance specially indorsed under ord. 3, r. 6: *Gurney* v. *Small*, [1891] 2 Q. B. 584, 40 W. R. Dig. 192. In this case the writ to which the defendant appeared was not specially indorsed, and he had a right to defend the action: moreover, he was given unconditional leave to defend by the order of the 21st of October, which order still stands. This right cannot be taken away by the subsequent amendment of the indorsement. The defendant's appearance to the original writ cannot be taken to be an appearance to the amended writ, and the master's order to that effect of the 1st of November was made without jurisdiction.

Willes Chitty, for the plaintiff.—This point was left open by the decision in *Gurney* v. *Small*. The amendment cured the original defect in our writ. After the order of the 1st of November (which has not been appealed from) had been made, there was a specially-indorsed writ and an appearance to it by the defendant, and that is all that is necessary to bring the case within ord. 14, r. 1. That rule does not say that the writ must be specially indorsed in the first instance. The defendant's appearance holds good as an appearance to the amended writ.

Abrahams replied.

Lord COLERIDGE, C.J.—It seems to me that the point which is raised in this case has never yet come under decision. It has, however, been noticed in *Gurney* v. *Small*, and in that case my learned brother has expressed his view upon it, and Charles, J., who made the order now under appeal, concurred in his judgment. The point taken is highly technical, but I do not say that it is therefore not entitled to succeed, for the procedure under order 14 requires to be carefully watched. Before that order can apply, there must be a writ specially indorsed under ord. 3, r. 6. In this case there was no special indorsement in the first instance. The defendant appeared to the writ, and upon a summons for judgment being taken out under order 14 unconditional leave to defend was

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

granted. The plaintiff then obtained leave to amend his writ so as to make it a specially-indorsed writ: it is said that that amendment makes it a specially-indorsed writ from the beginning, and I think, though with some hesitation, that that will do. The rules do not say that it is necessary to have a new appearance to an amended writ, and I think that for the purpose of doing substantial justice we may meet the technical objection by saying that the original appearance still stands after the writ has been amended. It follows that the defendant here has appeared to a writ of summons specially indorsed: therefore, order 14 applies, and this appeal must be dismissed.

WILLS, J.—I am glad to be able to come to the same opinion, for to hold the contrary would merely throw further costs upon the parties. As a party to the decision in *Gurney* v. *Small* I may say that I think that that decision was right and is not inconsistent with what we are deciding now. The substance of that decision is that the plaintiff must have his tackle in order before he takes out a summons under order 14. I can see no difference either in policy, justice, or good sense for saying that when the indorsement has been amended before the summons for judgment has been taken out so as to make the writ "specially indorsed" within ord. 3, r. 6, order 14 will not apply. Therefore, I think that instead of having a new writ and a new appearance to it, the old appearance stands as an appearance to the amended writ. In coming to this decision I have purposely given no effect to the words in the master's order of the 1st of November directing that the appearance shall stand—I doubt whether they would be operative—but I think that the appearance does stand, and is an appearance to a specially-indorsed writ. I am fortified in this conclusion by the fact that the order appealed from was made by Charles, J., who was also a party to the decision in *Gurney* v. *Small*. The proper order as to the costs of the proceedings before amendment should be made, and then justice will be done to all and we shall avoid the shame of having to say that an unnaturally narrow construction must be given to the word "appear" in ord. 14, r. 1, and additional and unnecessary expenses must thereby be incurred.

Appeal dismissed.

Solicitors for the appellant, *Blair & Girling*.

Solicitors for the respondent, *Vincent A. Applin*.

IN BANKRUPTCY.

Q. B. Div.
(Vaughan Williams and Wright, JJ.) Nov. 8.

In re POLLITT.
Ex parte MINOR. (a.)

Bankruptcy—Costs of solicitor—Payment by debtor to solicitor to secure his services in preparing balance-sheet and calling meeting of creditors—Execution of deed of assignment by debtor—Act of bankruptcy—Right of trustee in bankruptcy to repayment.

The debtor, who was then indebted to his solicitor in the sum of £40, consulted the solicitor as to his position, with the result that it was resolved that a balance-sheet should be prepared and a meeting of the creditors called. The solicitor declined to act for the debtor on credit, and a sum of £15 was accordingly paid by the debtor to the solicitor to secure his services in the matter. After services to the amount of about £3 had been rendered, the debtor committed an act of bankruptcy by executing a deed of assignment for the benefit of his creditors, and, on the application of the official receiver as trustee in the bankruptcy, the county court judge refused to allow the solicitor to retain the balance of £12 in respect of services rendered after such act of bankruptcy, and directed him to hand it over to the trustee.

Held, that the circumstances under which the payment by the debtor to the solicitor was made did not create a necessity such as would arise in the case of a payment to defend a debtor from a bankruptcy petition which had been presented against him, and that the solicitor was not entitled to retain the money in payment for services rendered after the act of bankruptcy was committed.

Appeal from an order of his Honour Judge Heywood in the County Court of Manchester, by which he directed the appellant to pay to the official receiver as trustee in the bankruptcy the sum of £12 3s. 4d.

The appellant, Mr. P. S. Minor, was a solicitor, and had acted in that capacity for the debtor, who in December, 1891, was indebted to him in a sum of £40 for costs.

On December 11, 1891, the debtor called on the appellant for the purpose of putting his affairs before him, with the result that it was decided that a balance-sheet should be prepared and a meeting of the creditors called.

Under the circumstances the appellant declined to act for the debtor on credit and unless the costs which would have to be incurred in the matter were secured to him, and consequently on December 12, 1891, the debtor paid to the appellant the sum of £15.

On that day the debtor executed a deed of assignment for the benefit of his creditors, which constituted the act of bankruptcy alleged in the petition which was afterwards presented against him, and on the application of the official receiver as trustee in the bankruptcy the county court judge directed the appellant to pay over the sum of £12 3s. 4d., which he claimed to retain in respect of services rendered after the act of bankruptcy had been committed, and only allowed the balance of £2 16s. 8d. costs incurred before that date.

Herbert Reed, Q.C., and *Shearman*, for the appellant.—The case is one of very great importance to solicitors. If a debtor who wishes to consult his solicitor as to his affairs and the advisability of calling his creditors together cannot pay him money for services which the solicitor can retain, a man will be precluded from obtaining any assistance. The case really falls within the principle laid down in *In re Sinclair, Ex parte Payne*, 15 Q. B. D. 616, 34 W. R. Dig. 19, where it was held that money paid by a debtor to his solicitor to oppose a petition could be retained. After the £15 was paid work was done by the solicitor more than sufficient to exhaust the whole of that sum. Further, the solicitor is entitled to retain the money in any event as a set-off to the old debt of £40 which was owed him by the debtor. At the commencement of the bankruptcy there was such a dealing between the parties as to entitle the appellant to a set-off.

Muir Mackenzie, for the official receiver.—The courts have expressed the opinion that the decision in *In re Sinclair, Ex parte Payne*, ought not to be extended: *In re Spackman, Ex parte May*, 38 W. R. 368, 497, 7 Morrell's Bankruptcy Cases, 100. This money was not paid by the bankrupt to resist proceedings, but to enable him to commit an act of bankruptcy. The contention as to set-off is really decided by *Stumore* v. *Campbell*, 40 W. R. 101, [1892] 1 Q. B. 314.

(a.) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

VAUGHAN WILLIAMS, J.—I am of opinion that this appeal must be dismissed. The material facts of this case are that the bankrupt, being in difficulties, consulted his solicitor. At the time he consulted his solicitor he was indebted to his solicitor in £40 for costs. His solicitor says, "I shall not go on unless you pay me for the work I am about to do." It is common ground that the solicitor made no bargain for work he had already done. All that was done was a deposit to secure payment for future services. This money was deposited on the 12th of December, and after the money had been deposited it is common ground that a few services were rendered, which accounts for the difference between £15 and the £12 3s. 4d., the money in dispute on the official receiver's motion. After services had been rendered to that amount the bankrupt committed the act of bankruptcy on which the petition was based. He assigned the whole of his property for the benefit of his creditors, and the result was that he was made bankrupt. Subsequently to the act of bankruptcy, and with full knowledge of it, the solicitor rendered further services to an extent which, apart from any question of taxation, exceeded the balance of £12 3s. 4d. remaining in his hands, and he says that he is not compelled to account to the trustee for that balance, but is entitled to keep it to pay the amount due to him for his services; and alternatively he says that he can keep it to repay *pro tanto* the old debt of £40. In my opinion he has neither the one right nor the other. It is said that the trustee is not entitled to have this balance handed over to him by reason of the decision in *In re Sinclair, Ex parte Payne*. That decision is that where proceedings are being taken against a man to make him a bankrupt there is a legal necessity, if I may use that term, which compels the courts to say that the sum of money spent to defend himself and to try to avoid an adjudication in bankruptcy must be allowed to be retained by the solicitor. If it were otherwise, a debtor when attacked would be defenceless, and would be able to get nobody to defend him. By reason of that legal necessity this exception has been established, and although it was first established as an authority by Cave, J., in *In re Sinclair*, yet I may say from my own personal knowledge that that practice was acted upon more than twenty years ago. But that decision, arising as it does from necessity, is not to be extended. In *In re Spackman, Ex parte May* Cave, J., himself said that that decision is not to be extended. He says there: "It seems to me impossible to say that what the appellants did was a necessity within the rule laid down in *In re Sinclair*. They were engaged in doing the same thing as a trustee under a deed of arrangement. They were trying to make arrangements to avoid bankruptcy and to withdraw the estate from the bankruptcy court, and we never held that a man engaged in so doing is justified in charging the estate with costs incurred in that way." That is precisely what has been done in the present case, and Cave, J., says that whatever extension there may be there is not to be this extension. He goes on, "It would be still more monstrous if solicitors, who are not trustees under a deed, and must be presumed to know the law, should be allowed to spend the money of the trustee in trying to get creditors together and avoid proceedings when it would not be allowed in the case of an ordinary trustee. This case does not fall within the principle of *In re Sinclair*, and for my part I am not prepared to extend that case in either of the directions contended for beyond the limit laid down there." When that case came before the Court of Appeal Lord Esher, M.R., also expressed the opinion that *In re Sinclair* is not to be extended. As to the question of set-off, I will only say that according to the case of the appellant the £15 was deposited for a particular purpose—to secure due payment of services to be rendered, and to attempt to apply that money to services in the past is really to misapply the money. So long ago as 1867, I think, it was held that a man cannot create a set-off by a wrongful act, and to use a sum which has been specifically paid to secure another debt is in my opinion a wrongful act.

WRIGHT, J., concurred.

Appeal dismissed.

Solicitors for the appellant, *Nicholson & Crouch*, for *P. S. Minor*, Manchester.

Solicitor for the official receiver, *The Solicitor to the Board of Trade.*

House of Lords.

From C. A. (England). March 14, 1892.

OOREGUM GOLD MINING CO. OF INDIA *v.* ROPER.
WALLROTH *v.* ROPER. (*a.*)

Company—Issue of shares at a discount—Registered contract—Companies Act, 1862, *ss.* 8, 38—*Companies Act*, 1867, *s.* 25.

A company incorporated with limited liability under the Companies Acts cannot issue its share at a discount.

In re Almada and Tirito Co., 36 *W. R.* 593, 38 *Ch. D.* 415, *approved.*

Per Lord Herschell.—*Though the company cannot exclude the liability of shareholders in a winding up to the extent unpaid on their shares for the benefit of creditors, the company may, where the memorandum of association permits, enter into any undertaking with those invited to become shareholders as to the terms on which the shares shall be taken, and as to the rights of the respective shareholders* inter se.

These two appeals from the order of the Court of Appeal were consolidated, as they raised the same question—whether a company incorporated with limited liability can issue its shares at a discount. The facts are set out in Lord Herschell's judgment.

Sir Horace Davey, Q.C. (*Grosvenor Woods* with him), for the company.

Rigby, Q.C. (*Bramwell Davis* with him), for Wallroth.—The case was considered below as governed by *In re Almada and Tirito Co.* 36 W. R. 593, 38 Ch. D. 415; *In re Addlestone Linoleum Co.*, 36 W. R. 227, 37 Ch. D. 191.

Burkinshaw v. *Nicholls*, 26 W. R. 819, 3 App. Cas. 1004, 1015; *Waterhouse* v. *Jamieson*, L. R. 2 H. L. (Sc. & Div.) 29, 18 W. R. H. L. Dig. 8; Companies Clauses Act, 1845 (8 & 9 Vict. c. 16), ss. 56, 160; *Spargo's case*, 21 W. R. 306, L. R. 8 Ch. 407; *Anderson's case*, 26 W. R. 442, 7 Ch. D. 75; *In re Ince Hall Rolling Co.*, 30 W. R. 945, 23 Ch. D. 545n.; and section 25 of the Companies Act, 1867, were cited or referred to.

Cozens-Hardy, Q.C., and *Mulligan*, for Roper.—Sections 8 and 38 of the Act of 1862 must be read together.

They referred to *Dent's case*, L. R. 8 Ch. 768, 775; *Fothergill's case*, 21 W. R. 301, L. R. 8 Ch. 270; *Trevor* v. *Whitworth*, 36 W. R. 145, 12 App. Cas. 409; *In re*

(*a.*) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

Dronfield Silkstone Coal Co., 29 W. R. 768, 17 Ch. D. 76; *Ex parte Sandys*, 37 W. R. 531, 42 Ch. D. 98; *Klenck* v. *East India Co.*, 16 Sc. Court of Sess. Cas., 4th series, 271.

Sir Horace Davey, Q.C., replied.

The House took time for consideration.

Lord HALSBURY, L.C.—The question in this case has been more or less in debate since 1883, when Chitty, J., decided that a company limited by shares was not prohibited by law from issuing its shares at a discount. That decision was overruled, though in a different case (*In re Almada and Tirito Co.*), by the Court of Appeal in 1888, and it had now come to your lordships for final determination.

The whole structure of a limited company owes its existence to the Act of Parliament, and it is to the Act of Parliament one must refer to see what are its powers, and within what limits it is free to act.

Now, confining myself for the moment to the Act of 1862, it makes one of the conditions of the limitation of liability that the memorandum of association shall contain the amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount. It seems to me that the system thus created, by which the shareholder's liability is to be limited by the amount unpaid upon his shares, renders it impossible for the company to depart from that requirement and by any expedient to arrange with their shareholders that they shall not be liable for the amount unpaid on their shares, although the amount of those shares has been, in accordance with the Act of Parliament, fixed at a certain sum of money. It is manifest that if the company could do so the provision in question would operate nothing.

I observe in the argument it has been sought to draw a distinction between the nominal capital and the capital which is assumed to be real capital. I can find no authority for such a distinction. The capital is fixed and certain, and every creditor of the company is entitled to look to that capital as his security. It may be that such limitations on the power of a company to manage its own affairs may occasionally be inconvenient, and prevent its obtaining money for the purposes of its trading on terms so favourable as it could do if it were more free to act. But, speaking for myself, I recognize the wisdom of enforcing on a company the disclosure of what its real capital is, and not permitting a statement of its affairs to be such as may mislead and deceive those who are either about to become its shareholders or about to give it credit.

I think, with Fry, L.J., in *The Almada and Tirito Co.'s case*, that the question which your lordships have to solve is one which may be answered by reference to an inquiry, What is the nature of an agreement to take a share in a limited company? and that that question may be answered by saying that it is an agreement to become liable to pay to the company the amount for which the share has been created. That agreement is one which the company itself has no authority to alter or qualify, and I am therefore of opinion that, treating the question as unaffected by the Act of 1867, the company were prohibited by law, upon the principle laid down in *Ashbury Co.* v. *Riche*, 24 W. R. 794, L. R. 7 H. L. 653, from doing that which is compendiously described as issuing shares at a discount.

The question remains whether section 25 of the Act of 1867 has made any difference in the matter now under discussion. That section prescribes that every share in any company shall be deemed and taken to have been issued, and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by contract duly made in writing, and filed with the Registrar of Joint-Stock Companies at or before the issue of such shares. Two things are manifest in this provision. The share is to be held subject to payment, and the payment is to be in cash. The amount is to be paid, and the whole amount to be paid in cash, and to me it appears, looking at the latter part of the section, whereby a contract made and filed may qualify and cut down the form of payment, and that it may be in goods or in value received in some form, instead of in cash, it must nevertheless be payment. I regret that the words in cash have received a judicial exposition which allows payment otherwise than in cash, and I hold myself free, if the question should ever come before your lordships, to consider the propriety of that decision. But for my present purpose it is enough to say that there is nothing in the section which justifies the notion that that which the statute required to be paid in cash, subject to qualification of a mode of payment, should not be paid at all.

The provisions of section 25 were probably to put a stop to such transactions as had become the subject of judicial animadversion in *Pellatt's case*, 15 W. R. 726, L. R. 2 Ch. 527; *Elkington's case*, 15 W. R. 665, L. R. 2 Ch. 511; also *Fothergill's case* and *Dent's case*. I should have been prepared to take this view if the matter were not covered by authority. But it seems to me that, although not directly in point, the principle laid down by your lordships' House in *Trevor* v. *Whitworth* would render it extremely difficult to so read the sections to which I have referred as to justify the appellants' contention. Under these circumstances it seems to me impossible to arrive at any other conclusion than that this appeal must be dismissed, with costs. Accordingly, I move your lordships that the order appealed from be affirmed, and the appeal dismissed, with costs.

Lord WATSON. — Can a company limited by shares, formed and registered under the Act of 1862, issue its shares as fully paid up for a money consideration less than their nominal value? That was the only question argued in these appeals. It has been answered in the negative by both courts below, without hearing argument, upon the authority of the *Almada and Tirito Co.'s case*, decided by the Court of Appeal in 1888. The limitation of such a company's liability is the creature of statute, and the question lies within a narrow compass, depending upon the construction of one or two clauses in the Companies Acts of 1862 and 1867.

The Act of 1862 (section 8 (2)) requires that, in the case of a company limited by shares, the memorandum of association shall contain the amount of the capital with which it proposes to be registered, divided into shares of a certain fixed amount. The statutory limitation which it imposes upon the liability of individual shareholders is contained in the enactment (section 38 (4)) that "no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member."

In my opinion, these enactments read together indicate the intention of the Legislature, that every member who takes shares from the company in return for cash shall either pay or become liable to contribute their full nominal value. The "amount, if any, unpaid" obviously refers to the "fixed amount" of the shares into which the capital is divided, as set forth in the memorandum, and not to any lesser amount which may be agreed upon between the company and its shareholders, and the statutory liability of each shareholder is for the difference between the amount fixed by the memorandum and

the sum which has actually been paid upon his shares.

Consequently, if shares are issued against money, it appears to me that any payment to the company less than the nominal amount of the shares must by force of the statute, and notwithstanding any agreement to the contrary, be treated as a payment on account, the member remaining to contribute the balance when duly called for.

A company is free to contract with an applicant for its shares, and when he pays in cash the nominal amount of the shares allotted to him, the company may at once return the money in satisfaction of its legal indebtedness for goods supplied or services rendered by him. That circuitous process is not essential. It has been decided that under the Act of 1862 shares may be lawfully issued as fully paid up, for considerations which the company has agreed to accept as representing in money's worth the nominal value of the shares. I do not think any other decision could have been given in the case of a genuine transaction of that nature where the consideration given is the substantial equivalent of full payment on the shares in cash. The possible objection to such an arrangement is, that the company may overestimate the value of the consideration, and, therefore, receive less than nominal value for its shares. The court would doubtless refuse effect to a colourable transaction entered into for the purpose or with the obvious result of enabling the company to issue its shares at a discount; but it has been ruled that, so long as the company honestly regards the consideration given as fairly representing the nominal value of the shares in cash, its estimate ought not to be critically examined. That state of the law is certainly calculated to induce companies who are in want of money, and whose shares are unsaleable except at a discount, to pay extravagant prices for goods or work to persons who are willing to take payment in shares. The rule is capable of being abused, and I have little doubt that it has been liberally construed in practice.

The Companies Act of 1867 contains one clause only which can affect the present question. Section 25 enacts that "every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint-Stock Companies at or before the issue of such shares."

It was argued that section 25 recognizes power in the company to accept a partial payment as a cash payment in full, provided there is a contract to that effect duly executed and filed with the registrar. I am unable so to construe the clause. I do not think its object was to give companies new powers in relation to the issue of their shares, but to regulate the statutory powers already possessed by them in regard to the acceptance of other than cash payments as part of their capital. The expression "unless the same shall have been otherwise determined" does not in my opinion imply that part payment may be accepted as payment in full. It refers to contracts so far as then lawful, by which a company might agree to accept considerations other than cash. In all such cases, the clause provides that the contract, if not duly filed with the registrar, shall be of no effect and that the shareholder shall remain liable for the value of his shares in money. The obvious purpose of the enactment is to enable persons dealing with the company to judge for themselves what may be the value of the consideration given as representing capital.

It is admitted that the appellants acted in good faith, and that the arrangement made with them would, even if carried out to the letter, have been of solid advantage to the company. But they accepted shares of the nominal value of 20s. as fully paid up, in the knowledge that only 5s. per share had been paid; and they cannot, therefore, benefit by the principle recognized by this House in *Waterhouse* v. *Jamieson* and *Burkenshaw* v. *Nicholls*.

It was urged at the bar that the appellants could have secured by other means all the advantages which were stipulated in their contract with the company, that instead of 20s. shares the company could have issued 5s. shares fully paid, bearing a preferential dividend of 40 per cent., and participating in the remaining profits equally with its ordinary 20s. shares; or that the appellants might themselves have bought the goods purchased with their contributions and received in exchange 20s. shares fully paid up. I see no reason to doubt that the first of these courses might have been successfully adopted; but I am not certain that the second would have been a legitimate proceeding, seeing that it might have involved acceptance by the company of goods in lieu of cash, at an estimated price of no less than four times their actual cost. It is needless, however, to consider what the parties might have done if that which they did is not of legal effect.

In my opinion, therefore, the register of the company is erroneous, in so far as it appears that these additional shares have been fully paid up, and the order appealed from which merely provides for its correction in that respect ought to be affirmed.

I have had an opportunity of considering the suggestions to be made by my noble and learned friend, Lord Herschell. I agree with him that the original shareholders had undoubted power to resolve that no call should be made upon the new shares except in liquidation, and then only for the purpose of paying debts and expenses of liquidation, because that power is expressly conferred upon limited companies by section 5 of the Companies Act, 1879 (42 & 43 Vict. c. 76). That the original shareholders could be held in the present case to have resolved to that effect is by no means so clear a proposition, because it appears to me to raise the question whether a single resolution that no money shall be paid in any event is severable into two distinct resolutions, one to the effect that there shall be no payment, and the other to the effect that there shall be no payment on the occurrence of a certain event. Seeing that the question has not been argued either in the court below or in this House, I abstain from expressing any opinion upon it.

I therefore concur in the judgment which has been moved by the Lord Chancellor.

LORD HERSCHELL.—This case raises the important question whether a company incorporated with limited liability can issue its shares at a discount. The company was incorporated in the month of October, 1880. The statement contained in the memorandum of association with reference to the capital of the company was as follows:—"The capital of the company is £125,000 divided into 125,000 shares of £1 each, and the shares of which the original or increased capital may consist may be divided into different classes and issued with such preference, privilege, guarantee, or condition as the company may direct." Forty thousand of the shares were allotted to the vendors of the company, the residue were issued to the public, and the full amount paid thereon. The operations of the company were not, in the first instance, successful, and a winding-up order was obtained. An application was subsequently made to the court for an order to stay the winding up, with a view to the introduc-

tion of fresh capital and a resumption of mining operations, and an order was made accordingly. In pursuance of this policy an extraordinary general meeting of the company was summoned, at which it was resolved that the capital should be increased by the issue of 120,000 preference shares of £1 each, to be credited in the capital and books of the company as having the sum of 15s. per share paid thereon, such preference shares carrying the right to a non-cumulative preference dividend up to ten per cent. on the nominal amount of such preference capital out of the profits of the undertaking each year and to equal participation (share per share) with the ordinary shares in such further profits as should remain for distribution each year after the payment of the above ten per cent. preference dividend. The special resolution so passed was duly confirmed.

At this time the market value of the ordinary shares was only 2s. 6d. per share. Upwards of 100,000 of these preference shares were allotted, with 15s. credited as paid thereon. Prior to the actual allotment an agreement was entered into between the company, of the one part, and an agent or trustee for the several persons whose names were entered in the schedule thereto, of the other part, whereby, after reciting the agreement to issue the shares at a discount of 15s. per share, and that 1s. had been paid on allotment, it was agreed that the shares to be allotted should be held as shares on which 16s. per share had been paid, and should be subject and liable to further payment of 4s. per share, and no more, and the company thereby undertook to cause the agreement to be registered at the Joint-Stock Registration Office, pursuant to the Companies Act, 1867, before the issue of the shares. The agreement was duly filed accordingly.

The capital raised by means of the issue of the preference shares sufficed to discharge the obligations of the company, to extricate it from its difficulties, and to give it a new start. Gold to a considerable amount was shortly afterwards raised from the mines, and the company has since been prosperous, the market value of the ordinary shares having risen to about 40s.

In February, 1889, the respondent, George Roper, purchased on the Stock Exchange and paid for ten fully paid-up ordinary shares in the company. On the 15th of July following he commenced this action to have it declared that the issue by the company of the 120,000 preferred shares, at a discount of 15s. per share was *ultrâ vires*. The statement of claim contained the allegation that the company had in 1889 issued debentures to the amount of £20,000, which were charged on all the property of the company, and which were then outstanding. It further alleged as follows:—"The defendant company had no power to issue the said preferred shares at a discount, and the entry of the preferred shares in the register book as fully paid up should be rectified. The said preferred shares are now quoted on the Stock Exchange at a premium, and if the said entry is rectified the ordinary shares will benefit thereby, and the 15s. unpaid on the preferred shares will be available for paying off the said debentures as and when they fall due."

The question whether there was power to issue the shares depends mainly upon the construction of the 8th and 38th sections of the Companies Act, 1862, though the 25th section of the Companies Act, 1867, has also a material bearing upon it. By the 8th section of the Act of 1862 it is enacted that in the case of a company limited by shares the memorandum of association shall contain "the amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount." The 38th section of the same statute provides that, in the event of a company formed under the Act being wound up, every present and past member should be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company and the costs of the winding up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with (amongst others) this qualification, that in the case of a company limited by shares no contribution should be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member.

It is contended that these two enactments, taken together, preclude a company from issuing shares as fully paid up in respect of the payment of a sum less than the nominal amount of the share—that is to say, that a person taking a share on those terms, if he remains a shareholder, is liable to pay the difference between the amount he has already paid and the nominal value of the share.

If it had been determined that under the Companies Act a shareholder was in all cases liable to pay the whole of the nominal value of a share in cash, I should have had less difficulty in adhering to the judgment of the court below. But the contrary had been determined. And not only may a share be allotted as fully paid up in respect of property, goods, or services received by the company, but the courts will not inquire into the adequacy of the consideration, and certainly have not required it to be proved that the consideration given was equivalent in cash value to the nominal amount of the share. The transactions which have taken place on this view of the law have been so numerous, and have extended over so long a period of years, that I doubt if it would have been possible for your lordships to adopt a different view now, even if the Legislature had not intervened.

But I think that the Legislature has distinctly recognized and given its sanction to these decisions. The 25th section of the Companies Act, 1867, provides that every share in any company shall be deemed and taken to have been issued, and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by contract duly made in writing, and filed with the registrar of joint stock companies, at or before the issue of such shares.

I quite agree that this enactment does not purport to render valid an issue of shares in respect of something other than full cash payment, in case it would have been invalid under the Act of 1862. But it seems to me distinctly to recognize the validity of such a transaction, imposing only the condition that the contract determining that payment is not to be made in cash shall be in writing and duly filed. The object of this is obvious. It is to enable any creditor, by reference to the documents at the office of the registrar of joint stock companies, to ascertain how much of the liability on the shares which does not remain undischarged has been discharged by cash payment, and how much in some other way. A creditor has not the right to assume that so much of the amount of the share as is no longer liable to be called up has found its way, in the shape of cash, into the hands of the company. But he has placed at his disposal the means of full information on the subject.

Having regard to the considerations to which I have called attention, and notably to the provisions of the Act of 1867, I do not feel so much impressed as some of your lordships by the mischiefs which it is contended would result from the decision that shares might be issued as fully paid up in consideration of a

payment less in amount than their nominal cash value, and I can conceive many cases in which such a course would be advantageous both to shareholders and creditors.

But the matter must, after all, be determined by an examination of the language of the Act of 1862, bearing in mind, of course, the decisions upon it, and the subsequent legislation which, as I think, sanctioned and acted on those decisions. I cannot myself place any great weight on the requirement of section 8, that the amount of capital with which the company proposes to be registered is to be divided into "shares of a certain fixed amount." The provision was of course, necessary in introducing a scheme of limited liability. But it does not of itself determine anything as to the extent of liability. Had it stood alone, the shareholders would have been liable, on general principles, to the extent necessary to discharge all the obligations of the industrial partnership.

The limitation of liability arises from the provision of section 38, that in case the company is wound up an individual shall only be liable "to the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member." This must be regarded as by implication enacting that he shall be liable to that extent. What, then, is the meaning of the "amount unpaid" on the shares? If it had been the law that taking shares in a limited liability company necessarily involved the payment in cash of the nominal amount of the share, the answer would have been free from difficulty. The words "the amount unpaid" would have been taken in their ordinary sense as meaning so much as has not been paid in cash. But it is impossible now to adopt that interpretation as applicable to every case. The Acts of 1862 and 1867 must be read together. And the latter statute prescribes that a share shall be deemed to be held subject to the payment of the whole amount thereof in cash, unless "the same shall have been otherwise determined" by a filed contract. What is "the same"? Clearly, as it appears to me, that the share is held subject to the payment of the whole amount in cash. When, then, it has been lawfully "otherwise determined," it appears to me impossible that the words "the amount unpaid" can have their ordinary meaning. They must, at least, be interpreted as meaning "unpaid, or not otherwise satisfied, in accordance with the provisions of a filed contract." And once this conclusion is arrived at I do not think there would be any insuperable difficulty in including within them the case where, in consideration of a certain payment, the liability had been by a filed contract entirely discharged.

At the same time I am quite sensible of the force of the argument that in the 25th section of the Act of 1867 the emphatic words are payment "in cash," implying that there must be payment in some form, even though it is not to be made in cash. And whilst goods or services given or taken in lieu of payment in cash may be regarded as in a sense payment, it is difficult to say that payment of a portion of a sum is payment of the whole. Although, therefore, my mind has not been free from doubt, I am not prepared to differ from the court below and from those of your lordships who entertain that view in thinking that a company cannot issue its shares at a discount so as to exonerate those taking the shares from the liability, in case the company be wound up, to pay the amount not already paid on the shares.

But the question before your lordships does not arise in the case of a winding up. The interest of the creditors is not in issue. The action is brought by a shareholder avowedly for the purpose of benefiting the holders of the ordinary shares at the expense of those who are possessed of the preference shares, which were taken on the express condition that their holders should not be required to pay more than 5s. per share. To accede *simpliciter* to the prayer of the plaintiff would, as it seems to me, be to sanction a violation by the company of a solemn agreement entered into between them and those who took the shares. I should have thought it was wrong to do this, except in so far as the contract provides for that which has been otherwise provided for by the legislature. In so far as the obligations arising under the contract do not involve a contravention of any enactment of the Legislature, I see no reason why they should not be given effect to. This point was not argued at the bar in the present case, but I will give my reasons for the opinion I have expressed. Except when the legislature has expressly or by implication forbidden any act to be done by a company their rights must be governed by the ordinary principles of law, and they are free to make, as between them and their shareholders, such contracts as they please. They may enter into any undertaking with those who are invited to become shareholders as to the terms on which the shares shall be taken and as to the rights of the respective shareholders *inter se*. What they cannot do is to exclude the liability, in case the company is wound up, to contribute to the extent unpaid on the shares for the benefit of the creditors. But what is to prevent the company agreeing that except in so far as the Legislature has imposed the liability they will not enforce any? Supposing the agreement had been in terms that the company would not enforce the payment of more than 5s. per share, except in the case of a winding up, and then only to satisfy the claims of creditors and the costs of the winding up, would there have been anything illegal in such an agreement? I fail to see anything in the Companies Acts which would render such an agreement invalid. And, taking the contract between the company and the shareholders, and the enactment together, is not this in effect what has been done? I am, of course, assuming that to issue shares on such terms would be within the memorandum of association. There can be no doubt of that in the present case. It is provided that the original or increased capital may be issued with "such preference, privilege, guarantee, or condition" as the company may direct. Whilst, then, I think it ought to be declared that the agreement between the company and those to whom the preference shares were allotted was ineffectual to absolve them from the liability prescribed by the 38th section of the Act of 1862, I should have thought, had the point been insisted upon, that it ought also to be declared that the company are not entitled to call upon such shareholders for any further payment beyond that agreed upon, except in the case of a winding up, and then only so far as necessary for the discharge of the obligations of the company and the costs of the winding up.

Lord MACNAGHTEN.—Your lordships are called upon to determine whether it is or is not competent for a company, limited by shares, to issue shares at a discount so as to relieve persons taking shares so issued from liability to pay up their amount in full. It was suggested that different considerations might apply to shares in the capital with which a company is originally registered and shares in additional capital created afterwards. But it seems to me to be perfectly clear that for the present purpose no distinction can be drawn between one portion of the capital of a company limited by shares and another.

The question turns upon the construction of the

Companies Act, 1862. The provisions of the Act are, I think, plain enough if one bears in mind the condition of things which existed before the principle of limited liability was introduced in 1855. Before that time there was no way known to the law by which persons trading in partnership could restrict their liability. They were liable to the utmost farthing. At last the Legislature intervened and authorized persons who proposed to trade in partnership to form themselves into a registered company with a declared capital and shares of a fixed amount, and limited the liability of the partners as members of the company to the amount unpaid upon their shares.

But all this legislation proceeds on the footing of recognizing and maintaining the liability of the individual members to the company until the prescribed limit is reached. The memorandum of association of a company limited by shares must contain "the amount of capital with which the company proposes to be registered divided into shares of a certain fixed amount." It must also contain a declaration "that the liability of members is limited." Neither the liability nor the limitation is defined in the memorandum itself. And so the declaration carries you back to the earlier part of the section, where you are told what is meant by "a company limited by shares." It is a company "formed on the principle of having the liability of its members limited to the amount unpaid upon their shares." That must mean that the liability of a member continues so long as anything remains unpaid upon his shares. Nothing but payment and payment in full can put an end to the liability. Plainer still and more explicit is the section headed "Liability of Members." It begins by declaring that in the event of a company formed under the Act being wound up, the measure of the liability of every present and past member is the amount required to satisfy all claims of creditors, to pay all the expenses of liquidation, and to adjust the claims of members *inter se*. Then come certain qualifications to which that liability is subject. One is, that in the case of a company limited by shares no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member.

To sum the matter up, I cannot, I think, do better than adopt the language Mr. Buckley has used in speaking of the Limited Liability Acts. "The dominant and cardinal principle of these Acts," he says, "is that the investor shall purchase immunity from liability beyond a certain limit on the terms that there shall be and remain a liability up to that limit." Whether this liability is one of "the conditions of the memorandum" within the meaning of that expression in the Act of 1862, as Lord Selborne seems to have thought (*Dent's case*), or a condition attached by the Act to a company limited by shares, and of the essence of such a company, though it may not be found contained within the four corners of the memorandum, is a matter of little or no importance. In either view of the case it is plain that the condition is one which cannot be dispensed with by anything in the articles of association, or by any resolution of the company, or by any contract between the company and outsiders who have been invited to become members of the company, and who do come in on the faith of such a contract.

If this conclusion be correct, there is, I think, an end of the question, and the arguments urged on behalf of the appellants may be disposed of very briefly. I may notice, in the first place, that reference was made in the course of the argument to section 25 of the Act of 1862, which specifies, among the particulars to be entered on the company's register of members, the amount paid, or agreed to be considered as paid, "on the shares of each member." It was suggested that this expression shows that the statute does not require actual payment. Nor does it, except in the case of a company limited by shares. The section, it will be observed, is speaking not only of such companies, but of all companies under the Act which have a capital divided into shares.

The next argument that was put forward strikes me as rather far-fetched. It was said that companies under the Companies Clauses Acts are authorized to issue new shares at a discount. It was pointed out that the language of table A. in reference to the issue of shares in additional capital is precisely the same as the language of the Companies Clauses Act, 1863, now that it has been amended by the Railways Clauses Act, 1867, and the Companies Clauses Act, 1869, so as to make the issue of shares at a discount permissible. Why, it was asked, should there be any difference in this respect between the two classes of companies? Why should that be taken to be prohibited in the one which is allowed in the other? Well, there is this difference to start with. A company limited by shares selects its objects and fixes the amount of its capital to suit itself; complying with the provisions of the Companies Acts, it is under no outside control in these matters. The Companies Clauses Acts are applicable to companies formed for the purpose of carrying out undertakings of a public nature. After Parliament is satisfied that the proposed undertaking will be of public benefit, and that the proposed capital is adequate, and not excessive, a special Act is obtained. Then, if the company comes for powers to raise further capital, it is open to the Legislature, if it thinks fit, when sanctioning an Act for the purpose, to incorporate with the special Act the Companies Clauses Act, 1863, and at the same time to modify its provisions as occasion may require. Because a special permission granted in consideration of the particular circumstances of the case is free from objection, it does not follow that a general licence might not be open to grave abuse.

There is this difference, too, a company limited by shares may borrow as much money as it can get. A company under the Companies Clauses Acts has only limited powers of borrowing. So there is the more reason that a company of the latter class having still some credit though its borrowing powers be exhausted, should be allowed in a proper case to make use of its unissued capital. But, after all, the real answer to any argument or appeal founded on the Companies Clauses Acts is this: whatever those Acts may prohibit or permit, table A. must be taken in connection with the Companies Act, 1862, and connot be read so as to contravene its provisions.

Much reliance was placed on the 25th section of the Act of 1867. It was said that what that section has in view is one of two things, either liability to pay in cash the whole amount of the shares, or else a contract in writing duly registered at or before the issue of the shares. It was argued that if there be a contract duly registered, the section does not impose any liability to pay in full. That is quite true, and for this reason: the section applies not only to companies limited by shares, but to all companies under the Act of 1862 having a capital divided into shares. In the case of a contract duly registered, the section does not require payment where payment is not required by the Act of 1862. On the other hand, it does not dispense with payment in full where the liability to pay in full is a condition imposed by the Act of 1862 as it is in the case of a company limited by shares.

Burkinshaw v. *Nicholls* was pressed into the argument. But all that case decides is that the company's certificate to the effect that shares are fully paid up is, as against the company, conclusive evidence of payment in the hands of a purchaser for value without notice.

Lastly, it was said that, if it be the case that, in companies limited by shares, members are liable to pay up in full the amount, if any, unpaid upon their shares, still the liability is one that may be easily evaded. And it was pointed out that in the present case if only a different method had been adopted, a result practically the same might have been attained, and then the transaction would have been unimpeachable. Whether that is a good reason for permitting the requirements of an Act of Parliament to be contravened may perhaps be doubted.

But I desire to protest against some of the propositions which were advanced in connection with this part of the argument. It was said that if a company limited by shares owes its bankers £1,000, and its shares are at 50 per cent. discount, fully-paid shares of £2,000 nominal value may be given in discharge of the debt. It was said that a company limited by shares may issue fully-paid shares at their market price at the time, however much they may have become depreciated, in exchange for goods having a recognized market value. Speaking for myself, I am not prepared to assent to either of those propositions without further argument. I am inclined to agree with the view expressed by Cotton, L.J., though it is not necessary to decide the point. It seems to me that all that has been determined so far is, that the court will decline to rip up a transaction not impeached as dishonest, and not proved to be such, merely because the company may have paid an exorbitant price for their property.

In the present case I regret I am compelled to say that, in my opinion, the transaction cannot stand. The course which the directors took probably saved the company. All parties concerned acted in a perfectly open and honest manner. But it seems to me that the requirements of the Companies Act, 1862, have been contravened, and therefore I think that the appeal must be dismissed.

Lord MORRIS.—The Act of 1862 enabled a company to be formed on the principle of having the liability of its members limited to the amount unpaid on their shares; it did not impose a liability—on the contrary, it limited liability to the extent of the amount of the share; but there is no power given, that I can see, to further limit liability by not paying that amount. Has that position been varied by section 25 of the Act of 1867, which provides, "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint-Stock Companies at or before the issue of such share"? That section appears to me plainly to refer to and deal only with, the mode of payment—*primâ facie* payment of the whole amount is to be in cash, but with a power given of contracting for something other than cash to be taken in payment, but payment in meal or malt is clearly contemplated—the amount of the shares must be paid. A company can only do what it is authorized to do, and not that which it is only not prohibited from doing. I can find no authority to issue a pound share, but that only five shillings is to be paid of the pound. For these reasons I concur in the judgment moved by the Lord Chancellor.

Lord HALSBURY, L.C.—Before putting the question I only desire to add that I have designedly avoided alluding to the point which has been mentioned by my noble and learned friend Lord Herschell, inasmuch as it was neither insisted upon nor argued at the bar.

Order appealed from affirmed, and appeal dismissed, with costs.

Solicitors for the company, *Snell, Son, & Greenip.*

Solicitors for Wallroth, *Freshfields & Williams.*

Solicitors for Roper, *Batten, Proffit, & Scott.*

Lunacy.

Lindley and Lopes, L.JJ. July 14, 1892.

In re LAURA DAVY. (*a.*)

Lunacy—Married woman—Found to be of unsound mind—Summons for appointment of committee—Claim of husband to be appointed as of right.

The husband of a woman found of unsound mind has no absolute right to be appointed, either solely or jointly, her committee.

Summons referred by the master to the court for the appointment of two committees of the person and estate respectively of Laura Davy, a married woman found of unsound mind.

On the 22nd of February, 1892, a petition was presented that an inquiry should be made into the state of mind of Mrs. Laura Davy, a married woman, and on the 29th of April an order for the inquiry was made. On the 24th of May the master found that she was a person of unsound mind.

On the 2nd of June the present summons was issued by the mother of the lunatic asking that two persons named, one being the applicant, but neither being the husband of the lunatic, might be appointed committees of her person and estate respectatively. The summons was heard by the master, but the husband, though duly served, did not attend and the summons was therefore adjourned. It was further heard on the 20th of June, when the husband appeared and opposed the application and the master reserved his decision. On the 27th of June the master referred the summons to the court, and it now came on for hearing.

The evidence showed that the husband had during their married life treated his wife, who was a deaf mute and whom he had married without her parents' knowledge, very badly; that he took her money for himself and did not provide her with sufficient food or clothing, and left her for long periods of time alone, which was peculiarly prejudicial to anyone afflicted as she was and specially requiring companionship; and that there was no real sympathy between them, but, on the contrary, she feared and disliked his presence.

Crackanthorpe, Q.C., and *F. H. Colt*, for the summons.

Craycroft, for the husband of the lunatic, *contrà*.—The husband or wife of a lunatic has a right to be appointed either solely or jointly her committee. That is so according to the old cases: *Lord Wenman's case*, 1 Peere Williams, 701; *Ex parte Le Heup*, 18 Ves.

(*a.*) Reported by ARTHUR LAWRENCE, Esq., Barrister-at-Law.

221; *In re Dyce Sombre*, 8 Jur. 817; and there has been no new practice since the recent Act.

LINDLEY, L.J.—This case is a remarkable one. The lady who has been found of unsound mind is a deaf mute. Her cousin married her some eight or nine years ago clandestinely, without the knowledge of her parents, and he has treated her very badly during their married life, and in such a way that I am satisfied that he should not be appointed her committee. If the money to which she is entitled during her life were to be paid to him for her, I have no doubt he would put it into his own pocket. The husband contends that he has a right to be appointed either solely or jointly. I do not agree that he has any such right. The court has full jurisdiction in the matter, and exercises its discretion as to what is best for the lunatic. That is what the court looks for, what is best for the lunatic. In 999 cases out of 1,000 it may be that it would be best that the husband should be appointed, but there may be a case in which it is best that he should not be, and there the court exercises its discretion. In my opinion the order must go as asked for by the summons.

LOPES, L.J.—In my opinion there can be no doubt at all that a husband has no absolute indefeasible right to be his lunatic wife's committee. If there is no precedent for the course the court is taking today, then I think the sooner a precedent is made the better. The paramount object which the court has to consider is the comfort and benefit of the lunatic. What would happen if the court were to appoint the husband? Can anyone doubt that if he were appointed he would continue to act as he has already done, and put the money which ought to go for his wife's benefit into his own pocket? I agree that the order should go as Lindley, L.J., has said.

Summons granted.

Solicitors, *Torr & Co.; J. Hopkins.*

Court of Appeal.

From Chan. Div. (Lindley, Bowen, and A. L. Smith, L.JJ.) — Oct. 31; Nov. 1, 11.

In re MCGRATH (INFANTS). (*a.*)

Infant—Guardian—Jurisdiction where no property—Religious education—Wishes of deceased father—Welfare of infant—Guardianship of Infants Act, 1886 (49 & 50 *Vict. c.* 27), *ss.* 6, 13.

The court has jurisdiction to interfere with and to remove a guardian of a child who has no property, on proof of misconduct of the guardian towards the child, or on proof that it is for the welfare of the child that the guardian should be removed.

But the duty of the court towards a penniless child under the care of a legal guardian who is able and willing to maintain the child is to leave the child alone, unless the court is satisfied that it is for the welfare of the child that some other course should be taken. The welfare of the child—religious, moral, and social, as well as physical and pecuniary—is the paramount consideration for the court.

Notwithstanding the Guardianship of Infants Act, 1886, *the wishes of the father, expressed or implied, will be the guide of, and followed by, the court, for the religious education of the child, unless there is very strong reason for disregarding his wishes. Ordinarily, where such wishes are not expressed, the court must infer, in the absence of evidence to the contrary, that the wishes of the father were, that his child should be brought up in the religion which the father professed; and that inference practically amounts to a rule of law that a child shall be brought up in the father's religion. But the welfare of the child is the ultimate guide of the court, and where the father has been himself indifferent to religion, and it is not for the welfare of the child that the ordinary rule should be enforced, the court will make an exception, and will not direct the child to be brought up in the religion nominally professed by the father.*

Decision of North, J. (40 *W. R.* 683), *affirmed.*

Appeal from a decision of North, J., reported 40 W. R. 683.

The question was, practically, whether infants whose father was dead should be brought up in the religion which the father, nominally a Roman Catholic, had professed.

The facts are considered to appear, sufficiently for the purposes of the present report, from the judgment of the court.

North, J., refused to remove a Protestant guardian appointed by the mother of the infants or to appoint Roman Catholic guardians to be co-guardians with the Protestant guardian, or to direct the guardian to bring the infants up in the Roman Catholic religion.

The infants, by their next friend, appealed.

Rigby, S.G., *S. Hall, Q.C.*, and *P. S. Stokes*, for the appellants.—It is what James, L.J., has called a sacred right that children should be brought up in their father's religion, unless there are special circumstances to the contrary, and Mellish, L.J., speaks of it as unquestionably the rule: *Hawksworth* v. *Hawksworth*, 19 W. R. 735, L. R. 6 Ch. 542. The fact that the faith of some of the brothers and sisters would be different from that of the others, if this appeal is allowed, is quite insufficient to constitute such special circumstances as to take the case out of the general rule. Here the children had received no such definite religious ideas or definite ideas as to the difference between Protestantism and Romanism as to be a reason for the court to refuse to interfere lest, by changing their ideas, it should take away all religious belief altogether. The recent Act expressly recognized the rule that the father's religion should prevail, even in the case of a bad father. There has been no undue delay on the appellants' part. And there is no advantage of temporal welfare on either side.

Cozens-Hardy, Q.C., and *Micklem*, for the respondent.—The children's welfare is really the matter to be considered: *In re Clarke*, 31 W. R. 37, 21 Ch. D. 817. The true test as to the rule about the father's religion being followed is not what was the father's religion, but what were his wishes, *In re Nevin*, [1891] 2 Ch. 299, 39 W. R. Dig. 90; but here the father had really no religious belief himself and no wish as to his children's, so the rule may be left out of account, and the children's welfare alone taken into consideration. As the eldest boy and the eldest girl will remain Protestants, it is for the benefit of the three younger ones to be Protestants too. In *Hawksworth* v. *Hawksworth* James, L.J., prefaces his remarks as to the rule by saying that in that case "there was not the slightest trace of any indifference on the part of the father," which preface is very important. If the rule is a strict one, it has been constantly broken in upon, *e.g.*, *Stourton* v. *Stourton*, 5 W. R. 418, 8 De G. M. & G. 760.

(*a.*) Reported by ARTHUR LAWRENCE, Esq., Barrister-at-Law.

Rigby, S.G., in reply.—The Act of 1886 expressly provides that it is not to interfere with the power of the court in respect of infants.

Cur. adv. vult.

November 11.—LINDLEY, L.J., delivered the judgment of the court as follows:—This is an appeal from the refusal of North, J., to interfere with the custody or education of three girls and a boy, all of whom are infants, aged respectively 15, 13, 11, and 6. Their father and mother were poor people; they were both Roman Catholics, and they are both dead. The mother survived, and by a deed executed by her in November, 1889, she appointed a Protestant lady of means, guardian of the children in question. This lady has had the care of them since April, 1890; she supports them out of her own resources and has brought them up in the Protestant, and not in the Roman Catholic, religion. An aunt of the father, who is a Roman Catholic and in poor circumstances, thinks this ought not to be. A kind and benevolent Roman Catholic lady is willing to take care of the children and to bring them up in the Roman Catholic religion if they are intrusted to her. In order to have the children transferred to her care, or, at all events, to insure their education in the Roman Catholic religion, a summons was taken out in the name of the infants, by their next friend, asking for the removal of their guardian and for the appointment of the Roman Catholic lady and the next friend as their guardians; or, in the alternative, that these ladies might be appointed co-guardians with the present guardian, upon the latter lady's undertaking to bring these children up as Roman Catholics. North, J., refused to interfere, and the infants, by their next friend, have appealed from his decision.

Before proceeding further, it is desirable to state the legal rights of the parties to this unfortunate litigation. The eldest girl is 15. She does not desire to become a Roman Catholic. She will soon be able to earn her own living, and the appellants' counsel saw it was hopeless to try and induce this court to interfere with her. The three youngest children have no property of their own, and their only right is to be supported and educated by the proper poor law authorities if no one else will provide for them. Their rights as regards their religious education will appear presently, when the duty of their guardian and of the court towards them is examined. The lady who is their duly-appointed guardian has the right to their custody and the right to support and educate them; in what particular religion will be considered hereafter. The other parties to this litigation have themselves no right to the custody of the children; no right to remove them from the custody of their legal guardian; no right to dictate to that guardian how she shall clothe them, nor how she shall feed them, nor what she shall have them taught. Their right in this matter is precisely the same as the right of the rest of her Majesty's subjects, and is limited to informing the court, at their own risk as to costs, of misconduct on the part of the legal guardian towards her wards.

There was at one time an attempt to throw some doubt upon the jurisdiction of the Court of Chancery over the guardians of children who had no property; but all doubt on this point was set at rest by Lord Cottenham's decision in *In re Spence*, 2 Phil. 247; and it is clear that the old Court of Chancery had, and that the High Court has, jurisdiction to interfere with and to remove a guardian of a child who has no property, on proof of misconduct on the part of the guardian towards the child, or upon proof that it is for the welfare of the child that the guardian should be removed. But it is obvious that the jurisdiction of the court is very limited in such a case. The child having no property under the control of the court, the court cannot provide any scheme for the child's maintenance or education. All that the court can do is to remove the guardian and appoint another, if another can be found to take care of the child. This limited jurisdiction being, however, established, it follows that the exercise of such jurisdiction can be invoked on behalf of any child by any one who is willing to come forward on its behalf and to act as its next friend. The jurisdiction of the court over guardians of children without property was exercised in *In re Scanlan*, 36 W. R. 842, 40 Ch. D. 200, and was recognized by North, J., in his judgment in this case, and is not open to controversy. But it cannot be too generally known that no next friend, no relation, no kind or charitable person, no co-religionist of the child, no priest or minister of any religion has in the case now supposed any right whatever, beyond the right of informing the court of what is wrong and asking the court's assistance on behalf of the infant.

The next point to consider is the duty of the court towards a penniless child under the care of a legal guardian who is able and willing to maintain and educate the child at his own expense. The duty of the court is, in our judgment, to leave the child alone unless the court is satisfied that it is for the welfare of the child that some other course should be taken. The dominant matter for the consideration of the court is the welfare of the child. But the welfare of a child is not to be measured by money only, or by physical comfort only. The word "welfare" must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded. As regards religious education it is settled law that the wishes of the father must be regarded by the court and be enforced, unless there is some very strong reason for disregarding them.

The Guardianship of Infants Act, 1886, which has so greatly enlarged the rights of mothers after their husbands' deaths, has not changed the law in this respect. This was decided by Stirling, J., in *In re Scanlan*, and is unquestionable. The consequence is that, notwithstanding that Act, a widow may still find herself compelled to bring up her child in a religion which she abhors. The wishes of the father, if not clearly expressed by him, must be inferred from his conduct. If the father is dead it will be naturally inferred that, in the absence of evidence to the contrary, his wish was that the children should be brought up in his own religion—*i.e.*, the religion which he professed. This inference is one which the court, in the absence of evidence to the contrary, is bound to draw, and is practically not distinguishable from a rule of law to the effect that an infant child is to be brought up in its father's religion, unless it can be shown to be for the welfare of the child that this rule should be departed from, or the father has otherwise directed. This we believe to be the true state of the law. The law is not so rigid as to compel the court to order children to be brought up in the religion of their deceased father regardless of the consequences to themselves. This point was carefully considered by the present Lord Justice Kay in *In re Clarke*, and more recently by this court in *In re Nevin. Hawksworth* v. *Hawksworth*, in which the duty of a guardian to bring up a child in its father's religion and the duty of the court to order this to be done, was most emphatically asserted, does not warrant the contention that there are no exceptions to this general rule; and the court will always depart from the rule for sufficient reason. The welfare of the infant is the ultimate guide of the court—see *Stourton* v. *Stourton*, *Andrews* v. *Salt*, 21 W. R. 616,

L. R. 8 Ch. 622, *In re Agar-Ellis*, 27 W. R. 117, 32 W. R. 1, 10 Ch. D. 49, and 24 Ch. D. 317. The right of the infant in this respect is the correlative of the duty of its guardian and of the court.

We proceed now to inquire why the court should interfere in this particular case. The question may be put in another form—namely, Is it for the welfare of the three younger children that the court should take steps to have them now brought up in the Roman Catholic religion rather than in the Protestant religion, in which they are being brought up by their legal guardian? Or, again, the question may be put in this shape—namely, Is it the duty of the court to remove the present guardian unless she will undertake to bring up these three children in the Roman Catholic religion? She is willing to give this undertaking rather than be removed. As regards the physical comfort and unsectarian education of the children, there is no ground whatever for the interference of the court. The whole question turns on their religious education. Does their welfare demand that this should be now changed? This court, judicially administering the law, cannot hold one religion to be better than another. The law does not impose upon the court the duty of doing more than to order a child to be brought up in its father's religion unless there are sufficient reasons for doing otherwise. Let us first inquire into the religious views of the father. It is plain from the evidence that he was not a religious man. He did not attend any place of public worship himself. His children were baptized as Roman Catholics, but in his lifetime his eldest son was educated, with his consent, by Protestants. The girls attended a Roman Catholic day school, but on Sundays they frequently went to a Protestant chapel and to a Protestant Sunday-school. The youngest boy was at home. If any kind and charitable person had in the father's lifetime offered to maintain his four youngest children and bring them up as Protestants we are convinced that he would have gladly assented to the arrangement. In this respect the case differs widely from *Hawksworth* v. *Hawksworth*, where James, L.J., said (L. R. 6 Ch., at p. 542):—"There is not the slightest trace of any indifference on the part of the father to the religious education of his child. There is nothing to show that he would have acquiesced in the child being brought up a Protestant if he had been living." Under the circumstances of the present case, to rely on the wishes or supposed wishes of the father as a ground for bringing some of his children up in the Roman Catholic religion rather than in any other religion, is to rely on a rotten reed. Still it does not follow that his religion is to be disregarded.

Let us then look at the present state of affairs. The father died in June, 1888, a Roman Catholic, and was buried as such. At his death his eldest girl was at a board school; but he was ill, and probably did not know it. The two other girls were at Nazareth House, which was a Roman Catholic school. After the father's death the eldest girl appears to have been sent to a Roman Catholic school on week days and to a Protestant Sunday-school. Her two sisters remained at Nazareth House until April, 1890, when they came home to see their mother, who was very ill. Since that time all the girls and the youngest boy have been brought up as Protestants by the guardian duly appointed by their mother in November, 1889. The girls have been brought up and educated at an institution which has become to them a home, and which is maintained by the lady who befriended their mother until she died in July, 1891. The eldest girl, who is now 15, wishes to remain where she is, and it is not the duty of the court to interfere with her. Under these circumstances is it for the benefit of the three youngest children—two girls and a boy—that their religious education should be again changed? Is it for their welfare that they should be brought up in a different religion from their eldest brother and eldest sister? Would such a change be in accordance with their father's wishes? Our answer to all these questions is, no. Their mother's wishes are not relevant, although it is very painful so to hold. They were, however, clearly expressed in her lifetime in favour of the present Protestant guardian. Is the court then driven by any rule of law to play battledore and shuttlecock with these children and with their religious education? Is the court bound to hold, contrary to its own inferences from the facts of the case, that it is for the welfare of these children that they shall be taken from the care of the lady to whom they were intrusted by their mother, and by whom they have been and are all, most kindly treated? Our answer again is, no. Our answer would be precisely the same if the father had been a Protestant and the guardian a Roman Catholic who was bringing up the children as Roman Catholics. With a father like the late Mr. McGrath, and with like indifference shown by him, it would be for the welfare of the children to leave them alone.

We entirely concur in the observations of Mellish, L.J., in *Hawksworth* v. *Hawksworth*, L. R. 6 Ch., at p. 545, "that we should be doing much mischief if we were to hold out encouragement to persons to think that if they get hold of a child of tender years they may, by educating it for a longer or shorter period of time in their own religion, secure that the child shall be educated in their own religion instead of the religion of the father." But where, as here, the father is proved to have been indifferent whether his children were brought up Protestants or Roman Catholics, and where two of his children are of one of those religions already, and the others are being brought up in the same religion, it is not for their welfare that they should be educated in the other religion. This very case illustrates the mischief which may arise if near relations differ in their religious views. This unfortunate litigation is due to the fact that the father's aunt thinks it her duty to see that his children are brought up in the religion in which she thinks he ought to have brought them up, although he was indifferent about the matter. Such litigation ought clearly to be discouraged. We refrain from going minutely into the evidence; but the whole of it has been read and carefully considered. The two youngest girls were at Nazareth House after their father's death longer than North, J., thought they had been. But, notwithstanding this, we are of opinion that his judgment is correct, and that this appeal should be dismissed, with costs.

Appeal dismissed, with costs.

Solicitors for the appellants, *Leathley & Willes.*

Solicitor for the respondent, *A. E. Pridham.*

From Q. B. Div. (Lord Esher, M.R., and Bowen and A. L. Smith, L.JJ.) June 25, 27, 1892.

KIRKHEATON DISTRICT LOCAL BOARD *v.* AINLEY & SON. (*a.*)

River, pollution of—Causing sewage to flow into stream—Sewer vested in local authority—Joint offenders—

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Discretion—Rivers Pollution Prevention Act, 1876 (39 & 40 *Vict. c.* 75), *ss.* 3, 10, 11—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 13, 15, 17, 19, 27—*Practice—Appeal from county court—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 120, 124.

The defendants discharged sewage from their premises into a sewer which was vested in the plaintiffs, the local sanitary authority. The sewer communicated with a stream, which became polluted by the sewage from the defendants' premises. The plaintiffs applied to a county court for an order under section 10 *of the Rivers Pollution Prevention Act*, 1876, *to restrain the defendants from polluting the stream. The county court judge made the order.*

Held (*affirming the decision of the* Divisional Court), *that the plaintiffs and the defendants had both committed offences against the Act, the defendants by causing the sewage to flow into the stream, and the plaintiffs by permitting them to do so; that the making of the order was discretionary, and that, under the circumstances, no order ought to be made at the instance of the plaintiffs.*

Appeals from county courts under the Rivers Pollution Prevention Act, 1876, *are properly made by way of motion.*

Appeal of the plaintiffs from the judgment of a divisional court (Lawrance and Wright, JJ.) allowing an appeal from the Huddersfield County Court, and directing judgment to be entered for the defendants.

The defendants were manufacturers, having a large number of persons in their employ, and their premises were within the urban sanitary district of the plaintiffs, the Kirkheaton Local Board. The plaintiffs instituted proceedings against the defendants in the Huddersfield County Court under the provisions of the Rivers Pollution Act, 1876, alleging that the defendants, in contravention of that Act, caused liquid and solid sewage matter from the defendants' premises, situate in the district of the plaintiffs, to be carried into a stream called the Kirk Ings Beck within the said district, such sewage matter being caused by the defendants to pass into the said stream along a drain on the defendant's premises communicating with a watercourse which was used as a public sewer, and which was vested in the plaintiffs, whereby the said stream was rendered foul and unsanitary. The plaintiffs asked for an order requiring the defendants to abstain from committing an offence under the said Act.

It was proved at the hearing in the county court that there was in the plaintiffs' sanitary district a natural watercourse which was vested in the plaintiffs as being a sewer. This sewer ran under the defendants' works and received the sewage from the waterclosets of the works. At a distance of 500 yards from the defendants' premises this sewer ran into the Kirk Ings Beck, the stream which the defendants were charged with polluting. Between 1878 and 1883 extensive alterations were made in the defendants' premises and the waterclosets above metioned were erected. The plans of these waterclosets were approved by the plaintiffs, but the plans did not show the connection between the waterclosets and the drain. In 1888 an owner of a house near the Kirk Ings Beck complained to the Local Government Board of the pollution caused to the stream by the defendants, but the Local Government Board declined to interfere. He then applied for a *mandamus* to compel the plaintiffs to make a proper system of drainage within their district. That application came before a divisional court, but stood over upon an undertaking by the plaintiffs to disconnect the drains of the defendants with the sewers, and so to prevent the sewage entering the Kirk Ings Beck, or to take proceedings against the defendants under the Rivers Pollution Prevention Act, 1876. The plaintiffs adopted the former alternative, but, on the motion of the defendants in the Chancery Division, Stirling, J., granted an injunction restraining the plaintiffs from diconnecting the defendants' drains with the sewer.

The plaintiffs then brought the present action, and the county court judge made the order asked for against the defendants.

On appeal to the Divisional Court Lawrance and Wright, JJ., held that the defendants were not the persons responsible for causing the sewage to flow into the stream, and entered judgment for the defendants. The plaintiffs appealed.

Section 3 of the Rivers Pollution Prevention Act, 1876, provides that every person who causes to fall or flow, or knowingly permits to fall or flow, or to be carried into any stream, any solid or liquid sewage matter shall be deemed to have committed an offence against the Act.

By section 10 the county court having jurisdiction in the place where any offence against the Act is committed may, by summary order, require any person to abstain from the commission of such offence.

Section 11 provides that there may be an appeal in any proceedings before a county court under the Act in point of law or on the merits, and that such appeal shall be by special case.

In the present case the appeal to the Divisional Court was not by special case, but by motion. The Divisional Court, however, were of opinion that though the special privilege of appeal on the merits conferred by the Act had not been taken away by the County Courts Act, 1888, yet sections 120 and 124 of that Act required the appeal to be brought by way of motion.

Cyril Dodd, Q.C., for the plaintiffs.—The defendants have committed an offence under section 3 of the Rivers Pollution Prevention Act, 1876, by causing sewage matter to flow into the stream. Assuming that there would have been no pollution if the plaintiffs had provided a different system of drainage, that will not exonerate the defendants: *St. Helen's Chemical Co.* v. *Corporation of St. Helen's*, 1 Ex. D. 196, 24 W. R. Dig. 165; *Attorney-General* v. *Colney Hatch Lunatic Asylum*, 17 W. R. 240, L. R. 4 Ch. App. 146. When an offence under the Act has been proved there is no discretion as to the making of the order. Secondly, under this Act appeals may be brought on the merits, but the appeal must be by special case; this appeal is by motion under section 120 of the County Courts Act, 1888, which only gives appeals on points of law, and the way in which the county court judge exercised his discretion is not a matter of law. Therefore, as there was evidence before him of a breach of the Act by the defendants, this appeal must fail.

Bosanquet, Q.C., and *C. M. Atkinson*, for the defendants.—The plaintiffs, who have the control of the sewers, are the real offenders against the Rivers Pollution Prevention Act, 1876, or, at least, are joint offenders with the defendants, and so the plaintiffs cannot obtain an order under the Act which in reality amounts to an injunction. The court is entitled to deal with the question on the merits. Even if an appeal on the merits is not within section 120 of the County Courts Act, 1888, the effect of section 124 of that Act is that all appeals from county courts must be brought in the manner provided by section 120—that is, by motion: *Eder* v. *Levy*, 19 Q. B. D. 210, 35 W. R. Dig. 152.

Dodd, Q.C., replied.

The following cases were also referred to:—*Attorney-General* v. *Dorking Union*, 30 W. R. 579, 20 Ch. D. 595; *Reg.* v. *Staines Local Board*, 60 L. T. N. S. 261, 37

W. R. Dig. 131; *Julius* v. *Bishop of Oxford*, 28 W. R. 726, L. R. 5 App. Cas. 214; *Hammond* v. *St. Pancras Vestry*, 22 W. R. 826, L. R. 9 C. P. 316; *Cator* v. *Lewisham District Board*, 13 W. R. 254.

Lord ESHER, M.R.—The first question to be determined in this case is whether the defendants have committed an offence against the Rivers Pollution Act, and that depends on the construction of the Act, and on that alone. Can the defendants be said to have caused this objectionable matter to flow into the stream within the meaning of the Act? The objectionable matter starts from the defendants' premises at their volition in such a way that it must go through a sewer, and the sewer flows into the stream. Unless the defendants had acted otherwise than they did, the sewage would not have got into the stream. The defendants are the *causa causans*, or, at any rate, they are the *causa sine qua non*. The mere fact that the sewage goes through a sewer which belongs to the sanitary authority cannot prevent the defendants from being the cause of the sewage going into the stream, and therefore the defendants are within the Act. Even if the plaintiffs have been guilty of a dereliction of their duty without which the sewage would not have got into the stream, that does not prevent the defendants from being the persons who caused it to do so. It makes them both liable for a breach of the Act: the defendants for causing and the plaintiffs for permitting the deleterious matter to enter the stream; for the wrongful act of one person cannot excuse that of another. Unless, therefore, there is some infirmity in the plaintiffs' case, the injunction ought to go against the defendants. It has been argued that the court has no discretion in granting an injunction in this case—that is to say, that if a person is once brought within the Act, the court is bound, as a matter of law, to grant an injunction. Having regard to section 10 of the Act, however, I am clearly of opinion that the granting of an injunction in this matter is discretionary. Therefore the learned county court judge had a discretion, which he was bound to exercise according to law, whether on the facts of this case he should grant an injunction or not, and the question whether he did exercise that discretion rightly in granting an injunction is a question of law, and is, therefore, a matter for appeal to the Divisional Court and to this court. That question we have now to determine.

The only thing the defendants have done—namely, the sending of their sewage into the sewer—was a thing they had a perfect right to do, and it was the duty of the plaintiffs to deal with the sewage in their sewers in such a way as to prevent its becoming a nuisance to the public, and I have come to the conclusion that the plaintiffs have failed to give any sufficient reason for not doing their duty; they have not shown they were prevented or forbidden, or that it could not be done without an unreasonable expenditure on their part. Under these circumstances I am of opinion that, the plaintiffs being joint offenders with the defendants, if we were to grant this injunction against the defendants, we should be allowing the plaintiffs to cast off the duty which was upon them of dealing with this sewage, and to throw it upon the defendants, who had a perfect right to send their sewage into the sewer, but who had the misfortune, through the plaintiffs' fault, of being the cause of the sewage flowing into the stream. I think such a result would be unjust, and that it would be wrong to exercise our judicial discretion otherwise than by refusing the injunction. For these reasons I agree with the decision of the Divisional Court, and the appeal must therefore be dismissed.

BOWEN, L.J.—I am of the same opinion. The first question is whether the defendants are offenders against section 3 of the Rivers Pollution Act, 1876. I am clearly of opinion that they are. I think that anyone is "a person who causes to flow" within the meaning of the section, who intentionally does that which is calculated in the ordinary course of things, and according to the ordinary laws of nature, to produce such a flow; and it seems to me that a person causes sewage to flow into a stream within the meaning of the section if he intentionally pours it into any channel through which, by the ordinary laws of gravitation, it will find its way into the stream.

The defendants, therefore, being offenders against the Act, what is the position of the plaintiffs? They are the local sanitary authority, and, therefore, by section 13 of the Public Health Act, 1875, the sewers are vested in them and placed under their control. The sewage matter in the sewers is therefore also under their control. The Act prohibits the use of the sewers for the purpose of conveying sewage into a natural stream until it is freed from foul matter. The local authority is bound to empty and cleanse the sewers (section 19), and powers are given, not only of taking lands, but of constructing works for the purpose of receiving and disposing of sewage. It may be an answer in any case to say that the sewage board are without the means and have no reasonable opportunity or power of finding any way whatever for disposing of the sewage, but I shall wait until a local board in that unfortunate position comes before me before determining that question. In this case, on the materials before me, I do not doubt that there are some means in the possession of the plaintiffs by which they could dispose of the sewage so as to prevent it finding its way into the stream. If they have power it is their duty to do it, and not having done it, in the absence of justification it seems to me that they are themselves persons within the section of the Rivers Pollution Act who knowingly permit noxious matters to be carried into the stream. It is no answer to say that the Local Government Board have pronounced an opinion in their favour, and that there are no means by which they could have prevented this consequeuce. In law what the Local Government Board say would not prevent the question being afterwards decided by the court on the materials before it, but it would make us, of course, pause before we lightly assumed a thing could be done which the Local Government Board thought could not; we should examine it with great care. But on the materials before us nothing is plainer in this case than that the Local Government Board have done nothing of the kind. They have refused to impose upon the plaintiffs the necessity of making a general scheme for the district, and perhaps also the necessity of making a general scheme for part of it, but what they do not propose to do is to decide the question as to what the plaintiffs as the local board ought to do with the sewage in these two sewers.

Both the plaintiffs and the defendants are therefore in the position of offenders against the Act. In these circumstances the plaintiffs are driven to their wits' end to know what to do, because they do not want to make a general scheme for the district, and they find themselves pressed on the one side by the defendants who discharge the foecal matter into their sewer, the plaintiffs being unable to close the sewer against the defendants, and on the other side they are being pressed by the riparian proprietors. Instead of taking steps to stop the pollution of the stream, they adopt the remarkable line of putting in force the Rivers Pollution Act against the persons from whose premises the matter originally comes, forgetting that they

themselves are even more in fault than the defendants, because it was their business to dispose of the sewage matter so as to prevent it going into the stream.

The Master of the Rolls has pointed out, and I agree with him, that the county court judge had a discretion to refuse or grant this application for what is in effect an injunction, though it is really an application for an order requiring the defendants to abstain from doing that which they are doing. It has been said that, when a local board stands in the position of the public, and is applying for the protection of the public to the justices or the county court for an order to prevent a nuisance or injury to the public, it is no answer to the local board to say that the local board itself has done something wrong. So stated, not much exception could be taken to that proposition so far as the local board represents the public, and it is necessary in the interests of the public that they should be represented by the local board. A case was quoted by Mr. Dodd, in which there was a compulsory duty imposed on the local board to get an order from justices to abate a nuisance, and the justices had no discretion, but were compelled to make the order. Under these circumstances the court held that it was no answer to the local board, which was in that way representing the public, that it was itself in fault, because the proceedings were compulsory and the board was bound by statute to take the step it did, quite apart from the question whether the board itself was right or wrong, and the county court judge was bound by statute to make the order.

The cases, on the other hand, in which the Attorney-General represents the Crown, and in which it has been held that the Attorney-General is not to be prejudiced in his right to ask for an information on the ground that the relators were in fault, have nothing to do with the case. The Attorney-General represents the Crown and the public, and what the relator does is not a matter which the court will consider in dealing with the matter. Unless there is something which is tainted with the injustice of the relator's proceedings there is no reason why the court should not help the public at the request of the Attorney-General simply because the person putting the Attorney-General in motion was himself in the wrong.

The cases which have been cited have no application to this case, and we come back to the section itself, which shows that the county court judge has a discretion on the prosecution either of the local board or of any other aggrieved person. Sections 8 and 10 show that the public or the aggrieved persons are not at the mercy of the local board. They can proceed for themselves. There is, therefore, ample reason for thinking that in such a case as this the conduct of the local board itself may well be taken into account in considering whether an order should be made at their instance. It does not follow as a matter of course that if the local board has been itself in the wrong the court must therefore refuse the injunction. But the conduct of the local board is a most material circumstance, and if the conduct of the local board has been such as to make it unjust that the local board itself should put the Act in force, then the ordinary principles of the courts of common law and equity in granting injunctions ought to influence this court, which has a discretionary power to make an order by way of injunction. The court will in such a case say that whoever else may be aggrieved can come and prosecute the matter themselves, but that it is not for the local board after its own conduct in the matter to do so, for it by no means follows that in such a case it is to the interests of the public that an order should be made at the instance of the local board. To make such an order would enable the plaintiffs to escape from the pressure of circumstances of their own particular district, to enable them, by stopping the flow of foecal matter from these waterclosets, to reconvert them into cesspools. It might not be at all for the interests of the public that the plaintiffs should be able to escape in that way, and having regard to their conduct I think that it would be most unjust as against the defendants that the plaintiffs should be the persons to put the law in motion. It may well be that if the matter was pressed by other persons the defendants might be able to arrange with them, but as between themselves and the plaintiffs the sole object of these proceedings is, so far as I can see, to emancipate the plaintiffs from the necessity of dealing in a reasonable and proper manner with the sewage in their own sewers.

For these reasons, which are not exactly the reasons of the court below, but reasons which commend themselves to anybody who is acquainted with the practice of the courts of equity, we say that it is not just that a local board, having acted as the plaintiffs have done, should be the persons to put in force against these particular defendants the powers of the Rivers Pollution Act.

As to the form in which this appeal has come to this court, it is an appeal from the county court judge, and I think myself that, assuming this to be an appeal on the merits, the court below were right in deciding that this appeal need not, now at least, be brought by way of special case, but that it ought to be brought by motion. Under section 124 of the County Courts Act no order of the county court is to be removed by way of appeal into any higher court except in the manner provided by the Act. Section 120 provides for appeals on questions of law, but the Act contains no provision for the special kind of provision given by the Rivers Pollution Act, under which there may be appeals upon the merits as well as upon points of law. Nevertheless it seems to me that the language of section 124 comes within the procedure indicated by section 120, and applies to appeals upon the merits under a special Act like this, although they are not within section 120 as far as the definition of appealing goes. The right of appeal in this case arises under the Rivers Pollution Act. The procedure by way of appeal is applied by section 124 of the County Courts Act coupled with ord. 59, r. 10, which indicate the procedure which now applies to all county court cases. Therefore there is nothing, as it seems to me, in the suggestion that we may not now deal with this appeal upon the merits, quite apart from what the Master of the Rolls has indicated as to this being an appeal upon the law. Putting it as an appeal on the merits, I am of opinion that we have now the power to do that which the learned county court judge ought to have done. The learned county court judge ought, in my opinion, to have acted in the way in which courts of law and equity, under such circumstances and upon such proof, would act, and that is, to refuse the injunction applied for by the person in whose mouth it does not lie to ask for it.

A. L. SMITH, L.J.—I am of opinion that this appeal should be dismissed. I think Mr. Bosanquet's proposition was well founded, that the defendants were entitled, under the Public Health Act, 1875, to drain their manufactory into this sewer. But, in my opinion, that Act must be read in conjunction with the Rivers Pollution Act, and reading them together I think that the true construction is that although, under the former Act, the defendants were entitled to drain their waterclosets into this sewer, and thence into the stream, yet, after the passing of the latter Act, it was not lawful either for the defendants or the

plaintiffs to cause to flow, or knowingly permit to flow, any sewage matter into the stream unless a deodorizing process was resorted to, or, in the case of the defendants, unless they had obtained the leave of the plaintiffs, the sanitary authority. I therefore come to the same conclusion as the Master of the Rolls and Bowen, L.J., that both the plaintiffs and the defendants are liable for offences under the Rivers Pollution Act.

On the other point I do not say who are the greatest offenders, but when both are offenders, is it right and just that one should come to this court, for the purpose of getting the yoke off his neck, and ask for an injunction against the other offender? That seems to me to be wrong, and on that ground I think that this order ought not to have been made.

On the question as to the way in which this appeal has been brought, I agree with what was said by Bowen, L.J.

Appeal dismissed.

Solicitors for the plaintiffs, *Van Sandau, Armitage, & Co.*, for *Mills, Nalder, & Mills*, Huddersfield.

Solicitors for the defendants, *Brooke, Freeman, & Batley*, London and Huddersfield.

High Court of Justice.

Chan. Div. Chitty, J. — April 1, 1892.

LUBBOCK *v.* BRITISH BANK OF SOUTH AMERICA (LIMITED). (*a.*)

Company—Profit and loss account—Sale of business—Profits on capital—Payment of—Dividends out of capital.

A banking company which had a nominal capital of £1,000,000, divided into 100,000 shares of £10 each, had issued all its shares, the sum of £5 having been paid on each share, which thus constituted a paid-up capital of £500,000. The company sold a part of its business for £875,000, realizing thereby a net profit of £205,000 after bringing the £500,000 into account, and after making certain payments to the purchasers.

Held, that the company was justified in carrying the £205,000 to the profit and loss account, and applying the same as dividends, the capital of the company (i.e., *the £500,000*) *being intact.*

Motion.

The above-named company was incorporated in 1863 as a banking company with a capital of £1,000,000, divided into 100,000 shares of £10 each. All the shares of the company had been issued with £5 each paid up, constituting a paid-up capital of £500,000. In January, 1891, the company entered into an agreement to sell its goodwill and property in Brazil to a Brazilian bank for £875,000, and also agreed, on payment of the £875,000, to discontinue the use of its name and to adopt a name not indicating a bank doing business in Brazil, and the agreement contained provisions restricting the company from carrying on business in Brazil. At the end of June all the purchase-money was paid, and in November the restrictions against the company carrying on business in Brazil were relieved by the Brazilian bank on payment by the company to the latter of £75,000. The £205,000 with which the present motion was concerned was the net value of the £875,000, after deducting the £500,000 paid-up capital of the company, the £75,000 repayment, and divers sums for outgoings and compensation in reference to the sale to the Brazilian bank. On the 10th of July, 1891, the directors sent a circular to the shareholders informing them of the sale and stating that "after payment of the bonus proposed the bank's position would be as under: uncalled capital, £500,000; capital paid up, £500,000; capital reserve fund, about £350,000; general reserve fund, £75,000. On the 24th of March, 1892, the directors passed a resolution that the profit derived from the sale and repurchase of the bank's business in Brazil be treated as profit, to be carried to the profit and loss account of the bank, and dealt with accordingly. This was a motion by the shareholders to restrain the company from acting on the resolution and from placing the sum of £205,000 to the profit and loss account of the company, and from dealing with or distributing the same as if it were income of the company.

Whitehorne, Q.C., and *S. Dickinson*, for the motion, referred to *Lee* v. *The Neuchatel Asphalte Co.*, 37 W. R. 321, 41 Ch. D. 1, and *Frames* v. *The Bultfontein Mining Co.*, 39 W. R. 134, [1891] 1 Ch. 140.

Byrne, Q.C., and *Methold*, for the company.

CHITTY, J.—This is a trading company. I have before me the company's accounts up to December, 1890. They put down on one side their liabilities, treating properly the £500,000 which has been subscribed by the shareholders as a liability, for the purposes of bringing it into account, as against the assets, which they put down on the other side. Then on the same liability side they properly put down their current liabilities, and certain other liabilities and reserve fund, which the company, according to its constitution, is justified in making, and they add up the total amount of those liabilities. On the other side they put down their assets, and for the purpose of giving information to the shareholders they divide the assets into certain heads, "Cash at bank," "Bank premises and managers' residences in Brazil" and the "River Plate," and then they add up the total on that side. They, of course—because there is not a suggestion that these accounts are not kept with perfect propriety and perfect honesty—therefore put down on the assets side the money value of their assets, some being in money itself and some not. Then when the two sides of this account are compared there is a surplus of £44,000 shown, which goes, according to the accountant's regular method of keeping accounts, to the liability side, and represents the balance of assets over liabilities. Now what is the result of keeping an account in this form? The capital of the bank is intact, and the account shows it, and after providing for the capital, there remains a surplus, which rightly goes to the profit and loss account. All that the company is required to do by the force of the Companies Act, 1862, is to keep its capital intact, and not to pay dividends out of its own capital; in other words, to keep that capital for its creditors and any others who may be concerned therewith. That mode of keeping the account is an excellent illustration of the right way to divide profit and loss. Taking the figures on this account this sum of £44,000 is profit made, and profit available, within the Act of 1862, for division among the shareholders, unless there is something in the articles which would prevent the directors and prevent the company from dividing the sum which thus stands to their credit. I say I have great difficulty in following the argument for the plaintiff, because it was said that what was sold was part of the capital of the

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

company, and that what came in over and above the £500,000 was an accretion to capital, and that therefore it must be kept intact as part of the capital. That has, with great respect to the counsel who put forward this argument, nothing to do with the matter. The sale being an authorized sale, it is immaterial what is the thing sold. I put during the argument a humble illustration. A man's business is to make boots and shoes. He has £10,000 which he takes into that business as his capital. He makes boots and shoes, and spends the whole of his £10,000 in doing it, and he sells and gets back from his customers a certain sum on the sale. He compares then, assuming he has sold all, what he has got back with his expenditure in producing the boots and shoes and putting them on the market, and if he finds he has his £10,000 (I am treating it apart from any question of debts outstanding, supposing it a good, solid sale), then his capital is intact, and the surplus, if there is any, is profit. On the other hand, if he has only £9,000, his capital is not intact, and he has lost. It is exactly the same principle that has to be applied to a trading company under the Companies Act, and the capital that has to be regarded for the purpose of the Act is the capital according to the Act, and not the things, whether houses, goods, boots and shoes, or hats, or whatsoever it may be for the time being representing the capital, in the sense of being things in which the capital has been laid out.

The result, therefore, is plain that on the facts of this case £205,000 is profit. Now I turn to the articles of the company, and I find there with regard to the dividends, article 176 provides that "all dividends on shares, other than a dividend on account, shall be declared by the ordinary meetings, and no dividend shall exceed the sum recommended to the meeting by the board." The article proceeds on the footing that the books of the bank are properly kept, as to which, without fear of being mistaken, I say there is no question or suggestion. That requires that the capital of the bank should be intact, and in this case, applying that article to the actual facts of the case, that means the £500,000, neither more nor less. Then comes article 29, which provides for the creation of a reserve fund. The directors propose to act on article 29, and to appropriate out of the profits of the bank such an amount as they shall think proper, and add the same to the reserve fund. But according to the constitution of the bank this £205,000, being a profit, has first to be carried to the profit and loss account. Then the directors, if they should think fit, would be entitled under article 29 to attribute a portion of it to the reserve fund, and the balance will be an available sum for dividend. The directors will make a proposal to the meeting which is about to be held, and if their proposal is accepted the meeting will pass a resolution authorizing the dividend, and it would be a dividend out of this £205,000, or so much as shall not have been appropriated by the directors themselves to the reserve fund. All that, to my mind, is plain, and I cannot find any ground on which the proposition which was advanced in a friendly manner by the plaintiff can be sustained, except, possibly, on the ground of the circular of the 10th of July, upon which it was said that it amounted to a representation by the directors to the members of the company which precluded them from dealing with this £205,000 by paying it to the profit and loss account, because it was alleged that the directors had called it capital reserve fund. There is really nothing in this argument. The circular was only a statement of what the result of the sale was expected to be. In my opinion the directors will be justified in acting upon the resolution which they have passed, and in carrying the sum of £205,000 to the profit and loss account, and then dealing with it in accordance with the articles. Therefore I refuse the motion.

Solicitors, *Janson, Cobb, Pearson, & Co.; Budd, Johnson, & Jecks.*

Chan. Div. North, J. } Nov. 1.

In re BRIDGER.

BROMPTON HOSPITAL FOR CONSUMPTION *v.* LEWIS. (*a.*)

Will—Construction—Mortmain and Charitable Uses Act, 1891, *s.* 9—*Will made before passing of Act—Death of testator after passing of Act.*

A testator by his will, dated before the passing of the Mortmain Act, 1891, *gave his residuary estate, consisting of realty and personalty, "in trust to pay such part of my said residuary estate which may by law be given for charitable purposes to the Brompton Hospital." He gave the remainder of his residuary trust estate to his wife's niece. Testator died after the passing of the Mortmain Act,* 1891.

Held, that the hospital was entitled to the whole of testator's residuary estate.

Adjourned summons.

By his will, dated the 29th of June, 1891, Mr. Walter Bridger gave the residue of his estate, consisting of real and personal property, to trustees in trust to pay the income thereof to his wife for her life, and after her death in trust "to pay such part of my said residuary trust estate which may by law be given for charitable purposes unto the Brompton Hospital for Consumption." And the testator gave "the rest and remainder of my said residuary trust estate in trust for my wife's niece, Elizabeth Williams, spinster, absolutely."

The testator died on the 20th of February, 1892. The Mortmain Act of 1891, enabling land and impure personalty to be given by will for charitable purposes, was passed on the 5th of August, 1891, after the date of testator's will, but before the date of his death. Section 9 of the Act provides that "this Act shall only apply to the will of a testator dying after the passing of this Act."

An originating summons was taken out to have it determined whether the Brompton Hospital was, subject to the life interest of testator's widow, entitled to the whole of the testator's residuary estate, or whether Elizabeth Williams was entitled to any, and what part thereof.

Sir A. T. Watson, Q.C., and *J. T. Prior,* for the hospital, cited *Hasluck* v. *Pedley,* 23 W. R. 155, L. R. 19 Eq. 271, and *Constable* v. *Constable,* 11 Ch. D. 681, 27 W. R. Dig. 230.

Ingle Joyce, for the trustees of the will.

Cozens-Hardy, Q.C., and *Charles Crawley,* for Miss Williams.—When the testator made his will he could only have given, and could only have intended to give, his pure personalty to the hospital. The court cannot, owing to a change in the law, put a different construction on the words he has used.

They relied on *Jones* v. *Ogle,* 21 W. R. 236, L. R. 8 Ch. 192, and *In re March, Mander* v. *Harris,* 32 W. R. 941, 27 Ch. D. 166.

NORTH, J.—This case is settled by the language of the Act. As I understand the words of section 9, they mean that the Act is to apply to the will of a

(*a.*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

testator dying after the passing of the Act. I am asked to say that this means the Act shall only apply to a will made or confirmed by codicil after the passing of the Act. This is entirely different from what the Act intended. For else why should "dying after" be referred to, if that is not the important thing. I cannot treat the Act as not meaning what it says, which I should do by holding that the words referred to the date of the will, and not to the date of the death. The testator might no doubt have expressed a contrary intention, as if, for example, he had said, "all that I can as the law now stands give to charity." But I cannot so read his will. I think the testator did intend to give all he could, to charity, and that the words "may by law be given" refer to the time at which the will should take effect. As regards the cases cited it is not necessary to go into detail, but I fail to see why *Hasluck* v. *Pedley* and *Constable* v. *Constable* do not refer to the present case; nor do I see how the cases in the Court of Appeal, *In re March* and *Jones* v. *Ogle*, displace their authority.

The hospital was therefore declared entitled to the whole of the residue.

Solicitors, *Norton, Rose, Norton, & Co.; Stanley Evans.*

Chan. Div. }
Stirling, J. } May 6, 21, 1892.

In re HOARE.
HOARE *v.* OWEN. (*a.*)

Administration—Creditor's action—Receiver—Mortgagee in possession—Right to back rents—Dividends in custodiâ legis.

Moneys in the hands of a receiver appointed by the court in a creditor's administration action are not necessarily in custodiâ legis *in the same way as they would be in the hands of a sequestrator. The receiver, so far as the receipt of the assets is concerned, stands in the place of the executor, and the creditors cannot be in a worse position than if the assets had been received by the executor.*

Delany *v.* Mansfield, 1 *Hogan*, 234, *discussed and disapproved.*

This was a motion to discharge an order made in chambers, on the 11th of April, 1892, dismissing the claim of A. C. de Rothschild to have delivered to him as the person entitled to 10,000 shares in the United Horse Shoe and Nail Co. (Limited), then standing in his name, a proportional part of the second mortgage debenture bonds for £335 17s. 5d. and £353 13s. 11d. which were issued to the receiver in the action (which was an ordinary creditor's action for administration), by the company in respect of arrears of dividends upon the 10,000 shares and certain other shares, and also to have paid to him a proportional part of the interest which had been paid by the company to the receiver upon the said bonds. The testator in the action created an equitable security in June, 1886, and transferred the shares to the mortgagee, the applicant. The transfer was not registered. The interest on the mortgage was paid down to April, 1888. On the 26th of July, 1889, debentures were issued to the receiver, representing a dividend on the shares.

Maidlow, for the motion, contended that a mortgagee entering into possession is entitled to have all arrears of dividends unless they have come home to the mortgagor: *Tatham* v. *Parker*, 1 W. R. 491, 1 Sm. & Giff. 506; *Delany* v. *Mansfield*, 1 Hogan, 234. The dividends being in the possession of the receiver are *in custodiâ legis.*

Hastings, Q.C., and *Maclaren, contrà.*—A mortgagee not having taken possession is not entitled to back-rents; after having put in a claim on the estate he cannot claim a dividend two or three years old: *Thomas* v. *Brigstocke*, 4 Russ. 64; *Flight* v. *Camac*, 4 W. R. 664; *Ex parte Wilson*, 2 Ves. & Beames, 252. [STIRLING, J., referred to *Walker* v. *Bell*, 2 Madd. 21.]

Maidlow, in reply.—The receiver is appointed, not by the mortgagor, but by his creditors.

He referred to Fisher on Mortgages, vol. I., para. 781; *In re Brown, Dixon* v. *Brown*, 32 Ch. D. 597, 34 W. R. Dig. 18; and *Attorney-General* v. *Mayor of Coventry*, 1 P. Wms. 308.

Cur. adv. vult.

May 21.—STIRLING, J.—This is a motion to discharge an order made in chambers, which raises a question as to who is entitled to certain debentures which have been issued in respect of the interest on certain shares in a company called the United Horse Shoe and Nail Co. (Limited), which stood in the name of the testator at the time of his death. On the 30th of June, 1886, the testator appears to have created an equitable security on the shares in question, the precise nature of which I do not know; but it appears to have consisted partly of a transfer to the mortgagee, which transfer the mortgagee did not see fit to have registered. On the 10th of May, 1889, the testator died. Interest on the security had been paid up till April, 1888. Shortly after the testator's death the present action was begun. It is an action by a creditor on behalf of himself and all other creditors of the testator for the administration of his estate; and on the 7th of June, 1889, an order was made appointing a receiver. On the 26th of July, 1889, certain debentures were issued by the company to the receiver of the nominal value of £689 11s. 4d., representing a dividend of $5\frac{3}{4}$ per cent. on the mortgaged shares, and on other shares held by the testator, for the year 1888, the period during which it accrued being prior to the death of the testator. The mortgagee took no steps in the action till February, 1892, when he came in and valued his security and proved for the balance. Subsequently, in March, he was registered as transferee of the mortgaged shares. The question was raised in chambers on an application for directions as to who was entitled to the debentures representing the interest on the shares. On the contention of the mortgagee that he was entitled to them, it was held that that contention was not well founded, and that they formed part of the general estate of the testator. A motion is now made to discharge that order.

The first argument is that the debentures, being in the hands of the receiver, are *in custodiâ legis*, and ought to be handed over to the mortgagee. In support of that contention three cases were cited—*Walker* v. *Bell*, *Tatham* v. *Parker*, and *Delany* v. *Mansfield*. The first two cases relate to property in the hands, not of a receiver, but of a sequestrator, and the cases in question, and the authorities referred to in them, establish the proposition contended for so far as sequestrators are concerned; and if the property here had been in the hands of a sequestrator I should have had to follow them. But receivers are not in the same position at law as sequestrators, and the question is whether I must apply the same rule to them.

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

In support of the contention that I should do so, *Delany* v. *Mansfield* was relied on. There a motion was made for the plaintiff in the first cause that a consent signed by the defendant might be made a rule of court in both causes. The consent was that the receiver, who had been lately extended to the second cause, might pay a sum of money which was previously in his hands to the plaintiff in the first cause. The bill in the first cause was filed in 1822 for the purpose of raising the arrears of an annuity, and there was a receiver on process in May, 1823. The plaintiff in the second cause, though a prior incumbrancer, was not made a party to the first cause. The bill in the second cause was filed in 1824, and the receiver was afterwards extended to that cause. He had previously collected three years' rent, and the plaintiff in the first cause rested his present application on the ground that, as these rents were collected in consequence of his diligence, the court would consider them as bygone rents as against the plaintiff in the second cause. The Master of the Rolls said: "I do not consider the right of the plaintiff in the first cause to be such as he now asserts it. This application is inconsistent with the course of business in a court of equity, as a receiver in a cause is not appointed for the benefit of a plaintiff merely, but for all other persons who may establish rights in the cause. A receiver cannot be more the agent of the plaintiff than a sequestrator; and *Walker* v. *Bell* is an authority to show that rents received by a sequestrator are not considered as vested in the plaintiff, but are *in custodiâ legis*, and there must be a further order before they can be applied for the benefit of the defendant; and if other parties come in the meantime and establish a prior right, they become entitled to them. Any argument which treats rents in the hands of a receiver as if paid to the plaintiff is quite unfounded and subversive of the rights of prior creditors who are not parties to the cause to be examined *pro interesse suo*. If money as soon as collected by a receiver is to be considered the property of the plaintiff, every inquiry in a decree as to prior incumbrances must be to a great extent useless. If a puisne creditor gets a receiver a prior creditor may file a bill and attach the money in his hands." *Delany* v. *Mansfield* is not binding on me, being an Irish decision, but of course it is deserving of all respect. The decision may be right, but I do not think that the learned judge intended to lay down that in all cases moneys in the hands of a receiver are to be treated as *in custodiâ legis*, in the same way as they would be in the hands of a sequestrator. This would be inconsistent with English cases of high authority which are binding on me. I shall refer to two or three of these cases. [His lordship then referred to and discussed the following cases: *Bertie* v. *Lord Abingdon*, 3 Mer. 560; *Gresley* v. *Adderley*, 1 Swans. 573; *Thomas* v. *Brigstocke*, and continued:—] It seems to me that these decisions are inconsistent with the contention that money in the hands of a receiver is *in custodiâ legis* in the same way as if it were in the hands of a sequestrator. It was argued that in *Thomas* v. *Brigstocke* it was made out that the receipt by the receiver was on behalf of persons who claimed under the will of the testator, and that the case could be distinguished on that ground: if so, that was an abandonment of the first point; but it leads to what in my opinion is the true rule: that where money is in the hands of a receiver, you must look in each case to the nature of the action and the object of the appointment of the receiver. Where the object of the action is to ascertain who are the incumbrancers on a particular property and their priorities, or to settle a dispute as to title, it well may be that the receiver holds money coming to his hands on behalf of the person who may prove to be the true owner. Here the action is simply an ordinary creditor's action in which a receiver has been appointed. The object of the action is to obtain payment of the testator's debts out of his assets. The object of the appointment of a receiver is to secure that all assets properly applicable for that purpose shall be so applied. In ordinary course those assets would be received by the executor, but here, for some good reason, and for the security of the creditors, the court has appointed its own officer to stand (so far as the receipt of the assets is concerned) in the executor's place. It seems to me that the creditors cannot, as regards the application of the assets thus received, be in a worse position than if the executors had received them. It was admitted (as it could not but be) by the counsel for the mortgagee that if these debentures had come to the hands of the executor the mortgagee would have had no claim. I think, therefore, that the application on his behalf fails.

Motion refused, with costs.

May 24.—*Hastings, Q.C.*, referred to a case of *Morrogh* v. *Hoare*, 5 Ir. Eq. Rep. 195, in which Blackburne, M.R., had also disapproved of *Delany* v. *Mansfield*.

Solicitors for the motion, *Dawes & Sons*.

Solicitors *contrà*, *Trinders & Capron*.

Q. B. Div.
(Pollock, B., and Hawkins, J.) Nov. 3.

GOSLING *v.* WOOLF. (*a*.)

Lease—Grant of sub-lease—Right to inspect lessee's title—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *ss.* 3 (1), 13 (1).

On the grant of a sub-lease by a lessee, the intending sub-lessee has a right to inspect the lessee's lease.

Appeal of the defendant from the judgment of the deputy judge of the City of London Court.

The plaintiff by his action sought to recover the sum of £10, paid by him to the defendant as deposit, under an agreement for the sale to him by the defendant, at the price of £180, of a messuage held by the defendant under an original lease. The agreement provided that the purchaser should take an underlease of the property for the residue of the vendor's term, less a few days, at an apportioned ground-rent. The defendant refused to give an abstract of title. The plaintiff accordingly brought this action in the City of London Court for the return of the deposit. The deputy judge held that the plaintiff had a right to demand an inspection of the defendant's lease, out of which the sub-lease was to be granted, and gave judgment for the plaintiff.

The defendant appealed.

Conveyancing and Law of Property Act, 1881, s. 3 (1).—Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion.

Section 13 (1).—On a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion.

(*a*.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Megone, for the defendant.—The decision of the judge in the court below was wrong. This is an agreement for the sale or assignment of a term of years derived out of a leasehold interest. The plaintiff contends that he has a right to call for the defendant's title, but that is a title to a leasehold reversion. Sections 3 (1) and 13 (1) of the Conveyancing Act, 1881, show that such a title may not be asked for: *Patman* v. *Harland*, 29 W. R. 707, 17 Ch. D. 353.

Elgood, for the plaintiff, was not called on.

POLLOCK, B.—I am of opinion that the decision appealed from is right, and that it is impossible to put any construction other than that put by the judge in the court below upon the sections of the Conveyancing Act relied on by the defendant. The words "leasehold reversion" in those sections do not refer to a lease out of which a sub-lease is to be granted, but to the reversion, if leasehold and not freehold, expectant on the determination of that lease. It would require very strong words to alter the course of practice which has prevailed for a long time in cases such as this.

HAWKINS, J., concurred.

Appeal dismissed.

Solicitor for the plaintiff, *Olivant.*

Solicitor for the defendant, *Marsden & Son.*

Q. B. Div.
(Pollock, B., and Hawkins, J.) } Oct. 24, 25.

In re ONWARD BUILDING SOCIETY (No. 2). (*a.*)

Solicitor—Costs—Sale of property by public auction—Scale of charges for property sold in lot—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44), *General Order, schedule* 1.

Where property sold by public auction is divided into different lots, the scale of charges is to be a commission upon the aggregate sum realized by the whole of the property, and not upon the value of each different lot, although the lots be held by the vendor under different titles, and be sold to different persons.

This was an appeal from the county court judge at Durham, on his refusal to vary a certificate of taxation.

The Onward Building Society being in liquidation, Mr. Watson, a solicitor, was employed to conduct the sale by auction of certain freehold and leasehold property of the society. The property was sold in three lots. Each lot was held under a different title and was sold to a different buyer. Lot 1 fetched £102 10s.; lot 2, £270 5s.; and lot 3, £262 10s., the total amounting to £635 5s.

By schedule 1 of the General Order made under the Solicitors' Remuneration Act, 1881, the vendor's solicitor is entitled to a commission of 20s. per £100 for the first £1,000 "for conducting a sale of property by public auction, including the conditions of sale, when the property is sold; a minimum of £5 to be made whether a sale is effected or not." By rule 7 made under this General Order "fractions of £100 under £50 are to be reckoned as £50; fractions of £100 above £50 are to be reckoned as £100."

By rule 1 "the commission for deducing title and perusing and completing conveyance on a sale by auction is to be chargeable on each lot of property, except that where a property held under the same title is divided into lots for convenience of sale, and the same purchaser buys several such lots and takes one conveyance and only one abstract is delivered, the commission is to be chargeable on the aggregate charge of the lots."

By rule 2 "the commission upon an attempted sale by auction in lots is to be charged upon the aggregate of the reserved prices."

A solicitor, under these circumstances, sent in a bill of costs for £15, being a charge of £5 on each of the three lots. The registrar of the county court refused to allow the charges, and reduced the bill upon taxation to £6 10s., being the scale fee on the aggregate price of the three lots. The solicitor moved in the county court to vary the registrar's certificate, but the judge refused to vary it, and the solicitor appealed.

Scott Fox, for the appellant.—It may be that the solicitor was not entitled to make a minimum charge in respect of each lot, but he is certainly entitled to a commission of 20s. per £100 for each lot. That would amount to £7 10s., because, by rule 7, fractions of £100 under £50 are to be reckoned as £50, and fractions of £100 over £50 are to be reckoned as £100. The lots were held by vendors under different titles and they were sold to different purchasers, so that the commission for deducing title under rule 1 would certainly be chargeable upon each of the lots, and it is unreasonable to suppose, in the absence of any express provision, that a different mode of calculating the commission should apply to conducting a sale.

Dibdin, for the liquidator, was not called upon.

POLLOCK, B.—I am of opinion that in this case the county court judge was right, and that the appeal must consequently be dismissed. The official liquidator of the Onward Building Society offered certain real property for sale by auction, and employed a solicitor to conduct the sale. The property, which was sold in three lots, realized in the aggregate £632 5s., and the question which has arisen is as to the proper charges to be made by the solicitor for conducting such sale. The county court judge held that the three lots were to be treated as one property, and that the solicitor was consequently entitled to a commission of £6 10s. and no more. That view seems to me to be correct. I think that the intention of the schedule was, that if property was put up for sale by auction, the solicitor conducting the sale was to be entitled to the scale fee of 20s. per £100 on the total amount realized by the sale, irrespective of the question whether the property was sold as a whole or in lots. But then it was argued that rule 1 points to a different conclusion, providing, as it does, that except in certain cases—of which the present is not one—the commission for deducing title is to be chargeable on each lot of property, and it was contended that there was no such distinction between the work of deducing title and of conducting a sale by auction, as to warrant the application of a different rule to the latter. But in that I do not agree. On the contrary, I think that that rule tells against the solicitor's contention, for in limiting the charge of the commission on each lot to the case of deducing title, it suggests that in all other cases the commission is to be charged on the property as a whole, on the principle that "*expressio unius est exclusio alterius.*"

HAWKINS, J.—I am of the same opinion. The question which we are called upon in this case to decide is, What is the amount of the commission

(*a.*) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

payable to a solicitor for selling on behalf of his client real property by auction in a case in which the property is sold in lots? The answer to that question depends upon the construction which is to be put upon the language of schedule 1 of the General Order under the Solicitors' Remuneration Act, 1881, and of the rules annexed to that schedule. It is provided by the schedule that the commission payable to a "vendor's solicitor for conducting a sale of property by public auction" shall, "when the property is sold," be 20s. per £100 for the first £1,000. Then, what are we to understand by the word "property"? Where the land is put up for sale in several lots, is each lot for the purposes of the schedule to be treated as a separate property? I think not. In my judgment the word "property" means the whole of the land intrusted to the solicitor for sale, or such portion of it as is actually sold, and, consequently, where more than one lot is sold the solicitor is entitled to commission at the rate of 20s. per £100 upon the aggregate of the prices realized by the whole of the lots so sold.

With regard to the lots which are not sold, the schedule provides that "when the property is not sold" the solicitor shall be entitled to 10s. per £100 on "the reserved price," and if those words stood by themselves, without any explanation in the rules which follow, I should feel myself driven to the conclusion that in such case the "reserved price" would mean the reserved price of each lot, for when some of the lots have been sold there is no price reserved in respect of the aggregate of the unsold lots, though there is a price reserved in respect of each of the unsold lots taken severally.

I now pass to the consideration of the rules. By rule 1: "The commission for deducing title and perusing and completing conveyance on a sale by auction is to be chargeable on each lot of property except where a property held under the same title is divided into lots for convenience of sale, and the same purchaser buys several such lots and takes one conveyance, and only one abstract is delivered, the commission is chargeable upon the aggregate prices of the lots." And that, I think, is reasonable enough, for, save in the cases falling within the exception, the work of the solicitor in respect of deducing title and completing conveyance is multiplied by the number of the lots, he may have to deduce a separate title in respect of each lot, and, even if they are held under the same title, he has the trouble of delivering a separate abstract and preparing a separate conveyance for each purchaser. It is otherwise, however, with the conduct of a sale by auction, which is practically one operation whether the property is offered as a whole or in lots. The division of the property into lots does not materially increase the trouble of conducting the auction. Then by rule 2: "The commission on an attempted sale by auction in lots is to be chargeable on the aggregate of the reserved prices." That provision, I think, is applicable as well to a case where some of the lots are sold, as to one in which none are sold. That rule, therefore, negatives the view which without it, as I have already said, I should have taken of the meaning of the words "reserved price" in the schedule. And the effect of the schedule read by the light of that rule is, that where property is offered in lots and a portion only is sold the solicitor is entitled in respect of the unsold portion to 10s. per £100, not on the reserved price of each lot, but on the aggregate of the reserved prices of the lots. The judgment of the county court judge must be affirmed.

Appeal dismissed.

Solicitors for the solicitor, *Iliffes, Henley, & Sweet.*

Solicitors for the liquidator, *Bridges, Sawtell, & Co.*

House of Lords.

From C. A. (England). April 4, 1892.

LONDON JOINT-STOCK BANK *v.* SIMMONS. (*a.*)

Banker—Negotiable instrument—Broker—Bonâ fide holder for value—Deposit of securities.

S. was a customer of H., D., & Co., stockbrokers, and had left in the hands of D., one of the members of H., D., & Co., for custody, a number of bonds known as "Cedulas." On the 12th of October, 1887, *D., desiring to raise money for purposes of his own, and without any authority from S., contracted to sell these bonds, and on the same day he made a further contract to repurchase similar bonds for the 28th of October. On the 28th of October D. delivered the bonds which he had contracted to sell in three separate lots, and on the same day he took delivery of the other similar bonds which he had contracted to buy. For the bonds so delivered to him he paid by a crossed cheque, and in order to put himself in funds to meet it he sent the bonds of which he had taken delivery, with other securities, to the appellant bank, on receipt of which the appellants placed £6,000 to his credit. Out of this sum the cheque was cashed. The bonds so deposited remained in the custody of the bank till D. absconded in June,* 1888, *when S. applied to the bank for the bonds, which, however, had been sold for a price which was admitted to have been fair. In an action against the bank by S. to recover the price of these bonds,*

Held (reversing the decision of the Court of Appeal, 39 *W. R.* 449, [1891] 1 *Ch.* 270), *that, the Cedula bonds being negotiable instruments, the bank, taking them in good faith and for value, acquired a good title.*

Lord Sheffield *v.* London Joint-Stock Bank, 37 *W. R.* 33, 13 *App. Cas.* 333, *distinguished.*

This was an appeal from an order of the Court of Appeal (Lindley, Bowen, and Fry, L.JJ.) (39 W. R. 449, [1891] 1 Ch. 270).

The facts are stated in the judgment of Lord Herschell and in the report in the court below.

Sir Horace Davey, Q.C., and *Finlay, Q.C.* (*W. D. Rawlins* with them), for the appellants.—Two questions arise—(1) whether Simmons had title? (2) whether the bank obtained *bonâ fide* title for value without notice? *Goodwin* v. *Robarts*, 24 W. R. 987, 1 App. Cas. 476, is conclusive in our favour. *Sheffield* v. *London Joint-Stock Bank*, 37 W. R. 33, 13 App. Cas. 333, is a different case to this.

They referred also to *London and County Banking Co.* v. *London and River Plate Bank*, 37 W. R. 89, 21 Q. B. D. 535; *Foster* v. *Pearson*, 1 C. M. & R. 849; *Raphael* v. *Bank of England*, 4 W. R. 10, 17 C. B. 161; *Lang* v. *Smyth*, 7 Bing. 284, 293.

Rigby, Q.C., and *Warmington, Q.C.* (*Grosvenor Woods* with them), for the respondent.—The entire profits in the bonds were vested in Simmons before the transaction with the bank. (The case was dealt with on the assumption that the bonds had been appropriated to the respondent and his property.) If bankers know that he is acting as agent they should inquire: *Cooke* v. *Eshelby*, 35 W. R. 629, 12 App. Cas. 271, 275. The bank cannot claim beyond the actual authority given to the broker or agent: *Lord Sheffield's case.*

Finlay, Q.C., replied.

The House took time for consideration.

April 4.—Lord HALSBURY, L.C.—I believe this

(*a.*) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

case, when it is examined carefully, raises no question of law, though doubtless some questions raised in other cases seem at first sight to be touched by it.

There is no doubt that the property which is the subject of debate (the character and quality of which I will discuss later), was at one time the property of the plaintiff. There is no doubt that the plaintiff, having left this property in the hands of a person named Delmar, one of the members of the firm of Herapath, Delmar, & Co., merely for safe custody, gave no authority, express or implied, to Delmar to dispose of it, and there is no doubt that unless that property has been changed it is still the property of the plaintiff, and ought to be restored to him.

I prefer stating the proposition in this form, because, though the disposal of one set of bonds, and the repurchase of others in their place, and their suggested appropriation as substitutes for those unlawfully disposed of, raises another question, it appears to me that the same question would arise in a much simpler form, but subject to precisely the same principles of law in the form which I have suggested.

Applying myself, therefore, to the simple form in which I have suggested that the question might be raised, the first point relied on is that the property in question is, according to the law merchant, negotiable, and if passed over, even by a person who had no title, but to one who received for value, in good faith, and without knowledge of the want of title in his predecessor in title, a good title is made by such transfer to an innocent holder for value.

If the facts support this proposition, it cannot be doubted—and first, as to the character and quality of the property itself, it consists of bonds known as "Cedulas." It seems to me here it is impossible to dispute that the bonds in question were negotiable instruments. I should have thought so upon the evidence, and after the decision of your lordships' House in *Goodwin* v. *Robarts*. But I should equally think so here from the course pursued at the trial.

I take the statement of the facts from the judgment of Bowen, L.J., who said:—"An admission was made at the trial to the effect that these bonds were commonly transferred from hand to hand by delivery, and this must be taken to be true. But the admission was carefully limited, and still left uncovered the question whether they are negotiable instruments in the sense in which bills of exchange and promissory notes are negotiable, so that delivery by a person who has no title confers, nevertheless, a title on a *bonâ fide* holder for value without notice. We should require either a more unqualified admission or else more conclusive evidence before we could accept the view that bonds like these had become part of the currency of this country, so as to have acquired the peculiar characteristics of a completely negotiable instrument. The appellants' counsel alleged that they had been misled at the trial by the form of the admission, and asked that, before we decided the case on the hypothesis that these bonds were not completely negotiable, an issue might be directed to try that question. For fear of a miscarriage of justice, we will, therefore, assume in the appellants' favour and for the purpose of this case only, that the documents in question had been proved to be completely negotiable instruments."

It is to my mind clear, therefore, that your lordships, if any doubt remained on the question whether these bonds were or were not negotiable in the true commercial sense of the term, could not decide this case without directing an issue such as the appellants' counsel demanded; in the event of your lordships considering that the evidence and admission made at the trial of what is after all in each case a question of fact were insufficient, it would be impossible to decide adversely to the appellants. For my own part, I do not see how, after the evidence and the admission made at the trial, it is possible to suggest that that matter of fact is left in doubt.

The remaining part of the proposition is, as I have said, equally a question of fact, Did the bankers receive these bonds in good faith? and, though it was almost involved in the proposition, without any reason to suppose that the person from whom they received them had no right to so dispose of them; and I am of opinion that they did. There is not, to my mind, the least reason to suppose that the bank did not take these bonds in the ordinary course of business, and with a full belief that the person from whom they received them was either the owner or had full authority to deal with them, as, in fact, he did deal with them.

The Court of Appeal appear to have been much influenced by the decision of your lordships' House in the case of *Lord Sheffield* v. *The London Joint-Stock Bank*.

The first observation that I would make is, that if, as I believe, it to be accurate, that the question is one which is to be determined upon the facts of the case, no one case can be an authority for another. The only question of law decided in *Lord Sheffield's case* was that a purchaser, even for value, cannot insist on his purchase if he knows that the person from whom he purchases has no right to sell, no very novel principle of law, nor one upon which, I should think, much doubt can exist.

The second observation I make is that in this case the claim is to take from the bankers the securities they have received without paying what had been advanced upon them. In *Lord Sheffield's case* no one doubted that the bankers were entitled to receive the amount which had, in fact, been authorized by the owner of the securities to be raised upon them. But the cardinal distinction between the two cases is that in this case, upon the facts proved, I am of opinion that the bankers were under the full belief and conviction the bonds were being lawfully dealt with, whereas in *Lord Sheffield's case* I thought (and I believe those of your lordships who were parties to that judgment thought also) that the bank had actual knowledge that the person pledging them had only a limited authority to raise money upon them. And although it was also considered that the bank sincerely believed that, as matter of law, that gave them a right to hold the securities for advances made beyond that limited amount, your lordships held that the mistake of the bankers as to the matter of law did not cure the effect of their knowledge of the fact that the person to whom they advanced the money was exceeding the limit of his authority.

In expressing my opinion in *Lord Sheffield's case* I said: "But I do not believe Mozley's business could have lasted a month if the banks had not allowed this system to continue by exchanging securities. Mozley was, as he says himself, entitled to pledge them to the extent to which he had advanced money upon them, and the conclusion I draw from the facts proved is that the banks knew very well the system of money lending pursued by Mozley, and trusted to him that he would not over-pledge, so to speak, the securities of his customers. Otherwise, the very first security refused to Mozley's customer upon his tendering the amount advanced upon it would have brought the whole business to a very speedy end. If this is the true view of the facts, it is impossible to contend that the bank is entitled to the position of purchasers for value without notice. I think they had actual knowledge, but if they had reason to think that the securities might be Mozley's own, or

might belong to somebody else, I think they were bound to inquire."

Lord Watson said: "In my opinion the character of the transactions between the respondents and Mozley was of itself sufficient to notify to them that his interest was limited. The bank officials, when examined before the judge of first instance, substantially admitted that they knew that the bulk of the securities lodged by Mozley were those of his customers; and apart from the admission, it is a matter of plain inference that they must have had that knowledge."

Lord Macnaghten said: "The banks knew that the person who dealt with them as owner was not acting by right of ownership."

And Lord Bramwell, though he was careful to disclaim an absolutely accurate definition of what was notice of the infirmity of the title, indicated that, in his opinion, at the same time the banks lent their money they had "notice of the infirmity of the pledgor's title, or of such facts and matters as made it reasonable that inquiry should be made into such title." He added that it was probably incomplete, but sufficient for the case he was then deciding.

Assuming all your lordships who were parties to that decision to have been right in your view of the facts, and I certainly see no reason to doubt the conclusion at which I in common with your lordships arrived, it is obvious to ask, what new principle of law is it possible to suggest was there laid down? It is manifest there was none.

Now when I turn from the facts proved in *Lord Sheffield's case* to the case now before your lordships (although I must make a protest that it is not a very profitable inquiry to consider whether one case resembles another in its facts), I am of opinion that every one of the elements relied upon in that case to show the knowledge of the banks of the infirmity of the title is absent here.

I can find no trace of any such course of business brought home to the knowledge of the bankers as would give them the least suspicion that their clients had not full authority to deal as they were dealing with the securities in their hands. I observe the question was plainly put by Sir Horace Davey to one of the witnesses, who was asked whether there was a custom on the Stock Exchange for brokers to make one client's bonds or stock security for another client's debt, and the answer was, No. It was then put that if the securities of ten clients were brought *en bloc* to the bank to borrow £10,000, the effect might be to make one client's property the security for money borrowed for another; the witness disclaimed any suspicion of any such transaction, and I confess I cannot share the view that Kekewich, J., took of the re-examination. Mr. Warmington asked, in substance, whether the banks did not suppose that they were dealing with honest men, obviously suggesting to my mind that it would be dishonest for Mr. A. to make Mr. B. security for Mr. A.'s loan.

Kekewich, J., seems to have been under the impression that relying on the broker's honesty did not alter the result. But to my mind it makes the whole difference. If there is £10,000 borrowed, and ten different clients' securities, what is there to tell the bank, or to suggest to the bank, that the ten clients had not each either a joint interest in the £10,000 or a several interest, which their several property justifies the broker in pledging? I do not, of course, mean to suggest any such mental process on the part of the broker as that he should be supposed to be appropriating only such part of the deposited securities as would properly be pledgable to each individual customer, but what appears to me very clear is that there is nothing in the nature of the transaction, nothing in the position of broker and customer respectively, which makes it a reasonable inference that the broker was exceeding his authority, or, indeed, that there was anything which could be reasonably supposed to raise a doubt on the subject.

The inferences derived from the business carried on by the money-lender in *Lord Sheffield's case* were peculiar to that case, and have no relation to the course of business which brokers habitually pursue towards their own clients, and for their own clients, when dealing with bankers with whom they deposit securities. The deposit of securities as "cover" in a broker's business is as well known a course of dealing as anything can possibly be, and the phrase that they are deposited *en bloc* seems to me to be somewhat fallacious. That they are, in fact, deposited by the broker at one time, and to raise one sum, may be true. It does not follow, and I do not know, that the banker could reasonably be expected to presume that they belonged to different customers, and that the limit of the broker's authority was applied to each individual security by his own client. It would, therefore, to my mind, be as totally different from the facts proved or inferred in *Lord Sheffield's case* as anything could well be.

I do not think that in that case any countenance was given to the notion that because Mozley, the money-lender, was assumed to be the agent for the owners of the property that circumstance alone put the bank upon inquiry as to his title to the property with which he dealt. To lay down as a broad proposition that in every case you must inquire whether a known agent has the authority of his principal would undoubtedly be a startling proposition, and certainly nothing said in *Lord Sheffield's case* could justify so novel an idea.

The broad proposition laid down by Abbott, C.J., in *Gorgier* v. *Mieville*, 3 B. & C. 45, that "a negotiable instrument by delivery to any person holding it gives a good title to any person honestly acquiring it," seems to me to be decisive of this case.

The property in question, for reasons I have already given, was, or must be presumed to be, negotiable. I think there was nothing in the evidence to raise a doubt that it was honestly acquired by the bank, and I am therefore of opinion that the judgment of the Court of Appeal should be reversed.

Lord WATSON.—I concur in the judgment which has been moved by the Lord Chancellor, and I shall endeavour to state shortly the considerations which induce me to differ from the decision of the Court of Appeal.

In the courts below, as at your lordships' bar, three questions were discussed. Were the Cedula bonds for 15,000 dollars, deposited by Delmar with the appellant bank, on account of his firm, the property of the respondent? Were those bonds negotiable instruments? Lastly, if the bonds belonged to the respondent and were negotiable, is the bank, in a question with the respondent, entitled to retain them?

I am prepared to answer the first of these questions in the affirmative. I am of opinion with Bowen, L.J., and for the same reasons, that the bonds, before they were taken to the bank, on the 20th of October, 1887, had been appropriated to the respondent, in substitution for his original bonds of the same amount, which Delmar had previously disposed of without authority.

The second question must also, in my opinion, be answered in the affirmative. Each bond, according to its tenor, appears to me to represent that the document will pass from hand to hand, and that any *bonâ fide* holder will be entitled to claim fulfilment of its terms from the Buenos Ayres Bank, by whom it

was issued. Then there is direct testimony to the effect that on the London Stock Exchange the bonds do pass from hand to hand by delivery only, and are treated as negotiable securities, and no attempt was made to shake that testimony either by cross-examination or by adducing evidence to the contrary.

In my opinion it necessarily follows from the negotiable character of the documents that Delmar, who was lawfully in possession of them for a special purpose, was nevertheless in a position to give a valid title to any person acquiring the bonds from him in good faith and for value, although the transaction on his part involved a fraud upon the respondent. That is the rule of law which was laid down by Parke, B. (following the older authorities), in *Foster* v. *Pearson*, and it met with the approval of this House in *Goodwin* v. *Robarts*.

That the appellants gave value for the bonds is not disputed, and I have not found anything in the evidence or in the circumstances of this case to suggest that they acted otherwise than in good faith. They were dealing with a broker at that time of unblemished repute, and seeing that brokers, in the ordinary course of business, are employed to sell, to buy, and to raise money upon as well as to keep in custody the securities of their customers, I think the appellants were entitled to assume, in the absence of aught to indicate the contrary, that, whether the bonds belonged to Delmar or to a customer, he had full authority to deal with them. The real question is whether the appellants believed at the time that Delmar had such authority, and I see no reason to doubt that they honestly entertained that belief.

The Court of Appeal, whose judgment was delivered by Bowen, L.J., seem to have held that, in point of fact, the appellants believed that Delmar had authority to raise money on the Cedula bonds in question, within the limit of their market value, but not to deposit them *en bloc*, together with other securities, in order to raise a lump sum upon the whole. Even upon that assumption I should have given judgment for the appellants. They were, in my opinion, clearly entitled to retain the bonds for the amount which Delmar had apparent authority to borrow. I may observe that in the case where the true owner authorizes a specific chattel to be impledged for its market value he might suffer prejudice, and it would be an excess of the authority which he gave to deposit it as part security for a larger sum. I doubt whether the same principle applies where the authority relates, not to a specific chattel, but to negotiable securities which are the subject of traffic upon the Stock Exchange. In that case it appears to me to be immaterial to the true owner whether his securities are pledged by themselves for their full market value, or are deposited with other securities in order to cover an advance beyond that value.

The learned judges in the courts below do not appear to have accepted the judgment of this House in *Earl of Sheffield* v. *London Joint-Stock Bank* in the same sense in which it has been regarded here. With reference to that case I can only say that it certainly was not my intention to apply any other rule to its decision than that which was laid down in *Foster* v. *Pearson*. Bnt I was satisfied, upon the evidence before us, that the banks concerned had such notice and knowledge of the limited title of their pledgor as made it inconsistent with fair mercantile dealing that they should retain Lord Sheffield's securities for any sum beyond the extent of the pledgor's interest.

Lord HERSCHELL.—The litigation in this case has arisen out of the frauds of Mr. Delmar, a partner in the firm of Herapath, Delmar, & Co., stockbrokers. The case of the plaintiff, the respondent in this appeal, is that Delmar, having in his possession, for safe custody merely, certain securities of the plaintiff, known as "Cedulas," fraudulently deposited them with the defendants by way of pledge for an advance, and that the defendants are consequently not entitled to detain them. The defendants deny that the securities pledged with them were the property of the plaintiff, and insist that, even assuming this to have been the case, they have acquired a good title as against him.

The facts may be shortly stated. In the month of October, 1887, Herapath, Delmar, & Co. had in their possession the bonds of 15,000 dols. Cedulas belonging to the plaintiff. On the 12th of October Delmar, on behalf of his firm, entered into a contract with Messrs. Prior & Williams, jobbers on the Stock Exchange, to sell them 15,000 dols. of Cedulas for the settling day of the 14th of October. He at the same time contracted with Messrs. Prior & Williams to purchase of them like bonds of the same amount for the account of the 28th of October, the price of these latter bonds being the same for which the former were sold, with interest at the rate of six per cent. for fourteen days added. On the 14th of October, in pursuance of the contract of sale, Delmar's firm delivered to Prior & Williams, or their nominees, the bonds of the plaintiff. On the 28th of October, in pursuance of the simultaneous contract of purchase, Herapath, Delmar, & Co. received from Greenwell & Co., a firm of brokers whose name appeared on the clearing ticket given by Prior & Williams, Cedula bonds of the same description and to the same amount as those which had belonged to the plaintiff.

The defendants, the appellant banking company, had for many years been in the habit of making advances to the firm of Herapath, Delmar, & Co. and their predecessors in business, receiving as security for such advances stocks, shares, and bonds. The securities deposited were frequently changed, such changes generally taking place at or about the time of the fortnightly settlements on the London Stock Exchange. On the 20th of October, 1887, the said firm obtained from the bank a temporary advance of £6,500, in addition to the then current loan, and in addition to the securities which the bank then held for the moneys already advanced, and which by the terms of their security they were entitled to hold for any additional advances, Herapath, Delmar, & Co. deposited with the bank the Cedula bonds which they had obtained from Greenwell & Co. on that day. The bonds were obtained from Greenwell & Co. in exchange for a cheque on the appellants, and without the advance of the £6,500 the firm would not have had at the appellants' bank sufficient funds to meet the cheque in favour of Greenwell & Co. and the other cheques drawn by the firm on that day.

I do not propose to enter upon the inquiry whether the plaintiff can establish a title to the bonds deposited with the bank, for in the view which I take of the case it is unnecessary to do so. I shall assume, for the purposes of my opinion, that these bonds were the property of the plaintiff.

The first question which arises—and, to my mind, a cardinal one—is, Are these bonds negotiable instruments?

The general rule of the law is that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can show that the true owner has so acted as to mislead him into the belief that the person dealing with the

property had authority to do so. If this can be shown a good title is acquired by personal estoppel against the true owner. There is an exception to the general rule, however, in the case of negotiable instruments. Any person in possession of these may convey a good title to them, even when he is acting in fraud of the true owner, and although such owner has done nothing tending to mislead the person taking them. I shall advert hereafter to the conditions which are requisite in order to render the title of one who takes a negotiable instrument valid as against the true owner; but I dwell, for the moment, on the distinction to which I have called attention, because it is obvious that the facts to be proved by anyone seeking to retain property he has obtained as against the person in fraud of whom it has been delivered to him will differ essentially according as that property is or is not a negotiable instrument.

At the trial of the action evidence was given on behalf of the bank that Cedula bonds are commonly dealt with on the Stock Exchange. On the question being put, "Are they dealt with as negotiable securities?" the learned judge interfered with the observation, "There is no dispute about that"; on which the learned counsel for the plaintiff said, "I do not want to make that admission." The question was then put and answered in the affirmative. There was no cross-examination by the plaintiff's counsel directed to this point, nor was any testimony adduced to the contrary. Having regard to the evidence thus given to the nature of the bonds, and to the decision of this House in the case of *Goodwin* v. *Robarts*, I can entertain no doubt that these Cedula bonds are negotiable instruments within the purview of that decision.

The question, then, which presents itself is, Whether the appellants, who are in possession of negotiable instruments which were delivered to them, I will assume, in fraud of the plaintiff, the true owner, can make good their title to them? That they became owners for value is not disputed. Nor is it disputed that they took with full honesty of purpose. The allegation in the statement of claim is as follows:—"The bank knew and had notice not only from the general course of business hereinbefore referred to, but from the particular transactions between them and the plaintiff's brokers that the securities deposited with them by the plaintiff's brokers were the securities of the customers of such brokers, and in the belief that the brokers who brought them made sufficient advances on them to justify them in obtaining the amounts which they from time to time obtained from the bank, and relying on the integrity of the brokers, the defendant bank from time to time made and continued advances to the brokers on such securities as the brokers from time to time deposited with them." Applying this allegation to the transaction under consideration it would be impossible to conceive a more unequivocal admission that the appellants acted in complete good faith in taking the bonds in question. But the statement of claim goes on to allege that the bank "made no specific inquiries as to the ownership of the said securities, or the authority (if any) which the brokers had to deposit the same, or the interest (if any) which the brokers had therein by reason of advances on such securities, or otherwise." It is upon this allegation that the bank had notice that Delmar held these bonds in the capacity of an agent that the respondent relies. I defer entering upon the inquiry whether it has been proved that the bank had either notice or knowledge that Delmar's title to the bonds was that of an agent only. Assuming for the moment that this was proved, what is its effect? It is contended on behalf of the respondent, as I understand, that it put the bank upon inquiry as to the title of the person with whom they dealt, and as to the authority which he possessed, and that, having made no such inquiry, they obtained as against his principal no better title than he had. It was admitted that any one buying from Delmar would have obtained an unimpeachable title, notwithstanding his knowledge that Delmar was a broker, and that the bonds were the property of his principal. What ground is there for the position that in regard to a pledge the case is different, that one may safely take a negotiable instrument by way of sale from an agent without inquiry, but cannot so take it by way of pledge? It is surely of the very essence of a negotiable instrument that you may treat the person in possession of it as having authority to deal with it, be he agent or otherwise, unless you know to the contrary and are not compelled, in order to secure a good title to yourself, to inquire into the nature of his title or the extent of his authority. The Factors' Act, 6 Geo. 4, c. 94, which gives validity to sales and pledges by persons intrusted with the documents of title to goods, contained a proviso "that the purchaser or pledgor had not notice by the documents, or otherwise, that the seller or pledgor was not 'the actual and *bonâ fide*' owner of the goods sold or pledged; a proviso which, especially after the decision in *Fletcher* v. *Heath*, 7 B. & C. 517, rendered it unsafe to make advances on goods or documents to persons known to have possession thereof as agents only" (per Blackburn, J., in *Cole* v. *The North-Western Bank*, L. R. 10 C. P. 354, 23 W. R. Dig. 186). Accordingly the Legislature intervened and altered the law by the 5 & 6 Vict. c. 39. The recital is noteworthy, that "advances on the security of goods and merchandise have become an usual and ordinary course of business, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto." Under this Act a document of title to goods may safely be taken by way of pledge from one known to be an agent without any inquiry as to his authority. It would be strange, indeed, if a negotiable instrument might not as safely be taken. Advances on the security of negotiable instruments are as usual and ordinary a course of business as advances on the security of goods and merchandise, and it is surely just as "expedient and necessary that reasonable and safe facilities should be afforded thereto." It was truly said that it was due to the act of the Legislature that documents of title to goods may safely be taken by way of pledge from an agent, and that there had been no such legislation in relation to negotiable instruments. But why not? The answer to my mind is plain, because it never was supposed to be necessary in order to give validity to such a transaction in the case of negotiable instruments. It is admitted that in the case of a sale legislation was not requisite, that the fact that the instruments were negotiable sufficed; why not, then, in the case of a pledge? If the contention of the respondent is to prevail, a negotiable instrument will be less negotiable than a bill of lading, or a dock warrant; a strange conclusion surely. The truth is, in my opinion, that what the Factors Acts have done is to attach some of the elements of negotiability to documents of title to goods, to render the mere possession of them evidence of authority to deal with them in the ordinary course of business, and to preclude the necessity of any further inquiry.

I proceed now to consider what the authorities show to be the conditions necessary to give a good title to a person taking a negotiable instrument from one who had, as against the true owners, no authority to transfer it. In *Foster* v. *Pearson* Parke, B., said, "The rule of law was long considered as

being firmly established that the holder of bills of exchange indorsed in blank or other negotiable securities transferable by delivery could give a title which he himself did not possess to a *bonâ fide* holder for value; and it may well be questioned whether it has been wisely departed from in the case to which reference has been made, and other subsequent cases in which care and caution, in the taker of the securities, has been treated as essential to the validity of his title, besides and independently of honesty of purpose." Now it will be observed that the learned judge considered two conditions only to be well established as essential to confer a good title upon the holder of a negotiable instrument, viz., that he should have taken it *bonâ fide* and for value. The other condition which he mentions, that due care and caution should have been exercised by the taker of the securities, he refers to as a departure from "a rule of law long considered as being firmly established," and he deprecates its introduction. The law has now for some time been settled on this point in accordance with the view indicated by Parke, B., in the *Bank of Bengal* v. *Fagan*, 7 Moo. P. C. 72, Lord Brougham said: "It may be taken as established that whatever may have been the law laid down in *Gill* v. *Cubitt*, 3 B. & C. 466, and *Down* v. *Halling*, 4 B. & C. 330, and one or two other cases, and not abandoned, at least as far as language went, which the court used in subsequent cases, is now law no longer, and that the negligence of a party taking a negotiable instrument does not fix him with the defective title of the party passing it to him." This passage was quoted by Willes, J., in delivering his judgment in *Raphael* v. *The Bank of England*, where it was treated as undoubted law that negligence did not invalidate the title of a person taking a negotiable instrument in good faith and for value. I think, therefore, that the rule of law enunciated by Parke, B., as firmly established, is the existing law. No authority to the contrary was cited at the bar, unless it be the recent case in this House of *Sheffield* v. *The London Joint-Stock Bank*. Now it is certain that none of the noble and learned lords who took part in that judgment criticized or questioned, much less purported to overrule, any prior authority. I will state what I understand to be the grounds of the judgment. The person from whom the bank took the securities in that case was himself a pledgee of them: as such he had an undoubted right to repledge them. He, in fact, repledged them as security for a sum exceeding that for which he held them in pledge. They were, with a number of other instruments, some negotiable and others not negotiable, made security for his entire indebtedness to the bank. The question which arose was whether the bank could insist on retaining them for the larger sum, or whether the owner could redeem them on paying to the bank the amount for which they were originally pledged. The noble and learned lords came to the conclusion, as I understand, that the bank knew that Mozley held the securities in question as pledgee only in respect of an advance made upon them, or that if they did not actually know this, what they knew of the nature of his business as a money-lender, and the information which they derived from their transactions with him, made it almost certain that this was the case. That knowing, or having every reason to believe, that his title was only that of pledgee for a limited advance, they knew, or had reason to believe, that in pledging them to the bank for his entire indebtedness he was exceeding any authority he had to deal with them. That under these circumstances it was incumbent upon them to make some further investigation if they wished to insist upon their security to the full extent. That these circumstances, as it was said, put them upon inquiry, I gather that their lordships must further have been of opinion that if the bank had made reasonable inquiries they would have ascertained the facts, and have thus had distinct knowledge of circumstances which would have made it appear that they could not hold the securities for anything beyond the advance in respect of which Mozley held them, and that in offering them as a security for a greater sum Mozley was exceeding any authority he had to deal with them. My reason for inferring that their lordships entertained this opinion is that I apprehend that when it is said that a person is put on inquiry the result in point of law is that he is deemed to know the facts which he would have ascertained if he had made inquiry. He cannot better his position by abstaining from so doing. On the other hand, his position cannot be worse than it would have been had he made inquiry and been in possession of the result of it. Supposing Mozley had been questioned as to his right to deal with the securities, and had given a satisfactory assurance, and there had been no reason to doubt his honesty, I cannot but think that the decision of this House would have been different. There was in the case then before the House, however, no ground for supposing that if Mozley had been asked the question the facts would not have been elicited. When once the conclusion was reached that the bank must be taken to have known that Mozley was exceeding any rights which he possessed in relation to the securities in purporting to pledge them for the sum he did, it followed that it would be contrary to good faith for the bank to retain them for anything beyond the sum for which he could legitimately pledge them; that, as regards the excess, the bank, though holders for value, were not holders of the securities in good faith. It will thus be seen that the judgment, which certainly did not purport to be a new departure or to lay down any principle of law differing from that already established, turned entirely upon the view taken of the facts. It would be unbecoming, as it is unnecessary, for me to express any opinion whether the findings were warranted by the facts proved. It is enough for me to say that the judgment leaves untouched what I believe to have been, down to that time, the established rule of law, that a person taking a negotiable instrument in good faith and for value obtains a title valid against all the world. *Sheffield* v. *The London Joint-Stock Bank* may perhaps be a binding authority as to the conclusion of the fact arrived at, where the facts are identical, but not otherwise. In any other case the tribunal must investigate the facts for itself, and determine whether those who claim to hold a negotiable instrument have made out that they took it in good faith and for value. One word I would say upon the question of notice and being put upon inquiry. I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further inquiry.

Applying myself now to the facts of the present case I cannot find any warrant for such conclusions of fact as those which, as I think, led to the recent judgment of your lordships' house on which so much reliance has been placed. The bank did not know, and had no reason to know, in what capacity Delmar became possessed of the bonds. They might be his own; he might be purchasing them for himself or a

principal, and be seeking for an advance from the bank to obtain the means of paying the price; or they might be bonds on which he had himself made an advance. I cannot see that there was anything to suggest to the bank that he was committing a wrong, or to make it reasonable and right that they should make further inquiry before entering upon the transaction. It was suggested, and this view seems to have found some favour with the court below, that though the bank might have been justified in thinking that Delmar had the power to pledge the bonds for an advance to their full market value, they were not justified in supposing that he could be entitled to pledge them *en bloc* with other securities for a lump sum. If the course of dealing between the bank and Delmar was, as alleged, such that he was entitled at any time to obtain back any of the securities deposited on delivering others of an equal value, the distinction does not strike me as very important. But even if it could be material were the plaintiff seeking to redeem his bonds, and the question were for what sum the bank could claim to retain them, it does not seem to me to be material in the present case, where the plaintiff is not seeking to redeem the bonds, but insists that the bank have no title to them at all.

Further assuming, for the moment, that the bank were put on inquiry and ought to have asked Delmar whether the bonds were his, and, if not, by what title he claimed to deal with them in the manner proposed, can it be doubted what would have been the result of such an inquiry? Why your lordships have listened to an elaborate argument, for which there was ample scope, designed to establish that the bonds were in fact Delmar's, and that if he had answered, as I think he undoubtedly would, that the bonds were his own, his answer would have been accurate. How can it possibly be contended that if the bank had made further inquiry they would have ascertained that Delmar was not entitled to make the pledge on which the bank take their stand?

I have made these observations for the purpose of showing the marked distinction which there is between the facts of the present case and those which had to be considered in *Sheffield's case*. But I desire to rest my judgment upon the broad and simple ground that I find, as a matter of fact, that the bank took the bonds in good faith and for value. It is easy enough to make an elaborate presentation after the event of the speculations with which the bank managers might have occupied themselves in reference to the capacity in which the broker who offered the bonds as security for an advance held them. I think, however, they were not bound to occupy their minds with any such speculations. I apprehend that when a person whose honesty there is no reason to doubt, offers negotiable securities to a banker or any other person, the only consideration likely to engage his attention is whether the security is sufficient to justify the advance required. And I do not think the law lays upon him the obligation of making any inquiry into the title of the person whom he finds in possession of them; of course, if there is anything to arouse suspicion, to lead to a doubt whether the person purporting to transfer them is justified in entering into the contemplated transaction, the case would be different, the existence of such suspicion or doubt would be inconsistent with good faith. And if no inquiry were made, or if on inquiry the doubt were not removed, and the suspicion dissipated, I should have no hesitation in holding that good faith was wanting in a person thus acting.

For the reasons I have given I think the judgment appealed from ought to be reversed.

Lord MACNAGHTEN.—There are only three possible questions in this case: (1) Did the "Cedulas" which were deposited with the London Joint-Stock Bank on the 28th of October, 1887, belong to the respondent at the time when they left the office of Herapath, Delmar, & Co.? (2) Were those "Cedulas" negotiable instruments? (3) Did the bank take them in good faith? That the bank gave value for them was never disputed.

In the view which your lordships take of the last two questions the answer to the first, whatever it may be, cannot affect the result of the case. But as both courts have considered the question and answered it on consideration in the affirmative, I am unwilling to pass it by in silence lest I should seem to intimate a doubt for which, in my opinion, there is no room.

The firm of Herapath, Delmar, & Co., consisting of a Mr. Herapath (who was admittedly innocent of any fraud), and a Mr. Delmar, who was undoubtedly a fraudulent person, held 15,000 dols. "Cedulas Series J." on account of the respondent. They were held by the firm for safe custody only. On the 12th of October, 1887, Delmar, without the knowledge of his partner, and in fraud of his customer, sold them. On the same day, Delmar, on account of his firm, contracted to buy "Cedulas" of the same amount and of the same denomination to be delivered on the 28th inst. In due course "Cedulas" to answer this contract were delivered and paid for. To whom did these "Cedulas" belong when they came into the office of Herapath, Delmar, & Co.? The object of the purchase of course was to repair and cancel the wrong which had been committed. Both the clerks concerned in the transaction, who had no reason to suspect anything improper, say they knew at the time whose they were, and that they were the respondent's. Neither of them was asked any question as to how he got this knowledge, nor is it material. There is no reason to distrust their recollection. And the only conclusion is that in some way or other, by word of mouth, or by writing, or by conduct, Delmar, who had dominion over these "Cedulas," must have declared that they belonged to the respondent. Thus, even without the aid of the entry in the number book, the value of which depends on a disputed fact, the date when the original entry was corrected or altered, there was as it seems to me a sufficient appropriation of the "Cedulas" in question to show that they were the property of the respondent, subject to his right to repudiate the transaction when he came to know the true facts.

Then were these "Cedulas" negotiable instruments? The "Cedulas" in question are foreign bonds with coupons attached, payable to bearer. Admittedly they pass from hand to hand on the Stock Exchange, and according to the evidence of the bank manager, who was not cross-examined on the point, they are dealt with as negotiable instruments. I do not see on what ground they are to be denied the quality of complete negotiability. In a matter of this sort it is not, I think, desirable to set up refined distinctions which are not understood, or are uniformly and persistently ignored in the daily practice of the Stock Exchange.

Lastly, did the bank take the "Cedulas" in good faith? They took them with other securities from a firm of stockbrokers, who were at the time of unblemished reputation. They took them in the ordinary way of business to cover their current advances. In regard to this question the difficulty is to see what there was in the transaction to suggest a shadow of suspicion that there was anything wrong with the deposit. The only objection alleged is that securities of different customers of the stockbrokers were pledged for one entire advance, and it is said

that the bank ought to have known it. But even so, if the bank had no reason to suppose that the stockbrokers were not at liberty to pledge each and all of the securities for their full value, I cannot see in what the supposed want of good faith consists. As was pointed out in *Foster* v. *Pearson*, such a practice—and the practice prevails in the case of stockbrokers as much as in the case of billbrokers—has advantages for the customers as a body, though it may occasionally operate hardly on an individual.

If it had not been for a mistaken interpretation of your lordships' judgment in *Lord Sheffield's case*, I doubt whether the present case would ever have been brought into court. *Lord Sheffield's case* depended on its own peculiar circumstances. The settled law relating to negotiable securities was not in question. No one impugned it. No one, as I understood the argument, thought of reviving qualifications long since exploded. But then it was held that the bank knew, or ought to have known, that the securities which the money-lender, Mozley, was depositing with them had been pledged to him by his several customers, and therefore that they were not his own, and that he could not pledge them for their full value. There was no want of good faith on the part of the bank in taking them in security to the extent of Mozley's pledgable interest. But there was, as it seems to me, a want of good faith in claiming to retain them for more than that limited interest, whatever it might turn out to be.

In commenting on *Lord Sheffield's case*, Sir Horace Davey, referring to some remarks of mine in which the expression "representations" occurred, observed that the words used went too far.

Of course there were no representations on the part of Mozley but what were contained in the memorandum of charge. And certainly I did not mean to convey that if the bank had received from Mozley explanations which a reasonable man could possibly accept, the bank might not have held the securities for their whole value. But I think the criticism of the learned counsel was perfectly well founded, and I should have better expressed myself if I had said that, whereas it had been supposed that the memorandum of charge neutralized the knowledge otherwise properly attributable to the bank, it seemed to me that that knowledge must prevail over the inference to be derived from the memorandum.

I agree that the judgment appealed from ought to be reversed.

Lord FIELD.—I also am of opinion that this appeal must be allowed.

First, I am satisfied that the "Cedulas" in question are instruments in which property and possession are inseparable, and that delivery and possession, if taken in good faith, confer a valid title. They impliedly contain a promise to pay the bearer; they are issued and circulated in a foreign State; and although the evidence as to the extent of their negotiability in this country was not (probably owing to a misapprehension) so full as it might have been, enough, I think, appears to bring the case within the authorities of *Gorgier* v. *Mieville* and *Goodwin* v. *Robarts*.

Secondly, it is not disputed that the bank are holders for value. It is not suggested that they were themselves guilty of any dishonesty or bad faith; on the contrary, Bowen, L.J., expressly finds that they were "honestly of opinion that Delmar could honestly make the pledge in question." Their title, therefore, as holders in good faith cannot be defeated if it is shown that they also held without notice—*i.e.*, not necessarily actual notice or knowledge of any infirmity, but without the knowledge of circumstances calculated to excite suspicion in the mind of the bank manager, who, with the means of further knowledge at hand, wilfully abstained from availing himself of those means and making inquiry, from a suspicion that the result would be to inform him of some vice or infirmity of title by which the pledge the bank were about to take might be rendered insecure.

It was at one time, no doubt, thought that the title of a holder for value of a negotiable instrument would be destroyed if the omission to inquire arose, not from any suspicion of a defect, but merely from a want of due care and caution on his part, but the authorities cited by Lord Herschell have conclusively established that such is not the law.

In one of those cases, *Raphael* v. *The Bank of England*, the plaintiff had at some earlier period received actual notice that the bank note in question had been stolen, but it was established to the satisfaction of the jury that the notice had been forgotten and was not present to his mind at the time of taking, and he was held entitled to recover.

In another case, *Foster* v. *Pearson*, cited by my noble friend, some of the objections to the plaintiff's title were somewhat analogous to those in the present case. One of them was that the bills then in question were pledged to the plaintiff by the billbroker for an antecedent debt of his own, but Parke, B., after stating that the rule that the holder of negotiable securities transferable by delivery can give a title, which he himself does not possess, to a *bonâ fide* holder for value, had been long considered firmly established, added that it was unnecessary to decide the validity of a usage for a billbroker to pledge for his own antecedent debt (which had been set up, but failed in proof), because, assuming the broker to have no such power as between him and his employer, or as to third persons who receive the bills with knowledge of all the facts, it by no means followed that Messrs. Fosters would not have a right to hold the bill. They might have supposed that the brokers were acting rightly in pledging their customers' bills, even if they knew them to be such, for their prior advance, because they might have given to those very customers a part of the £2,500 which was the amount of that prior advance.

It is, I think, worthy of observation that in the present case a portion of the £6,500, which was advanced to Delmar on the 27th of October, undoubtedly went to provide cash to meet a cheque drawn in payment for the substituted "Cedulas."

I do not suggest, of course, that the bank manager was aware of this, or that it could have formed any part of his calculations in taking the security, but it tends to show, as regards any inquiry of Delmar, if the defect in the appellants' title rests upon the absence of inquiry of Delmar, which was the only means of further knowledge that presented itself to the manager, how little probability there is that the answer would have disclosed the absence of authority on his part to make the pledge.

Another objection taken to the appellants' title in this case, as putting the manager upon inquiry, also existed in the case of *Foster* v. *Pearson*. But it was overruled, for it was said that, although a billbroker must ordinarily be taken to be an agent to procure the loan of money on each customer's bill separately, without any right to mix bills together, and pledge the mass for one entire sum advanced to him personally, yet his employment is one which depends entirely upon the course of dealing, and there would be nothing unusual or unreasonable in such a course of dealing in the City of London for billbrokers to raise money for their employers by pledging the bills of different proprietors for one advance.

In answer to the objection Parke, B., said that although, on the one hand, one proprietor may have

to answer for the non-payment of another's bill, on the other hand, it may give facilities to the raising of money on negotiable paper, for it may well happen that a capitalist would advance money in this way who would not discount each particular bill. Indeed, in the case now before your lordships, it was suggested, and may well be the case, that by that means the broker's customer obtains a loan on more favourable terms than if your broker could only pledge for each customer's individual debt.

Looking to the various exigencies of a stockbroker's legitimate business, as now carried on in the City of London, I fail to see any circumstances which ought in the present case to have caused the bank manager to suspect that Delmar was pledging securities which had been intrusted to him for safe keeping. The previous long connection with and high character of the firm of which he was a member, their extensive previous dealings, in which no irregularity is suggested as having taken place, tended to obviate the necessity for any inquiry, and I do not see any satisfactory ground for coming to the conclusion that the manager wilfully abstained from making it.

Indeed, the grounds upon which, as I understand, the judgments of the courts below rest their decision, exclude any such wilful closing of the eyes of the manager. What I understand is said against him is that, as he took the "Cedulas" with knowledge that they might not belong in full dominion to the brokers, the manager wilfully abstained from inquiry into his title from a misconception of law in thinking that he had authority in law so to do without express authority given by the customer.

The learned judges below did not in any way question the principles upon which the authorities I have referred to rest, but they appear to have thought that the present case was covered by the recent decision of this House in *Lord Sheffield's case*.

That case has undergone a very searching examination at your lordships' bar, and I have had the advantage of hearing the true view of it, as intended and understood by the Lord Chancellor, and those of my noble and learned friends who advised your lordships on that occasion, and I am quite satisfied, not only that no intention existed of questioning those principles, but that no such qualification is anywhere indicated. The decision seems to me to have proceeded rather upon the lines of *Cooke* v. *Eshelby*, and cases of that class, in which actual knowledge of the existence of an agency of a limited character only is held to put the person dealing with the agent upon inquiry as to the extent of it.

It was, indeed, contended at your lordships' bar that mere knowledge that a proposed transferor might be dealing with a security as an agent was sufficient to put the transferee of a negotiable security upon inquiry, the mere absence of which, if a defect was, in fact, found to exist, would be fatal to his title.

But I cannot accede to this contention. It is contrary to the authorities I have referred to, and it runs counter to the policy of the Legislature, which seems to me to be to protect rather than endanger the rights of persons taking securities of a negotiable character honestly and in good faith.

It is for these reasons that I think that the appeal must be allowed.

Thirdly, there was an objection taken to the plaintiff's title, that he had not gained sufficient property in the substituted "Cedulas" to entitle him to maintain the action. Upon that point it is unnecessary for to express any opinion.

Order appealed from reversed, with costs here and below. Cause remitted to the Chancery Division.

Solicitors for the appellants, *Clarke, Rawlins, & Co.*

Solicitor for the respondent, *R. S. Gregson.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Bowen and Kay, L.JJ.) — Aug. 5, 1892.

Ex parte CLARKE.
In re BURR. (*a.*)

Bankruptcy—Proof—Mistake—No debt—Application to withdraw proof.

Decision of Vaughan Williams, J. (40 *W. R.* 608), *affirmed, on the ground that the debt, in respect of which the proof in the bankruptcy was tendered, did not exist, and that, therefore, the proof might be withdrawn.*

Appeal by the trustee in the bankruptcy of Burr against an order of Vaughan Williams, J. (40 W. R. 608), giving leave to Norton to withdraw a proof which he had made in the bankruptcy.

The facts of the case are fully set out in the report of the case in the court below.

Herbert Reed, for the appellant.

Levett, Q.C., and *Carrington*, for Norton, were not called upon.

Lord ESHER, M.R.—In my opinion, the decision of Vaughan Williams, J., allowing the withdrawal of Norton's proof, must be affirmed, on the ground that there was no debt due from the bankrupt to Norton. The contract for the sale of the policy did not of itself pass the property in the policy and create a debt, nor did the judgment of Romer, J., for the specific performance of that contract. The judgment only established a binding contract, and ordered it to be performed. Norton made a mistake, and ought to be allowed to withdraw his proof.

BOWEN and KAY, L.JJ., concurred.

Appeal dismissed.

Solicitor for the trustee, *W. Stopher.*

Solicitor for Norton, *H. Fereday.*

From Q. B. Div. (Lindley, Lopes, and A. L. Smith, L.JJ.) — July 16, 18; Aug. 1, 1892.

SCOTT *v.* BROWN, DOERING, M'NAB, & CO.
SLAUGHTER *v.* THE SAME. (*b.*)

Contract—Illegality—Agreement to make a market for shares—Illegality not pleaded—Criminal conspiracy—In pari delicto potior est conditio possidentis—Judicial notice.

In these consolidated actions the plaintiffs sought to recover from the defendants, who were stockbrokers, the price paid by the plaintiffs for shares in a new company, upon the ground (amongst others) that the defendants had transferred to the plaintiffs the defendants' own shares, instead of purchasing them in the market in the usual way. Wright, J., before whom both actions were tried, nonsuited the plaintiffs in both actions, upon the ground that there was no evidence to go to the jury. The plaintiffs applied for a new trial, and in the course of the hearing the Court of Appeal took judicial notice of the fact that the correspondence and telegrams between the parties disclosed the nature of the transaction, which was

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

(*b.*) Reported by W. A. G. WOODS, Esq., Barrister-at-Law.

an agreement between the plaintiffs and defendants to induce would-be buyers of shares in the company, contrary to the fact, to believe that there was a market for the shares, and that the shares were of greater value than they really were.

Held, that the transaction was illegal, and might be made the subject of an indictment for conspiracy, and that, although the illegality of the contract was not pleaded, the plaintiffs were not entitled to relief.

This was an application by the plaintiffs in both actions (which had been consolidated by an order of the Court of Appeal) for a new trial upon an appeal from the decision of Wright, J., who, at the trial on the 7th of May last at Guildhall before a special jury, had nonsuited the plaintiffs in both actions, on the ground that there was no evidence to go to the jury. The facts, as stated by Lopes, L.J., in his judgment, are as follows:—The defendants in both these actions are members of the London Stock Exchange, and in December, 1890, they were brokers to a company called the Steam Loop Co. (Limited). The said company had issued a prospectus inviting subscriptions for its share capital, and the defendants had previously to such issue underwritten a part of the share capital of the company and were holders of a considerable number of shares of the company. The plaintiffs in the second action were the solicitors to the company. The plaintiffs in both actions had instructed the defendants to purchase shares for them respectively, in the company, and had duly paid for such shares. The plaintiffs in both actions sought to recover the price paid for such shares from the defendants, on the ground, among others, that, instead of purchasing shares for them in the ordinary way, the defendants had transferred to the plaintiffs the defendants' own shares.

The plaintiffs in both actions relied upon a contract contained in certain letters and telegrams passing between the plaintiffs and the defendants between the 6th and 9th of December, 1890. On the 6th of December, 1890, the following telegrams passed:—M'Nab to Scott.—"Should advise you to get 5,000 done by Trust Company Steam Loop." M'Nab to Scott.—"Must have positive order from you to buy at least 500 Loop shares in market on Monday, to start market on. Gillespie and Jack doing this on understanding that you do so. This necessary to insure public application and to start market. Reply." M'Nab to Scott.—"Unless have telegram agreeing to my former wire as to market in shares, I must withdraw from this business." M'Nab to Scott.—"You must agree, otherwise I drop the whole thing, as without it advertisements wasted and no public application; also no market in shares. Waiting reply." Scott to Slaughter.—"M'Nab wires me I must give him positive order buy 500 Loop shares in market on Monday start market. Gillespie and Jack doing same condition I do. Wired no. M'Nab replies must, otherwise he will drop whole business. I reply by writing him to-night. Wire what you advise." Slaughter to Scott:—"Have agreed with M'Nab that the 500 Gillespie owed us may be applied market purposes. Think additional support needed. Written you fully to-night." Scott to Slaughter:—"Am quite agreeable to what you have arranged with M'Nab." On the same day M'Nab wrote to Scott (*inter alia*) as follows:—"As I wired you to-day, it is an absolute necessity that somebody sends orders to buy Steam Loop in the market, otherwise who is going to start the market? Slaughter and myself are going 500 shares, Gillespie 500, Burnham 100, Jack 200, and honestly you ought to go at least 500. There is no risk in the matter. We have absolutely £47,000 underwritten, and whatever the public come in for will help the market. Then, again, unless we can get a quotation into the papers, saying the shares at a premium, on Monday, we will never get the public on. This we can manage with practically no risk to ourselves if we combine and absolutely buy the shares. If we do not do it, the money spent on advertisements is simply thrown away. . . . If I am to go on at all I must know that some one is going to back me up in at least starting the market in the shares. If it is not done I must give up the whole business, as otherwise I will be nothing more than a fool in this business. It is a vital point, and, whatever you write me to-night, please understand that it has to be done, and I must have orders on Monday from someone in Manchester to start the market on. . . . Do give this matter your assent, and wire me early on Monday that you are good for a purchase of at least 500 shares in the market. You must excuse my having written and wired so strongly about this, but it is an absolute necessity that it has to be done. You have only to ask anyone about new companies if it is not a necessity. Awaiting your reply on Monday morning."

On the 7th of December, 1890, Scott wrote in reply to Slaughter:—"As I wired you last night, I am quite agreeable that the £500 you, M'Nab, and I lent Gillespie shall be used to make a market, on condition that Gillespie gives you a written promise to pay the £500 in cash as soon as he has received his cash from the company. I am agreeable to this £500 also being spent in making a market, if you are."

On the 8th of December, 1890, Slaughter wrote to M'Nab:—"Steam Loop,—On behalf of Mr. D. Scott, I hereby authorize you to buy at a premium ordinary shares up to £500." On the same day Gillespie wrote to Slaughter:—"You having authorized Mr. M'Nab on Mr. Scott's behalf to buy at a premium ordinary shares up to £500, I write this line to confirm to you that it has been agreed between us that the £500 in cash or the £600 in shares which I have promised to Mr. Scott shall be £500 in cash, and shall be paid out of the second instalment I receive."

On the 9th of December, 1890, Brown, Doering, & Co. wrote to Slaughter as follows:—"We beg to enclose contract for purchase of 429 Steam Loop shares at 6s. 7d. premium. This is your proportion of the shares bought up to-night, taking an average of the orders from D. Scott, Gillespie, Burnham, and Jack. We have also averaged the price of the shares. We have forwarded to the *Financial News* the contract note for shares bought to-day on your behalf—150 shares, at 8s. 4½d. premium—to get the quotation."

Reid, Q.C., and *Boydell Houghton*, for the appellants.

Murphy, Q.C., *W. Willis, Q.C.*, *Rose Innes*, and *C. Rose Innes*, for the respondents.

At the close of the arguments for the respondents the COURT took the objection that the evidence disclosed an illegal conspiracy to which the plaintiffs were parties, and consequently that they were not entitled to relief.

Reid, Q.C., on the point whether or not the contract was an illegal one.—The parties did doubtless combine, but the object of the combination was not unlawful. The nature of the contract was to buy shares (1) to enrich the company and (2) to make a market; or, in other words, by example, and by publication of that example, to induce the public to buy. The object was to buy at a certain price, and the shares were actually bought and sold at that price. It is not illegal to pay a premium in order to raise prices or to flood the market for the purpose of

reducing prices. The transaction was *bonâ fide* and there were no concealments. There is no evidence that the shares were not worth the price given for them, which was fixed by the jobber. The point ought to have been left to the jury.

Cur. adv. vult.

Aug. 1.—LINDLEY, L.J.—My brother Smith has written a judgment in this case which I have read, and in which I concur. As, however, the case is one of great importance, I will add a few observations on it myself. *Ex turpi causâ non oritur actio.* This old and well-known legal maxim is founded in good sense and expresses a clear and well-recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invokiug the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him. If authority is wanted for this proposition it will be found in the well-known judgment of Lord Mansfield in *Holman* v. *Johnson*, Cowp. 343. In this case the correspondence put in evidence by the plaintiff Scott, in support of the claim he made at the trial shows conclusively that the sole object of the plaintiff in ordering shares to be bought for him at a premium was to impose upon and to deceive the public by leading the public to suppose that there were buyers of such shares at a premium on the Stock Exchange, when in fact there were none but himself. The plaintiff's purchase was an actual purchase, not a sham purchase; that is true, but it is also true that the sole object of the purchase was to cheat and mislead the public. Under these circumstances the plaintiff must look elsewhere than to a court of justice for such assistance as he may require against the persons he employed to assist him in his fraud, if the claim to such assistance is based on his illegal contract. Any rights which he may have irrespective of his illegal contract will, of course, be recognized and enforced, but his illegal contract confers no rights on him: see *Pearce* v. *Brooks*, 14 W. R. 614, L. R. 1, Ex. 213. The illegal purpose of the plaintiff distinguishes this case from *Wetherell* v. *Jones*, 3 B. & Ad. 221, and others of a similar kind. I am quite aware that what the plaintiff has done is very commonly done; it is done every day. But this is immaterial. Picking pockets and various forms of cheating are common enough, and are nevertheless illegal. The plaintiff was not entitled to judgment in the court below, and he has no right to a new trial.

LOPES, L.J., after stating the facts, said: The learned judge held that there was no evidence to go to the jury in support of the plaintiffs' case, and nonsuited them. In my judgment it is unnecessary to determine whether the holding of the learned judge is right in this respect. There is a preliminary matter to be considered of which the learned judge might have taken, and this court can and ought to take, judicial notice. [His lordship then read the letters and telegrams as stated above, and continued:—] I have read these letters and telegrams to show what the nature of the transaction was. In my judgment it was an agreement between the plaintiffs and defendants to induce would-be buyers of shares in this company, contrary to the fact, to believe there was a market for its shares, and that the shares were of greater value than they really were. Putting it shortly—an agreement to cheat the public by leading them to believe the shares had a value, which the plaintiffs and defendants knew they had not, and thus inducing them to become purchasers. Is such a transaction illegal? I am of opinion that it is, and might be made the subject of an indictment for conspiracy. *The King* v. *Berenger*, 3 M. & S. 67, is an authority on this subject. It was an indictment for conspiracy by false rumours to raise the price of the public Government funds with intent to injure those who should purchase, and Lord Ellenborough, C.J., said:—"A public mischief is stated as the object of this conspiracy; the conspiracy is by false rumours to raise the price of the public funds and securities, and the crime lies in the act of conspiracy and combination to effect that purpose, and would have been complete, although it had not been pursued to its consequences, or the parties had not been able to carry it into effect. The purpose itself is mischievous; it strikes at the price of a vendible commodity in the market, and if it gives it a fictitious price, by means of false rumours, it is a fraud levelled against all the public, for it is against all such as may possibly have anything to do with the funds on that particular day." I can see no substantial distinction between false rumours and false and fictitious acts; the price of the shares in this case was artificial, and the premium unreal and nominal, to the knowledge of all parties concerned, put forward to induce the public to take shares, with which otherwise they would have had nothing to do. Again, in *Reg.* v. *Aspinall*, 24 W. R. 921, 1 Q. B. D. 740, 25 W. R. 283, 2 Q. B. D. 48, it was held that an agreement to cheat and defraud by means of false pretences those who might buy shares was an indictable offence. Brett, L.J., 2 Q. B. D. 59, said:—"If the second count in this indictment contains averments sufficiently stated which are enough to show sufficiently that the defendants unlawfully—namely, with minds intending to do wrong—agreed by false pretences to cheat and defraud those who might buy shares in the company, it sufficiently alleges a criminal conspiracy."

I entertain no doubt that the agreement on which the plaintiffs rely is an illegal agreement. If the agreement is illegal, the question arises, whether the plaintiffs are not disentitled to recover, and whether they have not forfeited the relief which a court of law in other circumstances would have afforded them. *Begbie* v. *The Phosphate Sewage Co.*, 24 W. R. 115, L. R. 10 Q. B. 491, is conclusive on this point. It was an action for money had and received, plea never indebted, and it was held that the plaintiff could not recover because he was aware that no exclusive right to use the process in question could be obtained, and had entered into the contract with the defendants in contemplation of a fraud upon the shareholders of the intended company. Cockburn, L.C.J., said:—"Another ground of defence insisted on is that the money having been paid for the purpose of defrauding the intended shareholders, by holding out to them the assurance of an exclusive right to use the process in question as an inducement to contribute their money when it was known to the parties engaged in getting up the new company that no exclusive right existed, or could be obtained, the plaintiff cannot maintain an action to recover back the money on the well-established principle that money paid in furtherance of a fraud or other unlawful purpose cannot be recovered back. . . . Under these circumstances we are of opinion that the money sought to be recovered in this action having been paid in order to obtain from the defendants the agreement whereby this fraud could

be carried out, the rule of law insisted on by the defendants applies, and is a bar to the plaintiff's right to recover. The case falls immediately within the principle of the decisions in *Simpson* v. *Bloss*, 7 Taunt. 246; *Jones* v. *Yates*, 9 B. & C. 532; and *Fivaz* v. *Nicholls*, 2 C. B. 501. The plaintiff cannot present his case to a jury without necessarily disclosing the unlawful purpose in furtherance of which this money was paid."

Every word of that judgment applies. It is to be observed that the illegality of the contract was not pleaded. The point was taken by the court and acted upon. The plaintiffs cannot, and do not in this case, more than in that, present their case to the jury without necessarily disclosing the unlawful purpose in furtherance of which the contract was entered into. The plaintiffs, therefore, in my opinion, are disentitled to relief, and on this ground the appeal must be dismissed.

A. L. SMITH, L.J.—The plaintiff Scott applies to this court to set aside a nonsuit which passed against him at the Guildhall. He asserts that there was evidence to go to the jury of his cause of action, which was for the rescission of a contract to purchase shares in a company about to be brought out and to be called the Steam Loop Co., and for the return of £632 3s. 5d. paid thereunder to the defendants, upon the ground, amongst others, that the defendants, while acting as his brokers, had passed off their own shares to him instead of purchasing them upon the market. It appeared upon the plaintiff's own case that the plaintiff and the defendant M'Nab were jointly interested with others in bringing out this company and in floating its shares upon the market, and that the £632 3s. 5d. sought to be recovered in this action was paid by the plaintiff to the defendants in pursuance of an agreement come to between the plaintiff and the defendant M'Nab, that M'Nab should therewith purchase 500 shares of the projected company, when brought out, at a premium (at the time of the agreement there was neither company nor market), the sole object of such purchase being that the public might thereby be induced to believe that the shares of the company were at a real premium, whereas in truth and in fact, as the plaintiff and the defendant M'Nab well knew, they were not. Neither the plaintiff nor the defendants would raise the point of the illegality of the transaction at the trial, and my brother Wright, who tried the case, made some strong comment upon their conduct, but did nothing further in the matter.

Now, if two or more persons agree to cheat and defraud others by means of deceit and fraud, there can be no doubt that each and all are indictable for a criminal conspiracy at common law. It has been held that it is a criminal conspiracy for two or more to agree by false rumours to endeavour to raise the price of the public funds on a particular day: *Rex* v. *De Berenger*. It has also been held in *Reg.* v. *Aspinall*, that an agreement by two or more to cheat and defraud by means of false pretences those who might buy shares in a company was an indictable conspiracy. False pretences here do not mean such false pretences as would support an indictment for obtaining money or goods by false pretences: see *Reg.* v. *Hudson*, 8 W. R. 421, Bell C. C. 263. This is the law.

Lopes, L.J., has gone fully into the correspondence, but the telegram and letter of the 6th of December, 1890, from the defendant M'Nab to the plaintiff Scott, the letter of the 7th of December, 1890, from the plaintiff Scott to Slaughter, and of the 8th of December, 1890, from Slaughter to M'Nab in my judgment are sufficient. These documents contain, in my judgment, conclusive proof that the plaintiff Scott and M'Nab agreed together to cheat and defraud those who might buy shares in the company, by leading them to believe that the shares were at a genuine premium, whereas to their knowlege they were not, the fictitious premium being sought to be brought about by means of the purchases to be made with the plaintiff's £632 3s. 5d. by M'Nab, and which were to be made for the sole purpose of creating such fictitious premium. The agreement between two or more to do an illegal act has been proved.

The next question is, Was it shown that the plaintiff Scott and M'Nab agreed to carry out this intention by illegal means—viz., by deceit and fraud? For, if so, there can be no possible doubt that an indictable conspiracy has been committed—viz., the agreement to do an illegal act by illegal means. It is not necessary in this case to discuss whether the whole of this must be proved to constitute an indictable conspiracy. It is said for the plaintiff that there was nothing deceitful or fraudulent in his paying his £632 3s. 5d. to M'Nab to purchase shares with upon the open market, and as regards the mere payment itself I agree; but the question is, Was the payment of the £632 3s. 5d. by the plaintiff to M'Nab made for the sole purpose of creating therewith a fictitious premium, in order to induce the public to purchase shares in the company, and thereby benefit the plaintiff and M'Nab—a deceitful and fraudulent means whereby to cheat and defraud those who might buy shares in the company? I am of opinion that it was. Test it in this way. Suppose a purchaser induced to purchase shares of the plaintiff or M'Nab by means of the fictitious premium created by them solely for the purpose of inducing such purchaser and others to buy, could he or not have successfully sued either or both for a false and fraudulent misrepresentation? I say that he could, and this is another way of stating the same proposition—viz., that the plaintiff and M'Nab agreed by means of deceit and fraud to cheat and defraud the would-be purchasers of shares. The agreement to do an illegal act by illegal means is proved. For the reasons above both the plaintiff and M'Nab were liable to be indicted for conspiring to cheat and defraud.

Now, how does the law stand upon the subject? If a plaintiff cannot maintain his cause of action without showing, as part of such cause of action, that he has been guilty of illegality, then the courts will not assist him in his cause of action. This was decided in *Taylor* v. *Chester*, L. R. 4 Q. B. 309, 17 W. R. C. L. Dig. 28, 94, where the illegality was pleaded, and also in *Begbie* v. *Phosphate Sewage Co.*, where it was not pleaded, but, the fraud being apparent, the court would not interfere. When the plaintiff Scott's statement of claim is looked at it will be seen that he there states the purposes for which he handed the money to the defendants—viz., to "keep up the price of the shares," which upon the evidence was shown to be "to create a fictitious premium." In my judgment, the plaintiff Scott, when suing the defendants for breach of contract, as he does, has to prove the whole contract, and it was not competent for him to put in evidence only half of the contract, and he did not do so, for the letters above read were opened by his learned counsel as part of his case. Immediately the whole contract upon which the plaintiff sues is put in, the illegality of the conduct of the plaintiff and of M'Nab at once becomes apparent. In my opinion, the maxim "*In pari delicto potior est conditio possidentis*" applies, and this court ought not to assist the plaintiff when he seeks to recover the £632 3s. 5d. back from the defendants. Upon these grounds, and without going further into

the case, this appeal must be dismissed, and with costs.

Appeal dismissed.

Solicitor for the appellants, *C. J. Whinney.*

Solicitor for the respondents, *A. T. Armitage.*

High Court of Justice.

Chan. Div. Stirling, J. } May 19, 26, 28; July 5, 1892.

In re PARKIN.
HILL *v.* SCHWARZ. (*a.*)

Power—Execution—Covenant in marriage settlement that wife's power of appointment should be exercised only in favour of trustees—General testamentary power, exercise of—Specific performance—Damages—Liability of wife's executors.

A marriage settlement executed in 1867 *contained covenants by the husband and wife that all the property which the wife, or her husband in her right, should at any time during the coverture become entitled to at law or in equity should be settled, and that any power or powers of appointment over any property whatsoever of which the wife might at any time during the coverture be the donee, under any settlement, will, or other instrument whatsoever, should, if executed by her, be executed only in favour of the trustees of the settlement. During the coverture the wife became, under the will of her father, who died in* 1871, *donee of a general testamentary power of appointment over a sum of stock. She died in June,* 1892, *having by her will, dated the 29th of March,* 1889, *executed the power, not in favour of the trustees of the settlement, but in favour, amongst others, of her husband, whom she appointed one of her executors, and who duly proved her will.*

Held, that, although the cases showed that the court had gone a long way in enforcing, by way of specific performance, contracts to leave property by will, not one of them was a case of a contract to leave by will on the part of one who was merely donee of a testamentary power of appointment, and that specific performance ought not to be decreed in such a case; but that the trustees were entitled to recover, as damages against the wife's executors to the extent of her assets, the value of the property which would have come to the hands of the trustees if the covenant had been performed; and that the appointed fund was assets for the payment of her debts.

Adjourned summons.

By an indenture dated the 20th of December, 1867, being the settlement made on the marriage of the defendant Emil Tetens and Marie Creighton, widow, after a recital that by an indenture of settlement made in 1848 Mrs. Tetens then stood possessed of certain powers of appointment over divers sums of money, stocks, funds, and securities, and the annual produce thereof respectively, subject to a life interest therein of her father, Hugh Parkin, it was witnessed that Mrs. Tetens, by virtue and in execution of the power for that purpose given by the recited indenture of settlement and of all other powers and authorities enabling her in that behalf, appointed certain funds to the trustees of the settlement of 1867 upon trusts (after the intended marriage) for Mrs. Tetens during her life for her separate use without power of anticipation, and after her death out of the income to pay an annuity of £100 to Jules Creighton, her son by her first marriage, and subject thereto to pay the income to Mr. Tetens during his life determinable as therein mentioned, and subject thereto upon trust for the child or children of Mrs. Tetens (including her said son by her first marriage) who should be living at the death of the survivor of Mr. and Mrs. Tetens, and for the issue then living of any and every of Mrs. Tetens' then declared child or children (including her said son by her first marriage) who, being males, should attain twenty-one, or, being females, should attain that age or marry, to take if more than one in equal shares as tenants in common *per stirpes*, and in the case of the decease of Mrs. Tetens without leaving any such child or issue who should live to attain a vested interest in the premises then upon trusts for a sister of Mrs. Tetens and her issue.

The settlement contained the following covenants, upon which the questions in this case arose:—

The said Emil Tetens and M. Creighton covenanted that all the estate, property, and effects whatsoever which the said M. Creighton, or the said E. Tetens in her right, should at any time during the coverture become possessed of or entitled to at law or in equity in any manner whatsoever should be settled; and also that any other power or powers of appointment over any estate, property, and effects whatsoever of which she might then, or at any time thereafter during such coverture, be the donee under any settlement, will, or other instrument whatsoever should, if executed by her, be executed only in favour of the trustees or trustee for the time being of the settlement in order that all such estate, property, and effects should be effectually vested in and be held by them or him upon the trusts declared by the settlement.

Hugh Parkin, the father of Mrs. Tetens, died on the 16th of March, 1871, having by his will, dated the 13th of December, 1860, bequeathed 2½ per Cent. Stock of considerable amount to trustees upon trust for Mrs. Tetens during her life without power of anticipation, and after her death, as to the sum of £5,000 part thereof, upon trust for such persons or purposes as Mrs. Tetens should by will appoint, and in default of appointment upon trusts for the benefit of the sisters of Mrs. Tetens and their issue.

Mrs. Tetens made her will dated the 29th of March, 1889, and thereby appointed her husband and Mr. Frank Milner Russell her executors, and after bequeathing £100 to Mr. Russell and reciting the power conferred on her by the will of her father of appointing by will £5,000 2½ per Cent. Stock, she directed and appointed that from and after her death the trustees of her father's will should stand possessed of the said sum of £5,000 upon the trusts following—viz., as to the clear sum of £1,000 part thereof in trust for her nephew, Hugh Campbell Rowley, to whom she bequeathed the same accordingly, free of legacy duty; and as to the residue thereof (subject to the payment thereout of her just debts, funeral and testamentary expenses, and the legacy bequeathed to H. C. Rowley and the legacy duty thereon) in trust for her husband absolutely.

She made a codicil dated the 5th of December, 1889, and thereby revoked her appointment and bequest in her said will contained of the clear sum of £1,000 to H. C. Rowley free of legacy duty, and directed and appointed that from and after her death the trustees of her father's will should, out of the sum of £5,000 2½ per Cent. Stock referred to in her will, raise and pay legacies amounting to £700, and subject to the aforesaid legacies should stand possessed of the residue of the said stock upon the trusts by her said will declared with reference to the residue of the same after payment to the said H. C. Rowley of the legacy thereby revoked.

(*a.*) Reported by W. A. G. WOODS, Esq., Barrister-at-Law.

Mrs. Tetens died on the 19th of January, 1892, leaving Mr. Tetens and her son by her first marriage her surviving. Her will and codicil were proved on the 8th of March, 1892, by both executors. There had been no issue of the marriage between Mr. and Mrs. Tetens.

Questions having arisen as to the effect of the covenants on the part of Mr. and Mrs. Tetens contained in the settlement, and the testamentary dispositions made by Mrs. Tetens, an originating summons was taken out by the trustees of H. Parkin's will for the purpose of obtaining the decision of the court upon them. This summons was entitled both in the matter of the trusts of the settlement and in the matter of the trusts of the will of Mrs. Tetens, and contained the following questions for the determination of the court: (1) Whether the £5,000 2½ per Cent. Stock ought to be paid to the trustees of the settlement or to the executors of Mrs. Tetens' will? (2) whether under the terms of the settlement Mrs. Tetens was under any, and what, liability to exercise the power of appointment conferred upon her by the will of the testator in favour of the trustees of the settlement? (3) whether by reason of the exercise of the power by Mrs. Tetens as in her will and codicil mentioned her estate had become liable to the trustees of the settlement, and to what extent? (4) what interest the defendant E. Tetens was entitled to under the appointment contained in the will and codicil of Mrs. Tetens? (5) whether the defendant E. Tetens was liable in respect of such interest or otherwise to the trustees of the settlement to any, and what, extent?

When the summons came on for hearing Stirling, J., directed it to stand over in order that the defendant Emil Tetens might be separately represented.

Sheldon, for the trustees of Mr. Parkin's will.

Muir Mackenzie, for the trustees of the settlement.

Buckley, Q.C., and *Maidlow*, for the defendant Jules Creighton.—The court will decree specific performance of a contract to devise lands in a particular way: Fry on Specific Performance, 3rd ed., p. 107; *Goylmer* v. *Paddiston*, 2 Vent. 353, s.c. as *Goilmere* v. *Battison*, 1 Vern. 48; *Fortescue* v. *Hennah*, 19 Ves. 67; *Loffus* v. *Maw*, 10 W. R. 513, 3 Giff. 592, overruled on one point only by *Maddison* v. *Alderson*, 31 W. R. 820, 8 App. Cas. 467. The covenant being in a marriage settlement binds the property as against volunteers claiming under Mrs. Tetens and creates a lien on the same: Vaizey on Settlements, vol. 1, p. 201; *Lee* v. *Lee*, 25 W. R. 225, 4 Ch. D. 175. [STIRLING, J., referred to *Davies* v. *Huguenin*, 11 W. R. 1040, 1 H. & M. 730.] After the execution of the settlement the property the subject of the covenant could only be disposed of by Mrs. Tetens in a particular way—*i.e.*, in favour of the trustees of the settlement. If, however, the covenant cannot be specifically enforced the trustees are entitled to damages for breach of the covenant.

Hastings, Q.C., and *Henry Fellowes*, for the executors of Mrs. Tetens' will.—Mrs. Tetens had no power to enter into the covenant in question. She could only indicate by will the persons who were to take. The cases relied upon by the defendant Creighton related to contracts as to specific property, and not to powers which might never arise.

Beale, Q.C., and *Ingle Joyce*, for the defendant Emil Tetens.—The authorities merely establish that the donee of a power of appointment has a right to contract with another person that he will put that person in the same position as if he had made a will in his favour. The object of the covenant here was to prevent Mrs. Tetens from defeating her covenant to settle after-acquired property, and was not intended to operate upon such a power of appointment as in the present case. She could not contract so as to bind herself to exercise the power in a particular way, or so as to bind the property: *In re Currey, Gibson* v. *Way*, 34 W. R. 541, 32 Ch. D. 361; *Reid* v. *Shergold*, 10 Ves. 370. As regards the construction of the settlement, each party only covenants as to what he or she can perform: *Robinson* v. *Walker*, 1 Salk. 393; Macqueen on Husband and Wife, 3rd ed. p. 248; *Dawes* v. *Tredwell*, 29 W. R. 714, 793, 18 Ch. D. 354; *Ramsden* v. *Smith*, 2 W. R. 435, 2 Drew. 298. Mr. Tetens is not liable at all; and even supposing he is bound by the covenant, it must be confined strictly to what he himself can perform, and there can be no damages in respect of the breach, for no harm has resulted to the trustees of the settlement. The trustees can have no claim upon the portion of the fund which ultimately comes to Mr. Tetens by virtue of the appointment.

Buckley, Q.C., in reply.—Mrs. Tetens' right to dispose of the fund was not limited to a disposition by will, for she was in the position of an absolute owner. *Fortescue* v. *Hennah* shows that property may be bound by a covenant to dispose of property by will in a particular way. The fund is bound by the covenant, and Mr. Tetens is trustee for the trustees of the settlement of anything that may come to him under the appointment; but if we are not entitled to specific performance we have a claim for damages.

Cur. adv. vult.

July 5.—STIRLING, J., after stating the facts, said: It was contended on behalf of Jules Creighton that, inasmuch as Mrs. Tetens had made a will executing the power contained in the will of her father, the property which she had power so to dispose of was, against volunteers claiming under her, bound by the covenant contained in her settlement. It was not disputed that if Mrs. Tetens had not made a will, the £5,000 stock must have gone to the persons entitled under Hugh Parkin's will in default of appointment by her; but it was said that the persons claiming under her will, being mere volunteers, could not set up a title to the appointed property against persons claiming it for valuable consideration; and in support of this contention the following cases, amongst others, were cited: *Goylmer* v. *Paddiston*, 2 Vent. 353, s.c. *sub nom. Goilmere* v. *Battison*, 1 Vern. 48, and *Fortescue* v. *Hennah*. Unquestionably some of these cases show that the court has gone a long way in enforcing by way of specific performance contracts to leave property by will; but not one of them is a case of a contract to leave by will on the part of one who was merely donee of a testamentary power of appointment. In my judgment specific performance ought not to be decreed in such a case.

"It is not to be doubted," says Rolt, L.J., in *Cooper* v. *Martin*, 16 W. R. 234, L. R. 3 Ch. App. 47 (see p. 58) "that equity . . . will never uphold an act which will defeat what the person creating the power has declared by expression or necessary implication to be a material part of his intention." In *Reid* v. *Shergold*, 10 Ves. 370 (see p. 380), Lord Eldon, speaking of a claim by a purchaser from the donee of a testamentary power to the assistance of the court, says: "The testator did not mean that she should so execute the power. He intended that she should give by will or not at all, and it is impossible to hold that the execution of an instrument or deed, which, if it availed for any purpose must avail to the destruction of that power the testator meant to remain capable of execution to the moment of her death, can be considered in equity an attempt towards the execution

of the power." These remarks were made in a case in which the contest was between the purchaser and a person claiming in default of appointment. I think that in principle they apply when the question arises between persons claiming under a contract for value on the one hand, and those claiming under the will on the other. I think, therefore, that the contention on the part of the trustees and the beneficiaries under it fails.

I have next to consider what are the legal rights of the trustees of the settlement in respect of the covenant. Can they recover damages for breach of the covenant on the part of the wife contained in the settlement, and, if so, for what amount, and against whom? First, has Mrs. Tetens broken her covenant? She covenanted that "any other power or powers of appointment over any estate, property, or effects whatsoever over which she, the said M. Creighton, may now or at any time hereafter during such coverture as aforesaid be the donee under any settlement, will, or other instrument whatsoever shall, if executed by her, be executed only in favour of" the trustees of the settlement. During the coverture she became the donee of a general testamentary power of appointment, which she might have exercised in favour of the trustees. The power was executed by her, but not in favour of the trustees. It seems to me that this constituted a breach of the covenant.

Next, what is the amount of damages to be recovered in respect of such breach? It is said that the damages ought to be nominal only, because the trustees are in no worse position than if the wife had declined to exercise the power (which no doubt she was at liberty to do), with the result that the fund had gone as in default of appointment. It seems to me, however, that as the wife might have exercised the power in favour of the trustees, and as she exercised the power, but not in favour of the trustees, the covenantees ought to be placed, as nearly as may be, in the same position as if the covenant had been duly performed, and consequently that the trustees are entitled to recover by way of damages the value of the stock which would have come to their hands if the covenant had been complied with.

Then comes the question, who is liable in respect of the breach? The marriage took place in 1867, before the passing of any of the recent Married Women's Property Acts, and the liability in respect of Mrs. Tetens' ante-nuptial contracts is consequently governed by the common law. Now the liability in respect of the wife's ante-nuptial debts has recently been considered by the Court of Appeal in the case of *Beck* v. *Pierce*, 38 W. R. 29, 23 Q. B. D. 316, and I cannot do better than read the statement of the law which is given by Lindley, L.J., in delivering the judgment of the court: "At common law a husband was liable to such debts to the whole extent of his property, whether he knew of their existence or not, and whether he obtained any property from his wife or none. But he could not be sued alone for such debts if his wife were alive; and he could not be sued at all for them after his wife's death: Co. Litt. 351 *b*; Com. Dig. Baron & Feme, Y. and (2 C.). Nor was a promise by him to pay such debts of any avail, if the only consideration for the promise was his pre-existing liability to pay them: *Mitchinson* v. *Hewson*, 7 T. R. 348, where such a promise was averred. Nor would a court of equity assist his wife's creditors against him, even if he had acquired property through her: *Heard* v. *Stanford*, 2 Eq. Cas. Ab. 134 pl. 5. If he and she were both sued, and judgment was recovered against both, such judgment could be enforced against the survivor. If judgment was recovered against her before her marriage, a *sci. fa.* lay against him and her after marriage, and if judgment was obtained against them both on such *sci. fa.*, and then she died, such judgment bound him: *Obrian* v. *Ram*, 3 Mod. 186; and also cited in *Woodyer* v. *Gresham*, 1 Salk. 116. But a judgment against her alone did not affect him after her death, *Ibid.*, except, of course, in his character of administrator."

Now to the authorities that are cited by the Lord Justice I desire to add the cases of *Lockwood* v. *Salter*, 5 B. & Ad. 303, not that it is very material to the present case, but that it is a case which relates to a covenant by a wife contained in her own marriage settlement, the action being brought against the husband. The Lord Justice in the concluding words of his judgment refers to the liability of the husband when he becomes administrator of his wife and says, "The law upon that appears to me to have been long well settled." In Wentworth on the Office of Executors, the first edition of which was published in 1641, and the 14th in 1829, at pp. 369, 370 of the last edition the law is laid down thus:—After referring to the property to which the husband becomes entitled *jure mariti*, and explaining the law as stated by Lindley, L.J., that the husband after his wife's death is not liable in respect of property so acquired, the author goes on to say this: "Another sort or kind of goods, or rather interests, a woman may have, viz., debts or things in action which, as the former, are not divested out of her by marriage into her husband, nor yet can she thereof make an executor without her husband's consent, although they be one degree farther from the husband than the said chattels real; for that though the husband do overlive the wife, he shall not be entitled to them as to the former. But if his wife make him executor, as she may, or if after her death he take administration of her goods; then, as he is thereby entitled to them, so is he liable also to pay her debts out of the same, when he shall have received them."

That statement of the law is recognized by Parker, L.C., in *Earl of Thomond* v. *Earl of Suffolk*, 1 P. W. 461, and by Talbot, L.C., in *Heard* v. *Stanford*, 3 P. W. 409; Cas. t. Talbot, 173; and it is so stated in the successive editions of Williams on Executors.

In the present case the husband has not taken out administration; but, in accordance with the present practice of the Probate Division, probate has been granted to him and Mr. Russell, who are the legal personal representatives of the wife. The authorities to which I have just referred appear to me to show that they are liable on the wife's covenant to the extent of the assests come to their hands.

What, then, are the assets which are available for payment of the debt? That is a point which was not really discussed before me, and if any question arises on it it ought to be further discussed; but for the sake of avoiding any unnecessary discussion I shall take leave to state the conclusions which occur to me at the present moment. In the first place, the testatrix appears to me to have herself made the fund in question subject to the payment of her debts, and this is plainly a legal debt. A question may arise as to whether the legacies to the amount of £700 would not upon the pure construction of the lady's will, take precedence; but, independently of this, I apprehend that the fund, being subject to a general power of appointment which the testatrix has exercised, would be assets for payment of the wife's ante-nuptial debts: see *Fleming* v. *Buchanan*, 3 De G. M. & G. 976. In saying that, I do not forget the decision of Kay, L.J., in *In re Roper*, 36 W. R. 750, 39 Ch. D. 482, in which he held that a fund which was appointed by a married woman did not make the appointed property liable as assets of the appointor in respect of debts contracted after the marriage in regard to her separate estate. But the

Lord Justice recognizes the general law where he says:—"There is no doubt that in case of a man who has a general power of appointment and exercises it by will in favour of volunteers, the property so appointed will be considered as assets for payment of his debts." The conclusion at which the Lord Justice arrived in that case is thus stated: "In this case the powers of appointment were only by will; and as the provision of section 1, sub-section 4, of the Married Women's Property Act, 1882, does not apply, in my opinion the property appointed by her will is not subject to her engagements made during her coverture." Totally different considerations apply to a case when the liability arises out of an ante-nuptial contract.

As at present advised, therefore, it seems to me that the appointed fund is assets for payment of the debts, and that really settles all questions which arise in the case. Under these circumstances, I abstain from expressing any opinion on the question which was considerably argued before me, namely, the effect of the husband's personal covenant. That appears to me to give rise to considerations of very considerable nicety which, perhaps, were not fully discussed, and under these circumstances I do not propose to express any opinion as to his personal liability.

Solicitors, *Evans, Foster, & Wadham; A. A. Collyer-Bristow, Russell, & Hill; Prince, Ayres, & Austen*, for *Prince & Ayres*, Brighton.

Q. B. Div.
(Lord Coleridge, C.J.) Nov. 8.

HICKS *v.* STOKES. (*a.*)

Parliament — Registration — County voter — Notice of objection—Description of objector—Place of abode—Sufficiency of—Registration Order, 1889, *Forms* 5 (*A*) *and* (*B*), *and I., No.* 2.

Where notices of objection to certain county voters were signed "John Badgery, Burnard's-terrace, on the register of electors for the township of Bodmin Borough," without stating that Burnard's-terrace was situated in Bodmin, and it was found by the revising barrister that nobody had been misled by the omission,

Held, that the description of the objector's place of abode was sufficient to satisfy the Registration Order, 1889, *Forms* 5 (*A*) *and* (*B*).

This was a case stated by the revising barrister for the Bodmin Division of Cornwall.

At a court held for revising the lists of voters for the Bodmin Division of Cornwall certain notices of objection had been served upon a number of persons resident in the said division objecting to their names being returned upon the lists of county voters as owners, occupiers, or lodgers respectively. In respect of the owners the notices of objection were signed as follows: "John Badgery. Place of abode, Burnard's-terrace; on the register of electors for the township of Bodmin Borough;" and "Thomas Brock. Place of abode, St. Nicholas-street; on the register of electors for the township of Bodmin Borough," and in respect of the occupiers and lodgers the notices were signed "John Badgery. Place of abode, Burnard's-terrace, on the list of the parliamentary electors (and county electors or burgesses) for the township of Bodmin Borough" and "Thomas Brock. Place of abode, St. Nicholas-street; on the list of parliamentary electors (and county electors or burgesses) for the township of Bodmin Borough."

These notices were objected to as invalid because they did not contain the name of the town in which the particular terrace and street respectively were situated. The revising barrister overruled the objection, holding that the description of the voter in each case sufficiently indicated the town in which the objector lived, and finding as a fact that nobody had been misled or inconvenienced by the omission, and he further held that if there was any doubt he had the power to amend and would amend the said notices. One of the persons objected to appealed.

Duke, for the appellant.—The forms regulating these notices of objection are contained in the Registration Order, 1889, Forms 5 (A) (B), for ownership electors, and Form I., No. 2, for parliamentary occupation electors and county electors in a parish not a parliamentary borough. They require that the "place of abode" of the objector should be stated. That is not done by merely stating the street or terrace in which he lives, especially where the voter is a county voter, because he may reside in any of several towns or villages. That distinguishes this case from *Sheldon* v. *Flatcher*, 17 L. J. C. P. 34, where a notice of objection in a similar form was held to be sufficient. In that case the vote was a vote for the borough of Cheltenham, and the making of the objection showed that the objector must reside in the town of Cheltenham, because otherwise he would have had no *locus standi*. There are two cases precisely in point, in which county votes were in question and similar notices of objection were held to be insufficient. The first is *Woollett* v. *Davis*, 4 C. B. 115, where the notice was signed "James Birch, of the Oaks. On the register of voters for the parish of St. Woolos," and the second is *Humphrey* v. *Earle*, 36 W. R. 510, 20 Q. B. D. 294, where the notice was signed "George Chapman, of Churchyard. On the list of parliamentary voters for the parish of Petersfield." Secondly, if these notices were insufficient they could not be amended. By 41 & 42 Vict. c. 26, s. 28, sub-section 2, a revising barrister "may correct any mistake which is proved to him to have been made in any claim or notice of objection." This refers to cases of clerical errors or cases in which nobody could possibly be misled. For example, in *Adams* v. *Bostock*, 30 W. R. 460, 8 Q. B. D. 259, it was held that a revising barrister might correct the omission of an objector's place of abode, but that was in the case of a borough vote, where it was impossible that anybody could be misled, but that reasoning does not apply to a county vote.

T. J. Bullen, for the respondent, was not called upon.

Lord COLERIDGE, C.J.—Two points have been argued for the appellant in this case, first that the notices were bad, and secondly that if they were bad the revising barrister had no power to amend. I do not think it necessary to decide the latter point as to amendment, for I am of opinion that the notices were sufficient without it. According to the authority of *Sheldon* v. *Flatcher*, and according to good sense, I think that the objectors' places of abode were sufficiently described. The decision in *Sheldon* v. *Flatcher* seems to me to be directly in point. We have been pressed with the case of *Humphrey* v. *Earle*, but the distinction between that case and the present is that there was no finding that the persons objected to had not been misled, and the court seem to have thought that the omission of the word "the" before "churchyard" might have misled others into supposing that the address did not refer to the church-

(*a.*) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

yard in Petersfield, whereas here the revising barrister has found as a fact that no one has been misled or inconvenienced by the omission.

Appeal dismissed.

Solicitors for the appellant, *Law & Worssam*, for *Bond, Pearce, & Bickle*, Plymouth.

Solicitors for the respondent, *Busk & Co.*, for *Stokes*, Bodmin.

Q. B. Div.
(Pollock, B., and Hawkins, J.) } Oct. 31; Nov. 4.

RUSHMERE AND ANOTHER, *Petitioners.*
ISAACSON, *Respondent.*
STEPNEY ELECTION PETITION. (*a.*)

Parliament—Election petition—Practice—Corrupt and illegal practices—Time for delivery of particulars—Extension of time—Special circumstances—Rules of Court for Trial of Election Petitions, 1868, *rr.* 6, 7.

The general rule of practice in election petitions, that particulars of corrupt and illegal practices will be ordered to be delivered seven days before trial of the petition, is not a hard and fast rule, and, in determining whether there are special circumstances upon which it will act in extending the time, the court will take into consideration the size and nature of the constituency, the population, and the number of voters, and also the number of witnesses whom it is proposed to call.

Where, in a parliamentary election petition claiming to void the election, and also claiming the seat upon a scrutiny, and relating to a division of a metropolitan borough which contained above 7,000 *voters*, 58,000 *inhabitants, and in which some* 170 *witnesses were intended to be called by the petitioners, an order had been made for the delivery of particulars of alleged corrupt and illegal practices seven days before trial, the court made an order extending the time to ten days, the particulars being by consent limited to such as would not have the effect of anticipating the scrutiny list.*

Motion by the respondent to enlarge the time for the delivery of certain particulars by the petitioners under the order of Barnes, J., from seven to ten clear days before the day appointed for the trial of the petition.

The particulars in question, which required full and detailed information as to names and addresses, dates, places, and amounts, had reference to the following charges and allegations in the petition—viz., of (1) bribery, undue influence, and treating by the respondent; of (2) the same by his election agent; of (3) illegal payments for the use of premises and the exhibition of bills; of (4) prohibited persons having voted, and of procuring such prohibited persons to vote; of (5) payments by the respondent and his agent for election expenses otherwise than through the election agent; of (6) money provided for prohibited payments; of (7) payments made for bands of music, torches, flags, banners, &c.; of (8) illegal employments; of (9) illegal hirings; of (10) election expenses omitted from the return, and misstatements as to those incurred; of (11) failure by the respondent and his election agent to comply with the provisions of the Corrupt Practices Act, 1883, as to the return, and of corrupt practices by the election agent; of (12) election expenses incurred in excess of the maximum allowed; and of (13) general bribery and treating.

The petition claimed (1) to void the election, and (2) the seat for the unsuccessful candidate. The motion for the enlargement of the time for the delivery of the particulars was made in the first instance unsupported by affidavit of any special circumstances. This course the court held to be insufficient, but granted an adjournment to allow the respondent to produce such affidavit. On the adjourned hearing, the 4th of November, an affidavit by the respondent's solicitor was read to the effect that owing to the area of the constituency, which contained over 7,000 voters, and a population of 58,753, and the fact that a very large number of witnesses would in all probability be called on behalf of the petitioner, the period of seven days was insufficient to enable the respondent adequately to prepare his case.

Coward, for the respondent, in support of the motion. — The affidavit discloses sufficient special circumstances to warrant the enlargement of the time. It is true that the general rule has been to make a seven days' order, but that rule is not inflexible. In *Lenham* v. *Barber*, 31 W. R. 428, 10 Q. B. D. 293, the *Hereford case*, although the order made was a seven days' order, it was said by the judges that the general rule did not mean that a hard and fast line was to be drawn. The precedents in practice have chiefly been in cases of small boroughs, where the same difficulties did not exist.

Roskill, for the petitioners.—If this motion succeeds it will have the effect of making the order for particulars bad for want of jurisdiction, inasmuch as it will be granting ten days where six only are allowed by rule 7 of the Rules of Michaelmas Term, 1868, which applies to particulars of the votes objected to and the objection to such votes upon a claim of the seat. It would, therefore, have the effect also of anticipating the scrutiny list. [In order to meet this latter objection it was, however, agreed by counsel to limit the particulars in such a way as should not have this effect, and to confine those in reference to heads 4, 6, 7, and 8 to allegations against the respondent and his election agent.] The object of limiting the time to seven days is to prevent, so far as possible, any tampering with the witnesses, and the practice has been almost universal in favour of the seven days' order.

POLLOCK, B.—The order for these particulars was made by Barnes, J., and it was directed that they should be delivered seven days before the trial of the petition. The respondent now seeks to enlarge the time from seven to ten days. We should, of course, in substance, observe the rule in vogue in such matters. In ordinary civil actions, when there are a large number of witnesses, a period of ten days would not be unreasonable, and an election petition is a peculiar inquiry, and may involve a prolonged preliminary investigation which might be insufficient if curtailed. The question really depends on the population, and the area of the constituency, and the number of witnesses to be called. It is quite clear that a small borough like Hereford is but a weak analogy to the present case. There you might very likely have a ferment during the inquiry, but when you come to a large place like Stepney it is not likely to be so much disturbed. Now here the matters I have mentioned are material, and I think, especially as it is not the sole case in which a ten days' order has been made, that ten days is a reasonable time, and well within our power to order.

HAWKINS, J.—I agree.

Coward asked for the costs of the motion.

Roskill.—That part of the motion which we were

(*a.*) Reported by JOHN P. MELLOR, Esq., Barrister-at-Law.

compelled to resist as anticipating the scrutiny list, and so rendering the order bad for want of jurisdiction, has been abandoned with the petitioner's consent, and they ought not, therefore, to be ordered to pay the costs.

HAWKINS, J.—The motion must be allowed with costs.

Order accordingly.

Solicitors for the respondents, *Baylis & Pearce.*

Solicitors for the petitioners, *Field, Roscoe, & Co.*

Q. B. Div.
(Mathew and Bruce, JJ.) Oct. 31.

KNIGHT *v.* LEE. (*a.*)

Gaming—Betting—Employment of agent to bet—Gaming Act, 1892 (55 *Vict. c.* 9)—*Bet made and paid before passing of Act—Action brought after passing of Act—Whether Act retrospective.*

The Gaming Act, 1892, *does not apply to a promise made before the Act came into operation.*

Before the Act came into operation a betting agent made certain bets at the request of and for a principal.

Before the Act came into operation the betting agent received the winnings and paid the losses in respect of such bets. The result of these transactions was that there was a balance against the principal.

After the Act came into operation the agent brought an action against the principal to recover the balance.

Held, that he was entitled to recover.

This was an appeal from a decision of his Honour Judge Mackonochie, sitting at the County Court of Wiltshire, holden at Salisbury. The question was whether, after the Gaming Act, 1892, came into operation, an action could be brought to recover £11 12s. 6d., the amount which the plaintiff, Knight, who was a betting agent, had paid before the Act came into operation for bets made by him at the request of and for the defendant, Lee.

Between November 4 and November 28, 1891, the plaintiff executed certain betting commissions for the defendant. The plaintiff made bets for the defendant, collected the winnings, paid the losses, and rendered an account to the defendant, charging a certain commission for his trouble. On November 28, 1891, there was a balance of £11 12s. 6d. against the defendant in respect of these transactions. The Act came into operation on May 20, 1892. After the Act came into operation the plaintiff brought an action in the county court to recover from the defendant the balance of £11 12s. 6d.

The county court judge gave judgment for the plaintiff, holding that the Act related solely to promises made after the Act came into operation.

The defendant appealed.

Morten, for the appellant, referred to the Act.

D'Eyncourt, for the respondent.—A debt lawfully incurred before the statute can be sued for after the Act came into operation.

He referred to *Moon* v. *Durden,* 2 Ex. 22; *Towler* v. *Chatterton,* 6 Bing. 258; *Gillmore* v. *Shooter,* 2 Mod. 310.

Morten, in reply.—Some effect must be given to the words, "no action shall be brought." [MATHEW, J.—They are quite consistent with the Act being prospective.] The first part of the section would make void all promises to pay sums of money made before the Act, therefore the second part is not needed unless it applies to promises made before the Act. *Moon* v. *Durden* is distinguishable.

MATHEW, J.—The county court judge gave judgment for the plaintiff. I think his judgment must be affirmed. A betting agent had been employed and had paid money for his principal. Under *Read* v. *Anderson,* 32 W. R. 950, 13 Q. B. D. 779, he was entitled to recover the money. He had a vested right to recover the money at the time the Act came into operation. Then comes the statute? Is it retrospective or prospective? Mr. Morten says that the intention of the Legislature was that it should be retrospective, otherwise the second part of the section would not have been needed. Now the section provides that "any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of the 8th and 9 Victoria, chapter one hundred and nine, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any service in relation thereto or in connection therewith, shall be null and void. . . . ." So far all is prospective, and after the word "promise" you must read in "hereafter made." The section continues, "and no action shall be brought or maintained to recover any such sum of money," and it is argued that that is both prospective and retrospective. I cannot agree with that view, which would give no meaning whatever to the word "such." The word "such" is a repetition of the earlier part of the section, and shows that the second part of the section deals only with the sums of money dealt with in the first part—that is, sums of money due on a promise hereafter made.

BRUCE, J.—I am of the same opinion. The plaintiff's right accrued before the statute passed. It is possible to give a construction which will carry out the intention of the Legislature without any such harsh construction as that contended for by the appellant.

Appeal dismissed.

Solicitors, *Clarke, Rawlins, & Co.; H. J. King.*

Q. B. Div.
(Mathew and Bruce, JJ.) Oct. 31.

PUDNEY *v.* ECCLES. (*a.*)

Game—Dealing in game without licence—Exposing for sale and selling hare and black game killed in Russia—Game Act, 1831 (1 *&* 2 *Will.* 4, *c.* 32)—2 *&* 3 *Vict. c.* 35—23 *&* 24 *Vict. c.* 90, *ss.* 13, 14—24 *&* 25 *Vict. c.* 91, *s.* 17.

A person who did not hold an excise licence under 23 *&* 24 *Vict. c.* 90, *s.* 14, *exposed for sale in his shop and sold a hare and a brace of black game which had been killed in Russia and imported into this country for sale.*

Held, that, the hare and black game having been killed abroad, it was not necessary to hold the excise licence.

This was a case stated by a metropolitan police magistrate.

On the 24th of March, 1892, the respondent Eccles exposed for sale at his shop, 325, Old Kent-road, a hare and a brace of black game, which he on the same day sold to the appellant Pudney, an officer of Inland Revenue. The respondent at the time of

(*a.*) Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

(*a.*) Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

such sale did not hold an excise licence to deal in game. The hare and black game had been killed abroad (in Russia) and imported into this country for sale.

The magistrate found as a fact that the brace of black game were of the same species as, and indistinguishable from, the black game found in the United Kingdom, and named in section 2 of the Game Act, 1831 (1 & 2 Will. 4, c. 32), and that the hare was of the same species as, and indistinguishable from, the hares found in Scotland (commonly called blue hares), and named in section 2 of the Game Act, 1831.

On the 14th of June, 1892, the respondent was summoned before the magistrate at the Southwark Police-court to answer an information exhibited by the appellant which charged the respondent with dealing in game without having in force such a licence as by the statute in that behalf is required. The magistrate dismissed the information, being of opinion that on the facts no excise licence was necessary. The question for the opinion of the court was whether, under the circumstances, the respondent was guilty of the offence charged against him.

By 23 & 24 Vict. c. 90, s. 14, every person dealing in game in England, Scotland, or Ireland is required to obtain an excise licence upon payment of the duty of £2, and any person who purchases or sells or otherwise deals in game before he obtains such a licence is to forfeit the sum of £20.

By 24 & 25 Vict. c. 91, s. 17, it is enacted that in any information exhibited for recovery of the said penalty it shall be sufficient to allege and, upon the trial thereof to prove, that the defendant dealt in game without the licence required by 23 & 24 Vict. c. 90.

By section 13 of 23 & 24 Vict. c. 90 all the clauses, provisions, and penalties of 1 & 2 Will. 4, c. 32 and of the Act 2 & 3 Vict. c. 35 relating to dealers in game and to the selling of game are, so far as the same are consistent with the express provisions of 23 & 24 Vict. c. 90, and as the same are altered and amended by that Act, to extend to and be of full force and effect in and throughout the United Kingdom, and are to be observed, applied, and enforced as if the same, so altered and amended and made consistent with the express provisions of that Act, had been therein repeated and specially enacted.

Section 2 of the Game Act, 1831, enacts that the word "game" shall, for all the purposes of that Act, be deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards.

Danckwerts, for the appellant.—The respondent ought to have been convicted. If the magistrate is right, a person dealing in foreign game requires no licence, while if he deals in English game he does. 23 & 24 Vict. c. 90 was passed for the protection of the revenue.

He referred to *Guyer* v. *Reg.*, 37 W. R. 586, 23 Q. B. D. 100; *Saunders* v. *Baldy*, 14 W. R. 176, L. R. 1 Q. B. 87.

Sutton, for the magistrate.

The respondent was not represented.

MATHEW, J.—I am of opinion that the magistrates were right. The question is whether the fact that this person did not procure the excise licence mentioned in 23 & 24 Vict. c. 90, s. 14, renders him liable to prosecution, seeing that the birds he sold did not belong to the United Kingdom, but came from abroad. You can only construe the later Acts by reference to the former Act of 1 & 2 Will. 4, c. 32. By that Act it was intended to impose the obligation of obtaining a certificate to sell game. The obligation was imposed on the dealer to obtain a licence. The form of licence makes the section perfectly plain. [The learned judge read the form of licence in Schedule (A).] The licence was intended to apply to English game only. The subsequent statutes were passed extending the provisions of the Act of Will. 4. It has been said that revenue clauses of statutes ought to be construed widely, and that the Act of 1860 (23 & 24 Vict. c. 90) is a revenue Act, and that the intention was to raise a revenue upon the sale of game of any description. But it clearly refers to the earlier Act. Section 14 says: [The learned judge read section 14 of 23 & 24 Vict. c. 90.] The reasoning of Hawkins, J., in *Guyer* v. *Reg.* is perfectly accurate.

BRUCE, J.—I am of the same opinion. I think the later statute must be read by reference to the earlier.

Appeal dismissed.

Solicitors for the appellant, *Solicitors to Inland Revenue*, Somerset House.

Solicitor for the magistrate, *Solicitor to the Treasury.*

Q. B. Div.
(Lord Coleridge, C.J., and Wills, J.) — Oct. 28.

HOWARD v. SADLER. (a.)

Company—Director—Shares held for purpose of qualification—Charging order—"In his own right"—1 & 2 Vict. c. 110, s. 14.

Shares standing in the name of a judgment debtor in the books of a company cannot be made the subject of a charging order if he is not the beneficial owner of them, but is merely registered as owner for the purpose of qualifying as a director of the company.

Pulbrook v. Richmond Consolidated Mining Co., 27 *W. R.* 377, 9 *Ch. D.* 610, *commented on and followed.*

Appeal of the plaintiffs from an order of the judge in chambers discharging a charging order *nisi*.

The plaintiffs, having recovered a judgment for £43 against the defendant, obtained a charging order *nisi* on fifty shares standing in the defendant's name in the books of the Oldbury Railway Co. The defendant was a director of that company, and the company's private Act provided that the qualification for a director should be the possession, in his own right, of not less than fifty shares. After the charging order *nisi* had been obtained the plaintiffs were informed by the Great Western Railway Co. that that company had purchased the defendant's shares in the Oldbury Railway Co. in 1889, but that they had been left in his name in order that he might continue to be qualified as a director, and that this transfer had not been registered. By the Oldbury Railway Act, 1881, the Great Western Railway Co. were empowered to nominate three out of the five directors of the Oldbury Railway Co.

Gregson Ellis, for the plaintiffs.—This case can be distinguished from *Cooper* v. *Griffin*, 40 W. R. 420, [1892] 1 Q. B. 740, because here the defendant held himself out to the plaintiffs as the real owner of the shares, and is, therefore, estopped from now denying it, and also because the Great Western Railway Co., which has power to appoint three out of the five Oldbury Co. directors, has, by purchasing the defendant's shares, practically appointed a fourth

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

director. This is an evasion of the Oldbury Railway Act, 1881, and is possibly *ultrà vires*.

J. V. Austin, for the Great Western Railway Co.—This case is covered by *Cooper* v. *Griffin*, which case followed *Pulbrook* v. *Richmond Consolidated Mining Co.*, 27 W. R. 377, 9 Ch. D. 610, in which Jessel, M.R., held that possession of shares, in his own right, by a director for the purpose of qualification did not necessitate beneficial ownership. Assuming that the Great Western Railway Co. did act illegally in purchasing the defendant's shares, that is a fraud against the shareholders, not against the plaintiffs. The defendant is a trustee for the Great Western Railway Co., and therefore the plaintiffs cannot have a charging order against the shares: *In re The Blakeley Ordnance Co.*, 25 W. R. 111. [He was stopped by the court.]

Atherley Jones, for the defendant.

Gregson Ellis, in reply.—In *Pulbrook* v. *Richmond Consolidated Mining Co.* the words "in his own right" were contained in the articles of association of the company, and that case is no authority for the construction of words in an Act of Parliament, as is the case here.

Lord COLERIDGE, C.J.—I am of opinion that this appeal must be dismissed. I quite concur with what was said by the Court of Appeal in *Cooper* v. *Griffin* as to the case of *Pulbrook* v. *Richmond Consolidated Mining Co.* being a binding decision. That case was decided some time ago, and has often been acted on since, and it would cause great confusion if the interpretation placed by Jessel, M.R., on these words, "in his own right," was now to be called in question. I am unable to distinguish this case from *Cooper* v. *Griffin*.

WILLS, J.—I agree, and have only to add that I regret the decision in *Pulbrook* v. *Richmond Consolidated Mining Co.*, because I think it has a tendency to make people commit themselves to shams.

Appeal dismissed.

Solicitor for the plaintiffs, *A. F. V. Wild.*

Solicitor for the defendant, *P. J. Rutland*, for *J. Mead*, Birmingham.

Solicitor for the Great Western Railway Co., *R. R. Nelson.*

Q. B. Div.
(Mathew and Bruce, JJ.) Oct. 25.

HASTINGS (LIMITED) v. PEARSON. (a.)

Pawnbroker—Liability—Goods pledged by person entrusted to him by the owner for purposes of sale—Mercantile agent—Ordinary course of business—Factors Act, 1889 (52 & 53 *Vict. c.* 45), *ss.* 1, 2.

Where a person entrusted with goods for the purpose of sale only, pledges them with a pawnbroker, he is not a mercantile agent "acting in the ordinary course of business of a mercantile agent" within the meaning of section 2 of the Factors Act, 1889, *and the pawnbroker is not protected by that section from an action by the owner to recover the value of the goods.*

Appeal from a decision of his Honour Judge Bristowe at the Lambeth County Court, giving judgment for the defendant.

The plaintiffs were dealers in watches and jewellery, and employed a person named Brook to take articles to private houses for the purpose of selling them. Brook was paid by means of a small salary and a commission on the price of the articles which he sold. Brook pledged certain articles which had been so entrusted to him for sale with the defendant, who was a pawnbroker, and who received them in good faith, believing them to be the property of Brook.

The plaintiff then brought this action against the defendant, claiming to recover the goods or their value. The county court judge held that Brook was a "mercantile agent" within the meaning of the Factors Act, 1889, and that the defendant was protected from liability by section 2 of that Act, and gave judgment for the defendant.

The plaintiff appealed.

The Factors Act, 1889, enacts (section 1) that for the purposes of the Act (1) the expression "mercantile agent" shall mean a mercantile agent having, in the customary course of his business as such agent, authority either to sell goods or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods."

Section 2, sub-section (1), provides that "where a mercantile agent is, with the consent of the owner, in possession of goods, or of the documents of title to goods, any sale, pledge, or other disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same: provided that the person taking under the disposition acts in good faith, and has not, at the time of the disposition, notice that the person making the disposition has not authority to make the same."

Finlay, Q.C., and *Cluer*, for the appellant.—Brook was not a mercantile agent; and if he was, he was not "acting in the ordinary course of business of a mercantile agent" in pledging these articles.

Tindal Atkinson, Q.C., and *C. Attenborough*, for the respondent.—The terms used in the definition of a mercantile agent are disjunctive, and if a person comes within one of the terms he is a mercantile agent for all purposes. Brook, being authorized to sell articles for the plaintiff, was a mercantile agent, and therefore, by section 2, the defendant is protected in dealing with him.

They cited *Heyman* v. *Flewker*, 13 C. B. N. S. 519, 11 W. R. C. L. Dig. 54.

MATHEW, J.—I think that this appeal must be allowed. The argument that we have just heard has the effect of striking out of the 2nd section of the Act very material and very important words which are to be found there. What appear to be the facts in this case are these—a jeweller entrusted a man, who appears to have acted as a sort of traveller, with certain articles of jewellery for sale. There was no authority whatever to pledge. He pledged them with the defendant and thereupon the plaintiff brought an action to recover the goods from the defendant. A defence was set up under the Factors Act that the defendant in dealing with this traveller was dealing with a mercantile agent and was protected by the terms of the Act. The only section upon which reliance can be placed is section 2. [His lordship read section 2, and continued:—] I think that what the section means to refer to is a person of a class ordinarily carrying on that description of business; such a person held out to the world as belonging to that class is within the Factors Act a person who binds his principal. There is no evidence of a person here who answers to that description, because, so far as at pre-

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

sent known, there is no class of persons whose business it is to go about pledging watches on commission or for wages on the part of their employers. That being so, it seems to me that the Act does not apply, and the judgment must, therefore, be reversed.

BRUCE, J.—I am of the same opinion.

Appeal allowed.

Solicitor for the appellant, *H. E. Tudor.*

Solicitor for the respondent, *John Attenborough.*

Q. B. Div. (Wright and Collins, JJ.) July 11, 1892.

RIDGEWAY (*Appellant*) v. FARNDALE (*Respondent*). (*a.*)

Criminal law—Gaming—Betting in a public place—"At any game or pretended game of chance"—Vagrant Act Amendment Act, 1873 (36 & 37 *Vict. c.* 38), *s.* 3.

In order to obtain a conviction on a charge of betting by way of wagering, under section 3 *of the Vagrant Act Amendment Act,* 1873, *it is necessary to allege and prove that the wagering was at some game or pretended game of chance.*

Special case stated by the stipendiary magistrate for Birmingham.

An information was laid by the respondent, the Chief Constable of Birmingham, against the appellant charging him that he did unlawfully bet, by way of wagering in a certain street, with certain articles used as a means of such wagering—namely, written papers and coins, contrary to section 3 of the Vagrant Act Amendment Act, 1873.

The information did not allege that the wagering by the appellant had been at any game or pretended game of chance, and it was contended on behalf of the appellant that owing to that omission the information did not disclose any offence. The magistrate, however, convicted the appellant, but stated this case for the opinion of the court.

Section 3 of the Vagrant Act Amendment Act, 1873, provides that every person playing or betting by way of wagering or gaming in any street, &c., to which the public have access, at or with any table or instrument of gaming, or any coin, card, token, or other article used as an instrument or means of such wagering or gaming at any game or pretended game of chance, shall be deemed a rogue and vagabond within 5 Geo. 4, c. 83, and may be convicted as such.

A question was also raised as to whether what the appellant had done was betting with any coin as an instrument or means of gaming within the Act; but it became unnecessary to decide that point, and so much of the case as refers to it is therefore omitted.

Poland, Q.C. (*A. T. Lawrence* with him), for the appellant.—In order to obtain a conviction under section 3 of the Act of 1873 it is necessary that the playing or betting should be "at a game or pretended game of chance." That has not been alleged or proved in this case, and the conviction, therefore, was wrong.

Channell, Q.C. (*Hugo Young* with him), for the respondent.—The conviction was right. The words "at any game of chance" only apply when the charge is one of playing or gaming, but when it is a case of betting solely, like the present case, these words are immaterial.

WRIGHT, J.—I am of opinion that this conviction must be quashed. The original offence was created by 5 Geo. 4, c. 83, s. 4, and is in these words, "Every person playing or betting in any street, &c., at or with any table or instrument of gaming, at any game or pretended game of chance." That was extended by the Act of 1873 by including other instruments of gaming, such as coins or cards. But it still remains essential that the betting or gaming should be "at a game or pretended game of chance." The magistrate has not come to any finding on that point, and therefore the conviction is invalid on the face of it and must be quashed.

COLLINS, J.—I am of the same opinion.

Conviction quashed.

Solicitor for the appellant, *Dennison*, for *Tanner*, Birmingham.

Solicitor for the respondent, *E. W. Smith*, Town Clerk, Birmingham.

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Q. B. Div. (Wright and Collins, JJ.) June 14, 15, 1892.

REG. v. TIDY. (*a.*)

Quo warranto — *Acceptance of incompatible office—Churchwarden and vestry clerk—Non-corporate office.*

The defendant, while holding the office of churchwarden, was proposed for the office of vestry clerk and declared elected. He published a letter thanking the electors, but never acted as vestry clerk.

Held, that the defendant had not exercised the office of vestry clerk in such a way as to render the remedy by quo warranto *applicable.*

Reg. *v.* Jones, 28 *L. T. N. S.* 270, 21 *W. R. Dig.* 210, *followed.*

On the 12th of May, 1892, a rule *nisi* was granted for an information in the nature of a *quo warranto* to show by what authority one Tidy claimed to exercise the office of vestry clerk for the parish of Ealing.

Tidy was churchwarden, and his term of office expired at Easter, 1892. Before that date, and while he was still churchwarden, Tidy was proposed for the office of vestry clerk and declared duly elected. He published a letter thanking the electors for having elected him, but up to the date at which these proceedings were instituted he had not acted as vestry clerk, and had declared that he only accepted the office of vestry clerk on the condition that he should not act until he had ceased to be churchwarden.

Channell, Q.C. (*Wedderburn* with him), showed cause.

A. B. Kempe, in support of the rule.

The following cases were cited in the course of the arguments:—*Rex* v. *Ponsonby*, Sayer, 245, 2 Bro. P. C. 311; *Rex* v. *Whitwell*, 5 T. R. 85; *Rex* v. *Tate*, 4 East, 337; *Reg.* v. *Slatter*, 11 A. & E. 505; *Reg.* v. *Coaks*, 3 E. & B. 249, 2 W. R. C. L. Dig. 191; *Reg.* v. *Jones*, 28 L. T. N. S. 270, 21 W. R. Dig. 210; *Pritchard* v. *Mayor of Bangor*, 37 W. R. 103, 13 App. Cas. 241.

WRIGHT, J.—I am of opinion that this rule must be discharged, on the ground that we are bound by *Reg.* v. *Jones*. That case was decided in 1873, and must have been frequently considered. Apart from that case I think that a great deal might have been said in favour of the view that, when all has been done that ought to be done, the office must be regarded

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

as being full, and the remedy by *quo warranto* is applicable. But the case of *Reg.* v. *Jones* is an authority that in the case of a non-corporate office something more than mere acceptance is necessary. I desire to guard against the notion that in all cases it is necessary that the person elected should exercise the office, because in the case of a corporate office the rule is that election, acceptance, and admission are enough. I also agree with Mr. Channell that a conditional acceptance, such as in the present case, is no acceptance at all.

COLLINS, J.—I am of the same opinion.

Rule discharged.

Solicitor for the relator, *E. H. Baker*, for *C. Butterfield*, Ealing.

Solicitors for the defendant, *Nelson, Barr, & Nelson.*

House of Lords

From C. A. (England). April 4, 1892.

CHARLESWORTH *v.* MILLS. (*a.*)

Bill of sale—Pledge—Transfer of property—Possession—Bills of Sale Acts, 1878 (41 & 42 *Vict. c.* 31) *and* 1882 (45 & 46 *Vict. c.* 43).

The sheriff having seized the goods of A. under a fi. fa., *the appellant (an auctioneer) agreed verbally with A. to pay out the sheriff, provided he was put into possession, with authority to sell by auction and to repay himself, handing over the balance (if any) to A. The sheriff was paid out, the man in possession remaining in possession, not for the sheriff, but for the appellant, and a document was then drawn up embodying this arrangement.*

Held (reversing the decision of the Court of Appeal, 39 *W. R.* 1, 25 *Q. B. D.* 421), *that the appellant did not get his title under the document, but by virtue of the transaction, and, consequently, that there was no bill of sale within the Bills of Sale Acts*, 1878 *and* 1882.

Ex parte Hubbard, 35 *W. R.* 2, 17 *Q. B. D.* 690, *approved.*

This was an appeal from a decision of the Court of Appeal (Lindley and Lopes, L.JJ., Lord Esher, M.R., dissenting), reported 39 W. R. 1, 25 Q. B. D. 421.

The facts are set out in the report in the court below, and are shortly as follows:—The goods of one Wilson were seized by the sheriff's officer under an execution. On the 9th of December, 1887, Wilson applied to the appellant Charlesworth, an auctioneer, to pay the sheriff out, and he agreed to do so, provided the goods seized were of sufficient value, and also that the sheriff's officer, by his bailiff, should continue in possession, not for the sheriff, but for Charlesworth. The sheriff's officer agreed, and the sheriff was paid out; the bailiff, as arranged, remaining in possession. Wilson then gave Charlesworth a letter, which was as follows:—"December 9, 1887.—Mr. Charlesworth, Auctioneer, Hull.—Sir, In consideration of your paying the sheriff's officer £62 15s. 1d., I hereby authorize and request you to hold possession of my furniture and effects now on the premises, No. 2, Pendrill-street, Hull, and to sell the whole by auction as soon as convenient, and after deducting the above amount and your charges, pay over the balance (if any) to me.—Yours truly, H. P. WILSON."

On the 10th of December Wilson executed a bill of sale to the respondent Mills, who knew nothing of the seizure, nor of the arrangement with Charlesworth; and the bill of sale was duly registered. On becoming aware of this, Charlesworth moved and sold the goods.

The respondent Mills sought to recover their value from the appellant, and Day, J., gave judgment for him. The majority of the Court of Appeal held that the letter was essential to the proof of Charlesworth's title; that it was a bill of sale, and void for want of registration.

From these decisions the appellant (the original defendant in the action) appealed.

Witt, Q.C., and *Montague Lush*, for the appellant.—There was no act to be done to perfect Charlesworth's title. Nothing could be done under the document. Ours is an *à fortiori* case to *Ex parte Hubbard*, 35 W. R. 2, 17 Q. B. D. 690, and is not within *Ex parte Parsons*, 34 W. R. 329, 16 Q. B. D. 532.

Arnold Statham and *Dyer*, for the respondent.—What took place was one transaction, and until Wilson's signature to the letter the possession had not passed.

Wordall v. *Smith*, 1 Camp. 333; *Seal* v. *Claridge*, 29 W. R. 598, 7 Q. B. D. 516; *Newlove* v. *Shrewsbury*, 36 W. R. 835, 21 Q. B. D 41, were also referred to.

The appellant's counsel were not heard in reply.

Lord HALSBURY, L.C.—I confess that but for the doubts which have been in the minds of the learned judges in the court below, I should have thought that this was a very plain case. I am not quite certain that I appreciate at this moment what the learned judge who tried the cause meant by the phrases which he used. I can quite understand that what he called "the mischief" intended to be remedied by the Bills of Sale Act may have been very prominent before the learned judge's mind, but what it had to do with the facts of this case I am not able at present to fathom.

That the Bills of Sale Acts of 1854 and 1878 were intended to prevent false credit being given to people who had been allowed to remain in possession of goods which apparently were theirs, the ownership of which, however, they had parted with, is manifest enough by the language of those statutes. It was intended to prevent persons getting false credit by being permitted to remain in possession of goods of which they were no longer the owners. The Acts of Parliament, therefore, intended, in a case with creditors, that if people were allowed to remain in possession of goods, of which, nevertheless, the ownership was no longer theirs, those goods and chattels should be subject to the execution of *bonâ fide* creditors who ought not to have been induced to give credit by the apparent ownership of the goods being in those persons, and were, therefore, entitled to have their debts satisfied when by the default of the assignees of those goods they had been allowed to continue in the possession of persons to whom the property in them no longer belonged. That was the intended policy; and for such purposes it is manifest that the Legislature would desire to give the widest possible interpretation to every one of the documents by which the ownership was really intended to be practically changed, while the goods still remained in the apparent possession and dominion of the persons from whom the ownership had, nevertheless, really passed away.

The Act of 1882 was directed to a totally different subject-matter. It was thought by the Legislature, rightly or wrongly, that a great number of impecunious debtors might be induced to sign documents, the legal effect of which those persons did not understand—that there might be some question of future

(*a.*) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

property vesting in a person who had sent money to impecunious debtors who were likely to become the victims of that sort of deceit. It was, therefore, intended by the Legislature, in order to protect them, to give a particular form of words which should plainly express the nature of the contract as to the loan and the security for the loan. The Legislature, accordingly, in order to effect its object, gave a form of bill of sale, and made every bill of sale void unless it was in the form given by the statute.

It seems to me that the Legislature neither intended to interfere, nor is it the effect of the legislation to which I have referred to interfere, with other transactions than those which the Legislature has expressly pointed out.

Now let us see what the transaction here is. First of all, is it within the mischief of either the Act of 1854 or the Act of 1878, the object and purpose of which I have described? The transaction here is a very plain one. The debtor here has an execution in his house—the sheriff takes possession (upon what the effect and quality of that possession is, I will say a word presently), the debtor is under the impression that he can raise sufficient money upon the security of the goods of which the sheriff has taken possession to satisfy him, and also perhaps to leave a surplus for himself. For that purpose it is necessary that the execution should be paid out—the sheriff will not relinquish possession, and for his own security he cannot relinquish possession until he has been paid the money. Accordingly the debtor goes to the appellant, Mr. Charlesworth, and invites him to lend him the money upon the security of the goods, which at that moment are in the possession of the sheriff. Mr. Charlesworth agrees to do so, but he bargains for, and makes it a necessary part of the transaction, without which he will not advance his money, that he shall get possession of the goods. That is agreed to. The effect and value of what is done I will discuss presently, as I have said, when I am dealing with what was in the possession of the sheriff. That was a bargain that the possession should be changed from the person to whom the money was being advanced to the person lending it. That, therefore, undoubtedly was not within the mischief intended to be cured by the Acts of 1854 and 1878. The transaction is completed, the money is advanced, and the sheriff is paid out.

But it is said that this is a bill of sale within the Act of 1882, that the form of the instrument by which the property in these goods is changed, and the form by which the assignment of the goods is made, is within the Act of 1882, and that therefore inasmuch as the Act of 1882, in furtherance of the objects which I have described, makes a bill of sale in such a form void, even as against the grantor himself, no property passed by this instrument, and therefore the act of the fraudulent debtor, who, immediately after he had executed this instrument, went and assigned the goods to somebody else, and got more money upon them—the fraudulent debtor's act in doing that, is to be affirmed, because the instrument which it is said he executed, was void under the Act of 1882. The very simple answer to that is that the whole foundation of that argument fails. There was no assignment, there was no bill of sale, there was nothing that in the meaning of the Act of 1882 can be relied upon by reason of its operating a change of property, no such thing took place. The instrument itself does not purport to do any such thing. That which operated the change of property was the actual change of one guardian and keeper of the property by his filling one character instead of another. The reasoning of the Court of Appeal, so far as I can follow it at present, appears to be this—that although they affirm and rely upon their own decision in *Ex parte Hubbard*, they raise what, to my mind, would be a most serious and important question, having very wide consequences indeed; they raise a distinction between what is suggested as physical possession and formal possession.

Now I must say that I received a very candid answer from the bar when I put the question, what was the difference in the nature of the possession between the possession by the sheriff and the possession by the man who held the property on the part of Mr. Charlesworth? It was admitted with great candour that there was no difference at all in the character or quality of the possession. Then it comes to this, that the possession of the sheriff in this case, nay, I may say the possession of the sheriff in every case, must be regarded as open to that question, as to whether or not it is a physical possession or a formal possession. I am not quite certain that I am able to comprehend the exact distinction which has been pointed out. I understand what possession is (at least I think so), and I never understood that the possession of the sheriff was other than physical and actual possession. I do not mean by that, that the sheriff's man has at every moment in his possession every article which exists in the house. It is obvious that such a possession, if it is to be limited to that, would be absolutely impossible; it would make the question of whether or not there was possession sufficient to vest the property in the sheriff, a question depending upon the particular article or class of articles of which he was in possession, because some of them would be incapable of being grasped by the hand, if that is what is meant by taking physical possession. But what do I find occurred here? I find that there was a man in the house for the purpose of preventing any other person interfering with, or removing, or taking away any of the property in question; and it is not denied that if the assignor or anyone on his behalf had attempted to remove any of the articles which were in the house at the time when this man was in possession, on behalf of Mr. Charlesworth, he would have been immediately stopped. Therefore I should have thought that this possession was just as much a physical and actual possession as it is possible for any one man to have of articles which are distributed all over a house.

Under these circumstances, what is the problem which your lordships are called upon to solve? We have the fact that the debtor has given a perfectly good mandate. I am not quite satisfied that the word "pledge" is properly applicable to it, although I do not deny that in some respects the rights of a pledgor may come in question; but the transaction is this: the man says, "I hand over these goods to you," in the only sense in which goods that are distributed over a house are capable of being handed over, "in consideration of your paying money to the sheriff and getting them out of the hands of the sheriff"; and then he draws up a document in which he says, "Now keep this possession for me and sell the goods for what they will fetch by auction," and of course after he has done that, the person to whom they are handed holds them with this kind of trust attached to them, and when they are realized, if there is anything remaining beyond the amount of £62 which he has advanced upon them, he holds that money to the order of the person who has given him the mandate.

That is the transaction. What that has to do either with the mischief contemplated by the Bills of Sale Acts, or what it has to do with a bill of sale at all, I confess myself totally unable to understand. It is a transaction in which, simultaneously with the handing over of the goods and advancing the money (and I

affirm that the words "handing over the goods" are perfectly applicable to such a transaction as this, because they are handed over in the only way in which goods, distributed all over a house, can be handed over) a document is signed by the borrower which says, "Pay yourself the money which you have advanced, and hand me the surplus, if there is any such."

It seems to me, therefore, that the whole argument based upon the assumption that this is a bill of sale transaction at all entirely fails. It, therefore, appears to me to be obvious that the judgment of the Court of Appeal must be reversed.

There is one further observation which I wish to make, because it appears to me that there has been a confusion both in the argument and (I say it with all respect) I think in one of the judgments between what it is necessary to establish in a court of law when you are proving a transaction, and the operative part of the transaction itself. I can well understand and appreciate that where upon a trial this was elicited, that after the statement of the loan had taken place and after what the transaction was, had been deposed to, one of the witnesses might have said: "There was a writing drawn up and it had relation to the transaction," then the judge would, of course, insist upon the production of the instrument in order to see whether or not the rights of the parties had been reduced to writing, and would not allow a mere parol description of the transaction to go on without the writing being produced. But, after all, that only comes to producing the writing, such as it is, and if the writing, when it is produced, does not affect the rights of the parties, or make them different from what they would have been before, or from what they would have been if no writing had been referred to, no particular magic is applicable to such a thing as that.

One very cogent observation which appears to me to have been made by the Master of the Rolls on this subject, commenting on his own judgment and that of the rest of the Court of Appeal in *Ex parte Hubbard*, was this, that in *Ex parte Hubbard* the whole transaction was disclosed upon the writing, including the making of the advance and the terms upon which that advance was made; and but for one circumstance it might be very fairly and reasonably have been argued to have been a bill of sale within the Act; but the distinction was this, that it recorded a transaction which, in respect of possession, was already passed, possession had been given, and the relation of the parties had so far changed that there was no room for the application of any one of the definitions of the Bills of Sale Act; and the result was that, although that document did profess to disclose the whole terms of the transaction, it was held, and I think rightly held (and I should have thought that the Court of Appeal were in this case bound by their own decision in *Ex parte Hubbard*), that the Bills of Sale Act did not apply at all; that the transaction was one in which the possession had been already taken, and that it excluded the application of any of the definitions in the Bills of Sale Act, which, therefore, were not applicable to the case then under discussion.

Under these circumstances I have to move your lordships that the judgment of the Court of Appeal be reversed.

Lord WATSON.—I can have no hesitation in concurring in the judgment which has been proposed, because I am quite unable to distinguish the present case in principle from that of *Ex parte Hubbard*. The document of December 9, 1887, which has been treated as a bill of sale by the majority of the Appeal Court, does not give any licence to take possession of the goods, and it did not constitute the title upon which possession was given to the appellant. It contains a mandate to hold and sell the goods, but it was not intended to operate, and did not in point of fact come into operation, until possession had been actually transferred from the sheriff to the appellant. In any question with the present respondent the case seems to me to be the same as if the goods had been sent for sale to the appellant's premises and an advance made against them by the appellant before the document in question was either written or delivered.

Lord HERSCHELL.—I am of the same opinion. The question in this case must be decided in precisely the same way as if the debtor whose transactions have given rise to the controversy had been himself bringing this action; and it certainly would be startling, to my mind shocking, if there were anything in the state of the law which compelled us to say that under the circumstances which occurred in this case he could successfully maintain such an action.

Now I think that in a case of this description it is most important to bear in mind the distinction between the Acts of 1854 and 1878, relating to bills of sale, and the Act of 1882. The only Act which can have any operation in this case to make the transaction void is the Act of 1882; and the earlier Act of 1878 is only important as containing the definition of a bill of sale which is imported into the Act of 1882. But any reference to the Act of 1878 beyond that which is necessary for the purpose of transferring, so to speak, the definition contained in that Act to the Act of 1882 can only lead to misunderstanding and mischief.

Now the Act of 1882 no doubt makes a bill of sale void which is not in the prescribed form; but in order to make the Act operate at all it is essential in the first place to prove that the transaction was one which was effected by a bill of sale—of course, using those words in the sense which is attributed to them by the Act of 1878. Well, was it so effected? It is true that a document was drawn up simultaneously with the other acts which were done for the purpose of completing the right of Charlesworth in relation to these goods; but it is absolutely clear that it is not every document which may be drawn up at the time when a transaction is being carried out for the purpose of transferring goods from one party to another, that is a bill of sale. In each case one must look at the circumstances in order to see what the transaction was, and what the document was.

Now this document beyond all question was not a document which was intended to transfer or did transfer the property in these goods; because if there is anything clear in the transaction it is this, that at the time at which this document, whatever its effect, began to operate, Charlesworth was in possession of the goods under an arrangement by which he was to have, for certain purposes at least, a title to them. He did not get his title under that document, he got his title by virtue of the transaction, and the document never began to operate at a time at which he had not possession. Under those circumstances, what words in the Act of 1878 are supposed to cover it? For the reasons which I have given, it cannot be an "assurance." It certainly is not "a bill of sale" in the ordinary sense of those words. Is it a "licence to take possession"? The statement which I have just made seems to me to be conclusive that it is not a licence to take possession, because those words can only apply, as was pointed out by all the judges in *Ex parte Hubbard*, when the possession is to be taken subsequently to the signature of the document.

The case of *Ex parte Hubbard* seems to me to be absolutely indistinguishable from the present case. In that case there was a document drawn up, containing the terms upon which the advance was to be made, the sale of the goods was to be effected, and the repayment was to be required. That was much more like a bill of sale than anything which is to be found in the present case, and yet it was held that because the transaction was one of pledge where the possession was given and taken independently of that document, although you might be obliged to have recourse to that document if there was a controversy about the terms of the advance, nevertheless you did not need to have recourse to the document for the purpose of establishing title. Now what is the distinction between that case and the present? None that I have heard, unless it be that in this case Charlesworth was not put in possession of the goods simultaneously with the signature of this document. If Charlesworth was not put in possession of these goods simultaneously with the signature of the document, it seems to me that the sheriff was never in possession. I am quite unable to accede to the argument that a possession which is sufficient possession to make good the title of the sheriff under his authority to seize, is not a possession as between the person giving it and the person taking it, which is the only point we have to decide in the present case. The question whether it is a possession which excludes the apparent possession of the other party might arise under the Act of 1878, but is not of the slightest importance in the present case. Is it a possession as between the person giving it and the person taking it? When once it is admitted, as it was inevitably admitted by the learned counsel for the respondent, that it was a possession sufficient as between those two persons to constitute a good pledge, it seems to me that the case is at an end. I say "inevitably admitted" because how can it be disputed that as between the two persons to the transaction it would have been impossible for the person who had received an advance on giving this possession to say that he had not given the other person a possession of the goods which would entitle him to hold them as a security for the advance? And that after all, is all that a pledge is.

Then, if that be so, it seems to me to show conclusively that the case is within *Ex parte Hubbard*, because what was there decided was that if the transaction be one only of pledge, arising from a delivery by one party to the other, of the possession of his goods as a security for the money advanced, it is immaterial that the terms upon which those goods are pledged are reduced to writing. It does not make it a bill of sale. The decision in *Ex parte Hubbard* seems to me to be absolutely conclusive of this case.

But even if this were not a pledge there is another possible view of it—namely, that the goods were delivered to Charlesworth in his capacity of auctioneer, to be held by him as auctioneer, with authority to sell them, and to retain out of the money which arose from that sale the advance which he had made. If that is really the true nature of the transaction—possibly even that, might be a pledge with an authority to sell—but supposing it is not, strictly speaking, a pledge, and that what I have stated is a more accurate description of the transaction, the same result would follow, it would be an authority to sell which would be irrevocable, except upon the terms of paying back the money; and it seems to me impossible to say that, because the document which was given in this case was given simultaneously with the entering into that transaction, it was a bill of sale in any sense in which those words are used within the definition clause of the Act of 1878.

For these reasons it seems to me that the case of *Ex parte Hubbard* really governs this case. I desire to say that, so far as I am concerned, instead of seeing any reason to doubt the correctness of the decision in *Ex parte Hubbard*, I am very glad that that decision was arrived at—it has my hearty concurrence; and between that case and the present I can see no distinction.

Lord MORRIS.—I concur.

Lord FIELD.—I am of the same opinion.

Orders appealed from reversed, with costs here and below.

Solicitors for the appellant, *Pritchard & Sons*, for *Locking & Holdich*, Hull.

Solicitors for the respondent, *John Cotton & Son*, for *John H. Green*, Hull.

Court of Appeal

From Q. B. Div. (Lord Esher, M.R., and Lopes and Kay, L.JJ.) — Oct. 31.

DAVIDSON v. CARLTON BANK (LIMITED). (a.)

Bill of sale—Inventory or schedule therein referred to—Registration—Specific description of chattels—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-section* 2—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 4.

A bill of sale was given in respect of the furniture and other chattels in the grantor's house. The schedule annexed to the bill specified the furniture and other chattels in each room of the house. Under the heading "Study" was the item, "Eighteen hundred books, as per catalogue." The bill of sale and the schedule were registered, but not the catalogue. No evidence was given that there was any difficulty in identifying the books.

Held (affirming the judgment of Cave, J.), *that the catalogue was not referred to in the bill of sale within the meaning of section* 10, *sub-section* 2, *of the Bills of Sale Act*, 1878, *and that the non-registration of the catalogue did not, therefore, render the bill of sale void; and that the books were "specifically described" in the schedule within section* 4 *of the Bills of Sale Act*, 1882.

Appeal of the defendants from the judgment of Cave, J., at the trial of an interpleader issue without a jury.

The plaintiffs were the claimants under a bill of sale of goods taken in execution at the suit of the defendants. The bill of sale was given to secure money advanced to the grantor of the bill by the plaintiffs. At the date of the execution of the bill of sale, the *bona fides* of which transaction was not disputed, the grantor was possessed of furniture and other chattels, including certain books to the number of 1,800 volumes, which were in a study at the grantor's residence. The schedule to the bill of sale commenced with the following words, "The whole of the chattels at present at Westhoe Vicarage, and consisting, *inter alia*, of the following." The schedule then set out the furniture and other chattels contained in each room of the house. Under the head "Study" was the item "Eighteen hundred volumes of books,

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

as per catalogue." There was a catalogue of the books in existence which had been made prior to the granting of the bill of sale, but this catalogue was not put in evidence at the trial.

There was no evidence of any extrinsic facts showing that there was any ambiguity in the description of the books assigned, or any difficulty in identifying the books referred to by the description in the schedule. The bill of sale and the schedule were registered, but not the catalogue.

At the trial it was contended on behalf of the defendants that the bill of sale was void as against them because the catalogue had not been registered, and it was also contended that as regards the books the bill of sale was inoperative because the books were not specifically described in the schedule. Cave, J., decided against the defendants on both points and gave judgment for the plaintiffs.

The defendants appealed.

Willis, Q.C., and *Colam*, for the defendants.—First, the bill of sale was void because the catalogue of the books was not registered. Section 10, subsection 2, of the Bills of Sale Act, 1878, requires the registration of the bill, with every schedule or inventory thereto annexed or therein referred to. This catalogue was referred to in the schedule, and the effect of section 4 of the Act of 1882 is to make the schedule part of the bill of sale. Secondly, the bill of sale is inoperative as to the books, because they are not specifically described in the schedule: *Carpenter* v. *Deen*, 23 Q. B. D. 566, 38 W. R. Dig. 22; *Witt* v. *Banner*, 36 W. R. 115, 20 Q. B. D. 114. [Lord ESHER, M.R.—There is no evidence that there were more than 1,800 books in the study, and it was for the plaintiffs to show that the description in the schedule gave rise to ambiguity.]

Hickley v. *Greenwood*, 38 W. R. 686, 25 Q. B. D. 277, and *Roberts* v. *Roberts*, 32 W. R. 605, 13 Q. B. D. 794, were also referred to.

Reid, Q.C., and *Simey*, for the plaintiffs.—In *Witt* v. *Banner* Lord Esher, M.R., said, "The words 'specifically described' are used in section 4 of the Act of 1882 in connection with the word 'inventory,' which must mean an inventory in ordinary business parlance." This schedule was a sufficient inventory within that rule, and the catalogue was not required. [They were stopped by the court.]

Colam replied.

Lord ESHER, M.R.—I am of opinion that the decision of Cave, J., was right. A bill of sale was given by this clergyman on his goods, including, amongst other things, 1,800 volumes of books in his study. The schedule to the bill, under the head "Study," said "eighteen hundred volumes, as per catalogue." Are we to read that as meaning that he only gave such books as were described in the catalogue, or that he gave all the books in the study, and they were in the catalogue? Clearly the latter is the proper construction. It was his intention to give all his books, and they were, in fact, 1,800 in number. The words "as per catalogue" are mere description, and were not required. The inventory in the schedule is a proper inventory, and the books were sufficiently described for the purposes of identification. This appeal must therefore be dismissed.

LOPES, L.J.—The first objection to this bill of sale is that the catalogue ought to have been registered. The answer to that objection is that as the catalogue is not referred to in the bill, registration was not necessary. Another objection taken was that the description of the 1,800 volumes was not sufficiently specific to comply with section 4 of the Act of 1882. It is said that if it had been simply "eighteen hundred books," there would have been no difficulty, but that the addition of the words "as per catalogue" makes the description uncertain. In *Carpenter* v. *Deen* it was said by Cotton, L.J., that the meaning of the words "specifically described" is that there must be such a description in the schedule of the chattels described in the bill of sale as that they may be easily identified. In my opinion the words in this schedule entirely answer that requirement.

KAY, L.J.—I am of the same opinion on both points. With regard to the first point, the bill of sale is sharply distinguished from the schedule in section 10 of the Bills of Sale Act, 1878, and the inventory which that section says must be registered is an inventory referred to in the bill, and not in the schedule. Then, as to the second point, the meaning of section 4 of the Act of 1882 is that the schedule must contain a description of the goods sufficient to identify them without reference to any other document at all. If it had been proved in this case that the books could only be identified by reference to the catalogue, then the description in the schedule would not be sufficient, but there is no evidence to that effect. In my opinion, the true meaning of the schedule is, all the books in the study, 1,800 in number. Further reference to the catalogue, therefore, was unnecessary to identify the books.

Appeal dismissed.

Solicitors for the plaintiffs, *Le Riche & Stephens.*

Solicitor for the defendant, *E. C. Rawlings.*

From Q. B. Div. (Lord Esher, M.R., and Bowen and Kay, L.JJ.) [and Q. B. Div.] — Aug. 3, 1892.

ENGLISH AND SCOTTISH INVESTMENT CO. v. BRUNTON. (a.)

Company—Debenture—Charge on all property, present and future—Clause restricting creation of prior charge—Subsequent mortgage of chose in action—*Mortgagee without knowledge of contents of debentures—Notice of mortgage to debtor—Priority as between mortgagee and debenture-holders—Constructive notice.*

The plaintiffs were applied to by the E. Corporation for a loan to be secured by a mortgage of certain insurance moneys due to the E. Corporation from a fire insurance office. The E. Corporation had issued a series of first mortgage debentures, whereby they charged their undertaking and all their property whatsoever and wheresoever, both present and future. The debentures were to be a first charge on the property thereby charged, and the charge thereby created was to be a floating security, but so that the corporation were not be at liberty to create any mortgage or charge in priority thereto. During the negotiations for the loan the plaintiffs' solicitor, being informed that the corporation had issued debentures, asked the manager of the corporation whether the debentures were secured by any trust deed which covered the insurance moneys proposed to be mortgaged. The manager replied in the negative. The loan was advanced and the mortgage executed, and the plaintiffs gave notice thereof to the insurance office. The E. Corporation having gone into liquidation, and claims being made on the insurance moneys by the plaintiffs, and also by the defendant representing the debenture-holders, interpleader proceedings were instituted by the insurance office. At

(a.) Reported by Sir SHERSTON BAKER and F. G. RUCKER, Esq., Barristers-at-Law.

the trial the plaintiffs' solicitor said that at the time of the negotiations he had never seen or heard of debentures which prohibited the creation of any charge in priority thereto.

Held (affirming the judgment of Charles, J.), *that the plaintiffs ought not to be fixed with constructive notice of the contents of the debentures, and that, therefore, the plaintiffs' claim against the insurance moneys ought to take priority over the claim of the debenture-holders.*

Action tried before Charles, J., without a jury.

The facts and arguments are sufficiently stated in the written judgment of the learned judge.

R. T. Reid, Q.C., T. T. Paine, and *C. H. Sargant,* for the plaintiffs.

A. Cohen, Q.C., Bremner, and *Le Fanu,* for the defendants.

Cur. adv. vult.

April 26.—The following judgment was read by Charles, J.:—This was an interpleader issue directed to try the right of the plaintiffs and the defendant respectively, to the sum of £1,834 15s. 4d., or some part thereof, which had been paid into court by the Sun Fire Insurance Co. to abide the event. The plaintiffs claimed so much of this amount as would be sufficient to satisfy their claim to a sum of £1,400 and interest lent by them on Friday, February 26, 1891, to the Electrical Engineering Corporation (Limited). The defendant, who represented the debenture-holders of the corporation, claimed the fund in court for them.

The Electrical Engineering Corporation was registered in January, 1890, with a capital of £150,000 in £5 shares. Power was given to the corporation "to borrow on any terms and conditions any sum or sums of money, and to mortgage and charge the undertaking and all or any part of the real and personal property, present or future, and all or any of the uncalled capital for the time being of the company, and to issue debentures, debenture stock, and mortgage debentures, payable to bearer or otherwise," and in the articles of association it was provided that the directors might, for the purpose of securing borrowed money and interest, "issue mortgage or other debentures, whether payable to bearer or otherwise . . . and charge or mortgage in any form the whole or any part of any property, funds, assets, or effects of the company, including after-acquired property and uncalled capital as a specific charge or floating security." In pursuance of these powers there were issued 200 "First Mortgage" debentures of £100 each prior to February 26, 1891, and on that day the moneys secured by these debentures were and still are due to the debenture-holders represented by the defendant.

The form of debenture, as far as is material, is as follows:—"No. —. £100. The Electrical Engineering Corporation (Limited) will, on the 15th of October, 1900, or on such earlier day as the principal moneys hereby secured become payable, according to the conditions hereof, pay to —— or other, the holder for the time being, on presentation and delivery of this debenture, the sum of £100, and will in the meantime pay interest on the said sum of £100 at the rate of 6 per cent. per annum by equal half-yearly payments, on the 1st day of January and the 1st of July in each year, or on such other day as the principal moneys hereby secured become payable, according to the conditions hereof. The corporation hereby charges with such payments its undertaking and all its property, whatsoever and wheresoever, both present and future. This debenture is issued subject to the conditions indorsed hereon. Given under the common seal of the corporation this — day of ——, 189—. Conditions (1).—This debenture is one of a series of 200 debentures issued or about to be issued by the corporation. The debentures of the said series are all to rank *pari passu* as a first charge on the property hereby charged, without any preference or priority one over another, and the charge hereby created is to be a floating security, but so that the corporation is not to be at liberty to create any mortgage or charge in priority to the said debentures."

Early in the year 1891, further money being required for the purposes of the undertaking, Mr. Statter, the managing director, placed the matter in the hands of Messrs. Close & Co., solicitors, with the view of their finding a lender. They communicated on the 19th of February with Mr. Van Lauer, the manager of the plaintiffs. At this time there was coming due to the corporation from the Sun Fire Office a large sum upon a policy of insurance on the premises of the corporation at West Drayton, where a fire had recently taken place; and Mr. Jones, partner in the firm of Messrs. Close & Co., stated to Mr. Van Lauer that the corporation proposed to borrow on the security of the insurance moneys. Mr. Van Lauer said that he must be satisfied that his company would be absolutely secured, and thereupon Mr. Jones obtained from the secretary of the Sun Fire Office and handed to Mr. Van Lauer a letter in these terms:

"Dear Sir,—Electrical Engineering Co. (Limited). Referring to your call here to-day, I have to inform you that, although an examination of the estimate of loss is not complete, I am able to state that we have no doubt whatever that the sum which we shall finally have to pay to the claimants will very far exceed the sum of £2,000 which they are desirous of obtaining as an advance from your client. We have not received notice of any charge upon the loss money, nor do we know of any circumstances which will prevent an assignment of the amount due or of any part thereof being made."

This letter was forwarded to Mr. W. Paine, a member of the firm of Paine, Son, & Pollock, solicitors to the plaintiffs, with instructions to carry out the loan, which was to be of £1,900 (afterwards reduced to £1,400) for three months, with interest at the rate of 20 per cent., with a rebate if the advance was paid off earlier, and was to be secured by a charge on the claim against the Sun Fire Office.

On the 24th of February Mr. Paine saw Mr. Jones and discussed the subject. Mr. Paine, referring to the last sentence of the letter referred to, said to Mr. Jones, "I may take it from you that you are not aware of any dealings with this insurance." Mr. Jones said that he was not. He was aware, I may here state, of an unsuccessful attempt which had been made in the previous month through another solicitor to borrow money from another person, but he did not know that during the progress of the negotiations Mr. Statter had become fully alive to the difficulty of creating any charge on any part of the assets of the undertaking which should have priority over the debenture-holders. He did not, indeed, know of the existence of debentures at all until he received Mr. Statter's letter on the 24th of February, to which reference is made below. Mr. Paine also made some inquiry as to the borrowing powers of the company, and said he should wish to see the memorandum and articles of association. Jones went and fetched them, and later on the same afternoon brought also the Sun's covering note. Mr. Paine then engrossed the draft and sent it to Mr. Jones. On the 25th Messrs. Paine addressed an inquiry direct to the Sun Office, and received a reply that no notice had been received of any charges upon the moneys ultimately payable by the company to

the corporation. In the afternoon the parties met to complete. There were present Mr. Jones, Mr. Statter, Mr. Scrutton, secretary of the corporation, and Mr. Paine. There was a direct conflict of evidence as to what then took place, but I do not feel any doubt that I ought to accept Mr. Paine's account as substantially accurate.

The letters from the secretary of the Sun Office were read, and so also was the letter from Mr. Statter to Mr. Jones's firm, Messrs. Close & Co., which was as follows:—"Since meeting Mr. Jones to-day I received a telegram from Mr. Van Busch (another director) asking me to write to you *re* capital of company. The subscribed capital is nearly £60,000, and of the debenture issue of £20,000, £14,500 are placed and the balance held as security for a loan of £5,000." Mr. Paine, on reading this letter, asked whether the debentures were secured by any trust deed which might cover the insurance to be assigned. Mr. Statter replied that they were not. "Nothing whatever," added Mr. Paine, "was said conveying to me in any way that there was anything in the debenture which could interfere with the security. . . . I am positive no form of debenture was produced." Mr. Statter, who was to some extent corroborated by Mr. Scrutton, declared that a form was produced, and, indeed, read; but after carefully considering the examination and cross-examination of these witnesses, I have come to the conclusion that no form was either shown to Mr. Paine or read, and that he received no notice of the existence of the debentures beyond that which he states. I think I ought to add that Mr. Statter, on the part of the company, practised, in my opinion, a reticence much to be regretted upon this occasion. I am unable to accept his assurance that it never struck him that the restrictive clause in the debenture materially affected the matter. The effect of that clause had been fully brought to his notice very shortly before, when the previous attempt to borrow had been made, and must, I think, have been present to his mind. The deed was then executed, but was not delivered, as some doubt had arisen as to the amount of the indebtedness which the Sun Office was ready to admit. The deed stated the amount to be £2,000, and the loan was to be £1,900 on that assumption; but on the following day Mr. Paine learnt from the secretary that £1,500 and no more could be then admitted, and accordingly that sum was, on the afternoon of the 26th, inserted in the deed, and the loan reduced to £1,400. In its altered form it was delivered to Mr. Paine.

The deed was made between the corporation and the plaintiffs as mortgagees, and after reciting the insurances by the mortgagors with the Sun Office, and that a claim had arisen entitling them to at least £1,500, and that they had applied to the mortgagees for a loan of £1,400, which the mortgagees had agreed to lend upon repayment being secured in the manner thereinafter appearing, proceeded to assign by way of security the insurances and all moneys payable or to become payable thereunder. The mortgagors were to repay the loan, with interest at the rate of 20 per cent., on the 26th of May then next, or, if they repaid it earlier, then 20 per cent. was to be charged up to the date of such repayment, and thenceforward until the 26th of May at the rate of 15 per cent. Upon payment of principal and interest the policies were to be reassigned.

At the interview between Mr. Jones and Mr. Paine at which the deed was handed over, Mr. Van Busch, another director of the corporation was present, and on Mr. Paine's again referring to Mr. Statter's letter of the 25th of February, added and signed the following postcript:—"With the exception of the above debentures there is no other loan." On the 27th of February, Messrs. Paine & Son gave notice of the agreement of the 26th of February to the Sun Office, and received an acknowledgment on the same day. Shortly after this date the defendant, on behalf of the debenture-holders, commenced an action against the corporation, in which a receiver and manager was on the 20th of March duly appointed. In April the corporation went into voluntary liquidation, and the receiver was appointed liquidator. On the 2nd of May a supervision order was made, and leave was given to continue the debenture-holders' action. On the 15th of June the receiver and manager gave notice to the Sun Fire Office and to the plaintiffs that the debenture-holders claimed the insurance moneys in priority to the plaintiffs. An action against the Sun Co. was shortly afterwards commenced by the defendants, and these interpleader proceedings followed, in which I have now to determine the question of priority between the parties.

It was suggested on the part of the plaintiffs that they had, even prior to the Judicature Act, 1873, s. 25, sub-section 6, a legal title; but it appears clear to me that, appart from the statute, their title was equitable and not legal, and they could not in their own name have maintained an action. By virtue of the 25th section, sub-section 6, they now can, no doubt, do so, although the assignment purports to be by way of charge only. See *Tancred* v. *Delagoa Bay and East Africa Railway Co.*, 38 W. R. 15, 23 Q. B. D. 239. But their position is not thereby improved, for the sub-section expressly enacts that the assignee is to hold "subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed." I must, therefore, regard the question as one between two persons having equitable titles, both having a charge on the insurance fund, the title of the debenture-holder being first in point of time, but not perfected by notice to the insurance company until after the plaintiffs had given the company notice of their title, Now, there can be no doubt that, as a general rule, the giving of notice entitles the assignee who gives it to priority over a previous assignee who has not given notice. But it is said this rule does not apply between two equitable assignees, the first of whom holds a security in such a form as renders a notice by him practically impossible, but only between two successive assignees of a specific sum where each can give a notice if he pleases.

The foundation of the doctrine that he who gives the notice first has a better equity was said to be the negligence to be imputed to the assignee who fails to give the notice. See *Ryall* v. *Rowles*, 1 Ves. sen. 348; *Dearle* v. *Hall*, 3 Russ. 1; *Loveridge* v. *Cooper*, 3 Russ. 30; *In re Freshfield's Trust*, 11 Ch. D. 198. The mere failure to give it constitutes negligence; and it is equitable that the title of the assignee who is thus guilty of negligence should be postponed to that of him who uses diligence. Now, here it was pointed out that the debenture-holders were not in a position to give the Sun Fire Office a notice. Their charge was on the property of the corporation generally, they were not the assignees of the insurance fund specifically, and were, indeed, ignorant of its existence. No negligence could therefore be charged against them, and so it was contended that the doctrine of *Dearle* v. *Hall* and other cases referred to did not apply. But I do not think that this view of the rule is supported by authority. It is, in my opinion, the giving of the notice which creates the priority, see *Foster* v. *Cockerell*, 3 Cl. & Fin. 456; and if the former assignee is precluded from giving the notice either by contract with the assignor, as might often be the case, or by the nature of the charge which he holds, the

same result should follow as in a case where a prior assignee has negligently omitted to give the notice which he might have given.

There does not appear to me to be any difference in principle between the case—(1) of a person who can give the notice and does not; (2) of a person who has contracted not to give it; and (3) of a person who, like the debenture-holder here, holds a security which, from its nature, prevents notice from being effectively given. In each case, I think, notice gives priority unless the giver of it himself has either actual notice of the prior incumbrance or else is in such a position and has such a degree of knowledge as is in equity equivalent to actual notice.

Now, in this case, Mr. Paine, it is not disputed, knew that the corporation had issued debentures, and it was proved that a debenture might, according to present usage, be in one of three forms—(1) it might be simply an acknowledgment of debt under seal; (2), and this is the more common form, it might be an instrument not only acknowledging the debt, but charging the property of the company issuing it with repayment; (3) it might be an instrument acknowledging the debt, charging the property of the company with repayment, and restricting the company from giving any prior charge. Either of the two first-named forms would not in any way affect the priority of the plaintiffs. A mere acknowledgment under seal of indebtedness would not avail against an assignee of a specific fund, and it was decided in *Wheatley* v. *Silkstone and Haigh Moor Coal Co.*, 33 W. R. 797, 29 Ch. D. 715, that debentures in a form purporting to charge the property of the company with the debenture debts did not preclude the company from creating in the ordinary course, and for the purpose of their business, a charge in priority of the debenture-holders. It was, it would seem, in consequence of this decision that the third form of debenture was adopted, and both forms appear in Palmer's Precedents, ed. 1888. Mr. Paine had never, in fact, seen a debenture in the third form with the restrictive clause, and states that he had no suspicion after the interview of the 25th of February that the plaintiffs' security could be interfered with. All he knew was that debentures existed, and I think it must be taken that he did know that they were, at all events, in the form which had become usual in 1891—namely, that of a floating security on the property present or future of the undertaking. Mr. Paine ought to have insisted on seeing the debenture itself, when he would have discovered the restrictive clause, and the question in the cause really reduces itself to this: Was his failure to look at the debenture or to make further inquiry into its contents that sort of negligence which ought to deprive the plaintiffs of the priority which their notice otherwise conferred upon them?

The authorities cited on this part of the case were very numerous, and appear to establish the principle that the negligence which will deprive a person, who has done everything he can to complete his title, of priority must be gross or culpable—must, indeed, be such a wilful shutting of the eyes to inquiry as amounts to evidence of fraud: see *Ware* v. *Lord Egmont*, 3 W. R. 48, 4 De G. M. & G., at p. 473, and *Montefiore* v. *Browne*, 7 H. L. Cas. 241, 7 W. R. H. L. Dig. 5.

Now, applying this principle to the present case, I do not think that, having regard to what passed on the 25th of February, Mr. Paine can be held guilty of culpable negligence in not pursuing his inquiries further. Constructive notice of the restrictive clause cannot, on that ground, in my opinion, be imputed to him; and he ought not to be affected merely because he has omitted to do all which a cautious and prudent person might have done: Fisher on Mortgages, 3rd ed., vol. 1, p. 565. But it was also urged that actual notice of the existence of debentures was enough to affect Mr. Paine with constructive notice of their form and contents, and that I ought to apply the rule according to which a purchaser or lessee having notice of a deed forming part of the chain or title of his vendor or lessor is held to have constructive notice of the contents of that deed. There appears, however, to be a clear distinction between documents which must necessarily and those which may or may not affect title: see *Jones* v. *Smith*, 1 Hare, at p. 55, and *Patman* v. *Harland*, 29 W. R. 707, 17 Ch. D. 353. To the latter class the rule is not applicable, and it is to this class that these debentures belong. In the result, then, I cannot impute constructive notice of the contents of the debentures to Mr. Paine, and my judgment must be, therefore, for the plaintiffs, with costs.

Judgment for the plaintiffs, with costs.

The defendant appealed.

Aug. 3.—*Rigby, Q.C., Cohen, Q.C.*, and *Le Fanu*, for the appellant.

Sir H. Davey, Q.C., R. T. Reid, Q.C., Tyrrell Paine, and *C. H. Sargant*, for the respondents.

The following cases were cited besides those referred to in the judgment of the court below:—*Daniels* v. *Davison*, 16 Ves. 249; *Allen* v. *Seckham*, 28 W. R. 26, 11 Ch. D. 790; *Moriand* v. *Cook*, 16 W. R. 777, L. R. 6 Eq. 252; *Agra Bank* v. *Barry*, L. R. 7 H. L. 135, 22 W. R. Dig. 150; *Gibson* v. *Ingo*, 6 Hare, 112; *In re Hansard Publishing Union*, 8 Times L. R. 280.

Lord ESHER, M.R.—In this case the plaintiff advanced a sum of money to a trading corporation, took from them an assignment of a debt by way of mortgage, and gave notice thereof to the debtor. There were at the time debentures in existence, which, if he had had knowledge of their contents, would have prevented him in equity from claiming that his having given notice conferred on him priority over the debenture-holders. Had he such knowledge? In fact, he had not; that is admitted. He did not know that there were debentures which contained a clause preventing the creation of any mortgage or charge in priority thereto. It is said, however, that he had constructive knowledge of this. The doctrine of constructive knowledge, or constructive notice, is an equitable doctrine. There is an inference of fact known to common lawyers which comes very near it. If a man has knowledge of facts which point clearly to the existence of something which tells against him, and he wilfully shuts his eyes so as to avoid seeing that thing, an inference may be drawn that, though he never actually saw the thing, and was never expressly told of it, yet, in fact, he knew it. That is not constructive knowledge; it is an inference of actual knowledge. Constructive knowledge is a doctrine of equity which was not known to the common law, but has now to be adopted by the common law courts. The equity judges, after inventing the doctrine and putting it into shape, in later years saw that it was being carried further than had been intended, and they all agree in saying that it ought not to be extended any further. That the doctrine is a dangerous one, as being contrary to truth, has been pointed out in some of the cases. The foundation of the thing is that a man does not know, and yet is to be treated as if he did know.

We must consider the doctrine in the shape in which it is applicable to the present case. We have to deal with a mortgage of a debt given by a company, which had power to grant mortgages, and also

had power to issue debentures. The person to whom this mortgage was offered knew that the company had power to issue debentures, and that they had issued some debentures. What he did not know, and what he wanted to know, was whether debentures had been issued which interfered with the validity of that which was offered to him. He asked this question of another person, who knew. But the answer was such as to deceive him. We have to apply the doctrine of constructive knowledge to these facts.

The doctrine is accurately stated in the note to *Le Neve* v. *Le Neve*, in Tudor's Leading Cases, vol. 2, p. 55: "Although, as we have already seen, where a party has notice of a deed, which from the nature of it must affect the property, or is told at the time that it does affect it, he is considered to have notice of the contents of that deed and of all other deeds to which it refers; nevertheless, where a party has notice of a deed which does not necessarily affect the property, and is told that, in fact, it does not affect it, but relates to some other property, and such party acts fairly in the transaction, believing the representation to be true, he will not be fixed with notice of the contents of the instrument."

Now, if it would be unreasonable to suppose that the instrument in question did not affect the property, then I think it "must affect" it within the meaning of this proposition. If it be an instrument which may or may not affect the property, then it "does not necessarily affect" it within the meaning of the proposition. This is in accordance with what was said by Lord Lyndhurst in *Jones* v. *Smith*, 1 Ph. 244. The proposition was considered and dealt with by Jessel, M.R., in *Patman* v. *Harland*, 29 W. R. 707, 17 Ch. D. 353. The distinction is between a deed which must necessarily, in the sense I have stated, affect the property, and a deed which may or may not affect it. If the intending mortgagee has notice of a deed of such a class that it would be unreasonable to suppose it would not affect the mortgage for which he is negotiating, he ought not to accept a statement that, in fact, it does not affect it; if he has notice of a deed of such a sort that it may or may not affect the mortgage, he is entitled to accept a statement that, in fact, it does not affect it.

Now, were debentures issued by such a company as this deeds of such a nature that they must necessarily have affected the proposed mortgage, or were they deeds of such a nature that they might or might not have affected it? According to the evidence which was given in the court below, there are three classes of debentures in existence. Debentures of the first class do not affect title to property at all, and, therefore, would not have affected this transaction. Debentures of the second class would not have affected it. It was only debentures of the third class which could have affected it. I think Charles, J., was right in saying that when the mortgagee was told there were debentures, that was a statement that there was something which might or might not affect his title to the property proposed to be mortgaged. He was further told that they did not affect it. Under these circumstances constructive notice would not have been attributed to him in equity, and therefore must not be attributed to him by us. I think the judgment of Charles, J., was right, and the appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion. Of the three forms in which debentures are drawn, the first is a simple admission of debt, and does not contain anything to charge property. A debenture in the second form contains something which purports to charge property, but does not create any priority; this has now become a very common form of debenture. The third form is that in which the present debentures were drawn. Mr. Paine did not know in what form these debentures were drawn. He knew there were debentures, but he did not know there were debentures which charged the property of the company, though I think he must be taken to have known there were debentures which might charge the property of the company. He certainly neither knew nor thought there was anything in the debentures which could prejudice his client's security. For debentures in the first form would not affect property at all, debentures in the second form would not create any priority, and as to the third form he did not know that such a form existed. He inquired whether the debentures were secured by any trust deed which covered the debt proposed to be mortgaged. He couched his inquiry according to his limited knowledge, the result being that he asked the wrong question; and he was answered by the card. He honestly understood that there was nothing outstanding which could affect the security.

We have to apply to this state of facts the law as to constructive notice. I agree with the Master of the Rolls as to the necessity of resisting any extension of the doctrine of constructive notice. I think it is a doctrine which is not to be run to death. In *Jones* v. *Smith* Lord Lyndhurst was dealing with documents affecting landed estates. He said, "The question, therefore, resolves itself into this, whether when a party is informed of the existence of an instrument which may, but which does not necessarily, affect the property he is about to purchase, or upon which he is about to advance money, and it is at the same time stated that the instrument does not affect that property, but relates to some other property, whether if he acts fairly and honestly, and believes that statement to be true, but it turns out in the result that he is misled, and that the instrument does relate to the property, he is under such circumstances to be fixed with notice of the contents of the instrument." He then proceeds to state the principle of law: "Undoubtedly where a party has notice of a deed, which from the nature of it must affect the property, or is told at the time that it does affect it, he is considered to have notice of the contents of that deed, and of all other deeds to which it refers. But where a party has notice of a deed which does not necessarily — which may or may not — affect the property, and is told that in fact it does not affect it, but relates to some other property, and the party acts fairly in the transaction, and believes the representation to be true, there is no decision which goes the length of saying that, if he is misled, he is fixed with notice of the instrument." When we pass from landed property to *choses in action*, it is at least worthy of consideration whether we should not express the rule thus: "Where a party has notice of a deed which from the nature of it must affect his security, or his title to that which he is purchasing, he is considered to have notice of the deed." If that be the right way of expressing the rule with regard to the subject-matter with which we have to deal, this case becomes clear, because the debentures would not from their nature necessarily affect the plaintiffs' security, or their title to that which they were purchasing. But whether that be so or not, we can deal with this case under the second part of the rule. I assume that when the rule is applied to *choses in action* the words "may or may not" refer to such reasonable probability as would regulate the action of a reasonable person in the affairs of life. Lord Lyndhurst's proposition, then, is, that where a person knows there is a deed which a prudent man would honestly and reasonable think might or might not affect the property, and is told that in fact it does not

affect it, and believes that representation to be true, he is not fixed with notice of its contents. Perhaps in applying the doctrine to the case of a *chose in action* it is not necessary that the person should be told that the deed does not affect the property. I am inclined to think that possibly it might be sufficient, if he did not know or honestly think, and if it was reasonable that he should not know or honestly think, that the deed was one which must affect his security. But I will assume that the entire doctrine laid down by Lord Lyndhurst is to be applied to the present subject-matter. I think it is clear that the plaintiffs' solicitor must have known that the debentures were instruments which might or might not affect the property of the company, but that he certainly did not know that they would probably affect his clients' security. And further he was told, and it was reasonable for him to believe, that there was nothing in them which could affect the security. I am of opinion that the appeal must fail.

KAY, L.J., concurred.

Appeal dismissed.

Solicitors for the appellant, *Dowson, Ainslie, & Martineau.*

Solicitors for the respondents, *Paine, Son, & Pollock.*

From Q. B. Div. (Lord Esher, M.R., and Bowen and A. L. Smith, L.JJ.) — June 24, 1892.

In re VINCE.

Ex parte THE TRUSTEE IN BANKRUPTCY. (*a.*)

Bankruptcy—Advance to person in business—Interest varying with profits—Allowance to be made on inability to pay agreed interest by reason of deficiency of profits—Agreement void for uncertainty—Right to prove for money lent—Partnership Act, 1890, *ss.* 2 (3) (d), 3—28 & 29 *Vict. c.* 86 (*Bovill's Act*), *ss.* 1, 5.

By an agreement between A. and B., which recited that a statement of account signed by A., showing the credits and liabilities of his business, was the basis of the proposal thereinafter made, and that B. had agreed to advance A. the sum of £4,500, *it was provided that, in consideration of the said sum paid to A. by B., A. would punctually pay interest on the same by two regular half-yearly payments of* £462 10*s. for every half-year; and that, in case A. should be unable to pay any portion of the half-yearly payments upon any part of the said sum of* £4,500 *by reason of the deficiency of the profits of A., then and upon every such occasion a due allowance should be made by B. to A. in respect of the same in a fair and reasonable manner.*

In pursuance of this agreement the sum of £4,500 *was advanced by B. to A. Subsequently A. was adjudicated a bankrupt, and B. tendered a proof for the amount of his loan, which was rejected, on the ground that it was an advance to a person in business on a contract that the lender should receive a rate of interest varying with the profits, and that, by* 28 & 29 *Vict. c.* 86 (*Bovill's Act*), *s.* 5, *B. was postponed to the other creditors.*

Held, that there was nothing in the agreement to show how the allowance in respect of interest was to be calculated; that, as the agreement showed that some allowance was contemplated, and the intention was expressed in such vague terms that no allowance could have been enforced, the whole agreement was void for uncertainty; consequently, the loan was outside Bovill's Act altogether, and B. was entitled to prove for the amount with the other creditors.

Decision of the Queen's Bench Division (40 *W. R.* 428) *reversed.*

(*a.*) Reported by JOHN P. MELLOR, Esq., Barrister-at-Law.

This was an appeal from a judgment of the Divisional Court (Vaughan Williams and Collins, JJ.) setting aside an order made in the bankruptcy of John Vince by the county court judge sitting at Norwich, which order directed that the proof of Dudley Baxter should rank for dividend with the claims of the other creditors against the estate.

By an agreement between John Vince and Dudley Baxter, which recited, as the basis of the proposal thereinafter made, a statement signed by Vince of the credits and liabilities of his business at that date, Baxter agreed to advance to Vince £4,500, and Vince agreed to pay interest on the same by two half-yearly payments of £462 10s. for every half-year; and that "in case John Vince should be unable to pay unto Dudley Baxter any portion of the half-yearly payments upon any part of the said sum of £4,500, by reason of the deficiency of the profits of John Vince, then and upon every such occasion a due allowance shall be made by Dudley Baxter to John Vince in respect of the same in a fair and reasonable manner."

The sum of £4,500 was advanced by Baxter to Vince, and Vince was subsequently adjudicated a bankrupt.

The trustee rejected Baxter's claim to prove with the other creditors, on the ground that his advance to Vince came within section 5 of Bovill's Act (28 & 29 Vict. c. 86), and consequently was postponed till the other claims had been satisfied. This decision was reversed by the county court judge, but restored by the Divisional Court.

Cooper Willis, Q.C., and *Eversley*, for the appellant.—The court below have construed this agreement as if inability to pay by reason of the deficiency of the profits was equivalent to inability to pay out of the profits. But the words "out of the profits" ought not to be read into the agreement. It was never intended that an allowance should be made in respect of the agreed interest every half-year that the profits fell below some undisclosed standard. The whole of the £462 10s. was to be paid every six months unless there should be a total inability on the debtor's part to pay it. This is not a contract for a rate of interest varying with the profits, but for a fixed rate of interest with an undertaking by the creditor to make some allowance in respect of the interest if the debtor, by reason of the falling off of his business, should be without the means to pay the whole of it. Moreover, there is no standard in this agreement by which the allowance in respect of interest is to be calculated.

They cited *Ex parte Mills, In re Tew*, 21 W. R. 557, L. R. 8 Ch. 569; *Manby* v. *Gresham Life Assurance Co.*, 9 W. R. 547, 29 Beav. 439.

M. Muir Mackenzie, for the trustee in bankruptcy.—This is an agreement for a rate of interest varying with the profits within Bovill's Act and the Partnership Act, 1890. It is immaterial that the interest is only to vary by way of reduction. The interest is fixed at a high rate corresponding to the largest amount of profits that it was thought that the business could make, and that rate is to be reduced in proportion as the profits fall below the highest possible. [Lord ESHER, M.R.—That is assuming that the interest was, under this agreement, to be paid out of profits, and that inability to pay any portion of the interest by reason of the deficiency of the profits means inability to pay out of the profits. Unless words that are not in the agreement are read into it Bovill's Act does not apply.] The terms of the agree-

ment show that this was an investment of £4,500 in the business, and that the interest was to come out of the profits. There would be no difficulty in ascertaining what due allowance should be made when there was a deficiency in the profits. As the contemplated profits were to the actual profits in any given year, so would £925 be to the interest to be paid in that year. Vaughan Williams, J., in his judgment in the court below, said that there was no reason why the contemplated profit should not be ascertained. His words were: "Then if the court should be of opinion that the non-payment was due to the falling off in the profits, it seems to me the court would have been able to take the further step of fixing what was the proper reduction. No doubt in order to do so one would have to ascertain what were the circumstances at the time when the agreement was first entered into, or what was the rate of net profit which was expected by the parties at the moment when the agreement was entered into. I do not see why the court should not do this, and I do not see why, for the purpose of our present decision, we are bound to quantify that factor which would be one of the factors of the rule of three sum which necessarily would have to be done."

Lord ESHER, M.R.—In this case the appellant, who is a creditor in the bankruptcy of John Vince, has lent a sum of £4,500 to the bankrupt, and desires to prove for that sum in the bankruptcy. The answer which is made to his claim is that he has entered into an agreement with regard to the loan of the money in such terms that it is within the provisions of Bovill's Act, and that consequently he is not entitled to recover any portion of his principal until the claims of the other creditors have been satisfied. That raises the question whether the agreement, upon the true construction of it, has brought this loan within the terms of Bovill's Act. The court has, therefore, to construe this agreement; but, in order to come to a conclusion whether it is within the Act by reason of the rate of interest varying with the profits, they must find some measure agreed upon in the instrument by which to ascertain what is meant by a deficiency in the profits, and in what respects the rate of interest is to vary. I am of opinion that the agreement is worded so artificially and so mysteriously that it is impossible to know what the provisions as to the rate of interest mean. If I cannot attach any definite meaning to those provisions so as to ascertain whether the agreement comes within Bovill's Act, I certainly could not treat it as coming within that Act. But I think that we must treat this agreement as being too vague to be a binding one in any respect. If that is so, the creditor has lent this money and it must be repaid in the ordinary way; he is, therefore, entitled to prove for the amount. I will read from a book that has been handed to me the principle on which we decide this case: "A promise must be reasonably certain; and if the parties have expressed the matter of their agreement in such uncertain or imperfect terms that it is impossible to ascertain any definite meaning, the agreement is necessarily void; for 'in every deed there must be such a degree of moral certainty as to leave in the mind of a reasonable man no doubt of the intent of the parties'" (Leake on the Law of Contracts, 3rd ed., p. 591, citing Tenterden, C.J., in *Coles* v. *Hulme*, 8 B. & C. 573).

BOWEN, L.J.—I am of the same opinion; and were it not for our established practice, when differing from the court below, to give our reasons individually, I should not add anything to what the Master of the Rolls has said. The question is, Whether this is the case of a loan on a contract that the lender shall receive a rate of interest varying with the profits? If it is such a case, then the Partnership Act, 1890, applies, and the lender is postponed to the other creditors of the borrower upon his insolvency. The question whether this is money lent upon such an agreement depends upon the construction of the particular agreement. There is really no law to be laid down in this case, except that which is stated in the passage which the Master of the Rolls has read. Primarily, it is a question as to the construction of a particular provision with regard to the payment of interest contained in an agreement. A fixed sum is to be paid each half-year for interest; but if there should be inability to pay any portion of the sum by reason of the deficiency of the profits, upon every such occasion due allowance is to be made in respect of the same in a fair and reasonable manner. If we came to the conclusion that there was a standard in the agreement by which the measure of a due allowance and a reasonable manner was to be fixed, then we should have to determine the difficult question whether such a provision was within Bovill's Act at all. It seems to me, however, that there is nothing in this agreement by which a reasonable person could arrive at the standard rate of profits by which the allowance is to be measured. Are you to take as your standard rate the actual profits for the half-year previous to the advance being made, or the £462 10s., or the amount of profits expected in future by the parties at the date of the agreement? I think the last was the one finally accepted by Mr. Mackenzie, and also adopted by the court below. I cannot myself see that the agreement points to one more than to another. But if the last is taken it is a measure that is so uncertain, so absolutely incapable of being even approximately fixed, that it would make the operation of the provision as to an allowance a mere matter of chance. *Pearce* v. *Watts*, 23 W. R. 771, L. R. 20 Eq. 492, shows that where that is so, where there is a reservation which is too vague to be given effect to, the whole agreement becomes void. Even if this provision as to an allowance being made when there is an inability to pay could be cut adrift, it would cut adrift the only clause that could bring this agreement within Bovill's Act, But, in my opinion, you cannot cut adrift that provision, and the agreement is void for uncertainty. Then Bovill's Act only applies to agreements that the law recognizes; it cannot apply to void agreements. Consequently the appellant is entitled to have his money returned, and is, therefore, entitled to prove for it. The court below have held that inability to pay the agreed interest by reason of the deficiency of the profits means inability to pay out of the profits. On that point I say nothing. They have also held that the allowance to be made in respect of profits when such an inability arose was to be calculated with reference to the amount of the profits which in the expectation of the parties at the time of the agreement the business would have realized. If that was so it is too uncertain a basis of calculation to have entitled the borrower to enforce an allowance upon that footing. But there is nothing in the agreement to show that the factor upon which the allowance is to be based is the amount of profit in the expectation of the parties at the time of the agreement.

A. L. SMITH, L.J.—If this agreement had contained some mode of measuring the allowance to be made in case of a deficiency of profits, I should have been of the same opinion as the Divisional Court, that this was an agreement with the bankrupt that the

appellant should receive a rate of interest varying with the profits of the bankrupt's business, and consequently was within Bovill's Act. But when the question comes to be argued as to the basis on which the allowance in respect of interest is to be assesssed, it becomes impossible to ascertain what that basis is to be. The more the question is discussed the more difficult it is to see what is to be the measure of the allowance. The learned judges in the court below were not agreed upon that point. Vaughan Williams, J., thought that the due allowance could be ascerained by measuring the profits actually made with the profits contemplated at the time the agreement was entered into. Collins, J., on the other hand, seems to have thought that the amount of the allowance was to be calculated by comparing the amount of the profit made with the amount fixed by the agreement as the normal interest. In his argument here Mr. Mackenzie finally rested on the former view as to the construction of the agreement, saying, as Vaughan Williams, J., did, that the measure was to be the profit contemplated by the parties at the time of the agreement. If that measure is adopted I cannot see how there could be any possibility of ascertaining from this agreement what the parties contemplated that the future profits of the business would be. In my opinion, therefore, this provision as to an allowance in respect of interest is too uncertain to have been enforced, and I quite agree with what Bowen, L.J., has said, that if that provision can be cut adrift and the rest of the agreement left standing, the only clause that could bring this agreement within Bovill's Act is taken out of it.

Appeal allowed.

Solicitors for Baxter, *F. J. & G. J. Braikenridge*, for *Nevill & Atkins*, Tamworth.

Solicitors for the trustee in bankruptcy, *Crowders & Vizard.*

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20 Searle (1900) 2 Ch. 531

High Court of Justice.

Chan. Div. Kekewich, J. } Nov. 12, 17.

In re CARTER. (*a.*)

Tenant for life—Remaindermen—Income in specie—*Discretion in trustees to retain—Rule as to wasting securities—Originating summons—Practice.*

Where the trustees of a will held freehold and leasehold estate in trust for sale, with power to postpone at discretion,

Held, that the words of the will were insufficient to entitle the tenant for life to enjoy in specie *the income arising from the leaseholds prior to sale.*

Semble, *in an originating summons the court will not, at the instance of the respondent, decide a point not raised by the plaintiff taking out the summons.*

Adjourned summons.

A testator by his will, after various specific bequests of personalty, devised and bequeathed all his real and personal estate to trustees upon trust to, at their discretion, sell, convert, and invest such parts of his real and personal estate as were "not thereinafter specifically devised and bequeathed," with power, at their discretion, to continue his business of pawnbroker as long as they should think fit. He directed his trustees to pay the rents, profits, and income of all his real and personal estate "not thereinbefore directed to be sold," and also the interest, dividends, and income of the moneys to arise from the sale of such property as was "directed to be sold," and of the stocks, shares, and securities in which the same might be invested, to his wife during widowhood, and that upon the death or remarriage of his wife his trustees should stand possessed of the whole of his real and personal estate, "both that which might then be converted" and that which might "then be unconverted," upon certain trusts, as to specific freeholds; leaseholds, and annuities, in favour of his children *nominatim*, with remainder over. He further directed that as to all the rest, residue, and remainder of his real and personal estate "not otherwise thereinbefore specifically disposed of," his trustees should forthwith sell and dispose of the same unless previously sold and converted under the power thereinbefore contained, and invest the proceeds and stand possessed of the same upon the trusts thereinafter declared.

By an order in chambers it was declared that the trustees held the real and personal property of the testator (other than what was specifically devised and bequeathed by the will) upon trust for sale with a discretion as to the time of sale of any part thereof.

Upon this arose the main question whether the tenant for life was entitled to enjoy *in specie* the income of unconverted estate held on trust for sale.

C. Lyttelton Chubb, for the tenant for life.—I am entitled to income *in specie*. *In re Laing*, 14 W. R. 328, L. R. 1 Eq. 416, places this beyond a doubt as to freeholds, and the general scheme of the will shows sufficiently the intention with regard to leaseholds. Testator gives income of freeholds and leaseholds specifically devised and bequeathed to his widow, also she is to have the income of realty on trust for sale (*In re Laing*), and the testator obviously did not intend the leaseholds on trust for sale to be dealt with in a different manner to the rest of the property: *In re Thomas*, 40 W. R. 75, [1891] 3 Ch. 482; *In re Chancellor*, 32 W. R. 465, 26 Ch. D. 42.

A. W. M. Baillie, for the remaindermen.—Here there is no such expression of intention as was laid down in *In re Thomas* to be necessary in order that the tenant for life may enjoy *in specie* the income until sale.

He cited *Brown* v. *Gellatly*, 15 W. R. 1188, L. R. 2 Ch. 751, and also referred to the judgment of Cotton, L.J., in *In re Chancellor*, at p. 45 of 26 Q. B. D.

Bramwell Davis, for the trustees.

KEKEWICH, J.—In my opinion the language in this will is not sufficient to justify the widow enjoying *in specie* the income of the unconverted leaseholds. I may not guess at the testator's intentions. Probably he did intend her to have it, but, if so, he has not expressed his intention. There is nothing here whatever to justify me in saying that he has done so. He has divided his property into two classes: (1) "All my property not hereinafter specifically bequeathed"; (2) "All my property not hereinbefore directed to be sold." Why he has used long phrases and those not convenient I do not know, but it is plain that property "hereinbefore directed to be sold" is all his property "not specifically bequeathed," and property "specifically bequeathed" is "property not directed to be sold."

He has directed that the one part should be sold, and has given the trustees a discretion as to the time of sale, but he has not said that his widow is to be entitled to the income until sale. What he has said

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

is that she is to have the income of the proceeds of sale, and it seems to me that as far as there is any expressed intention there is no gift of income until sale.

Abundant cases show that in the case of real property, where a sale is directed, with discretion to postpone, this discretion is given not for the convenience of persons but of the estate; and, therefore, the tenant for life may have the income, and the trustees may not postpone the enjoyment of any object of the trusts.

Then comes in the rule of law with regard to wasting property, to the effect that you must adopt a rule of thumb and give the tenant for life a fair equivalent only proportioned to his interest in the whole—that is to say, you calculate the value of the property and give him a fixed rate of interest thereon.

Both these doctrines apply in the present case. The tenant for life is entitled to enjoy the income *in specie* of the real estate until sale, but with regard to the leaseholds they are governed by the rule of law to which I have just referred.

Bramwell Davis asked for a declaration, in answer to question (2) of the summons, that the tenant for life was entitled to 4 per cent. on the capital value as at the death of the testator.

A. W. M. Baillie.—The declaration should be as at, and from the death of the testator.

KEKEWICH, J.—That would be raising a question which the trustees do not ask. All the court has to do on this summons is to answer questions raised by the trustees. It is open to the remaindermen to raise this question hereafter.

Solicitor, *Arthur B. Chubb.*

NOTE.—But see judgment of North, J., in *In re Wenham*, 40 W. R. 636 [1892] 3 Ch. 59.

Q. B. Div. (Pollock, B., and Hawkins, J.) Nov. 3, 4.

GOSLING *v.* GREEN. (*a.*)

Shipping — Thames Conservancy — Bye-laws — Watermen's and Lightermen's Amendment Act, 1859 (22 & 23 *Vict. c.* 133), *bye-law* 99—*Thames Conservancy Act*, 1864 (27 & 28 *Vict. c.* 113), *bye-law* 36.

By the 99th bye-law under the Watermen's and Lightermen's Amendment Act, 1859, *if the master, &c., of any steam vessel navigated on the Thames within a certain district "shall not (when practicable) remain, continue, and be on one of the paddle-boxes or on the bridge" of such vessel, or on the deck cabin adjoining, "or shall not cause and procure a proper look-out to be kept from the bow" of such vessel, he shall incur a penalty not exceeding five pounds.*

By the 36th bye-law made under the Thames Conservancy Act, 1864, *the master of every steam vessel navigating the river shall be and remain on one of the paddle-boxes or bridge, "and shall cause a proper look-out to be kept from the said vessel."*

The appellant, the master of a steamboat, was convicted and fined for not having caused a proper look-out to be kept from the bow of the vessel, contrary to bye-law 99 *of the first-mentioned Act.*

Held (affirming the conviction), that the Watermen's and Lightermen's Amendment Act, 1859, *and the Thames Conservancy Act*, 1864, *being intended to be read together, the bye-laws under the latter Act did not supersede generally those made under the former, and that the provisions in question of bye-law* 99 *of the former Act were not inconsistent with bye-law* 36 *of the latter, and remained, therefore, in force.*

Case stated by Mr. De Rutzen, metropolitan police magistrate.

A summons was taken on the 17th of June, 1891, by Harry Gosling under the 99th bye-law of the Watermen's and Lightermen's Amendment Act, 1859, against George Green, charging that on the 17th of June, 1892, between Southwark Bridge and Westminster Bridge, he, being the master or person in charge of the steamboat *Rifleman*, did navigate the same without causing a proper look-out to be kept from the bow of such vessel, contrary to the bye-law.

The summons was heard on the 29th of June, 1892, and the 6th of July, and it was then contended by counsel for the defendant that the bye-law 99 of the Watermen's and Lightermen's Act, 1859, was bad as being inconsistent with the bye-law 36 of the Thames Conservancy made under the Act of 1864. The learned magistrate found as a fact that there was no person in the bow of the vessel on the day charged in the summons. He convicted the defendant and fined him five shillings and three guineas costs, but stated a case for the opinion of the court, which now came on to be argued.

J. P. Grain, for the appellants.

Horace Avory, for the respondents.

The nature of the argument, which turned upon the construction of the Act of Parliament and bye-laws, sufficiently appears from the judgment.

POLLOCK, B.—This is an appeal upon a case stated by Mr. De Rutzen, a metropolitan police magistrate, and is a case of a summons under the 99th bye-law of the Watermen's and Lightermen's Act, 1859, charging the appellant with navigating a steam vessel called *The Rifleman* without a proper look-out in the bow. It was found as a fact that there was no person in the bow. The question of law which we have to determine is whether that bye-law is still valid. It was made in pursuance of the Watermen's Act, 1859. [The learned judge read the bye-law, and continued:—] There are two things required by it. First, the master is to remain on the bridge, and, secondly, he is to cause a proper look-out to be kept from the bow.

Now it is obvious that that was passed with the double intention of protecting the persons on the river, and also of pointing out how that protection is to be arrived at. But now comes the bye-law 36 of the Thames Conservancy, made under the power of the Thames Conservancy Act, 1864. That bye-law does not provide for a man to be kept in the bow, but for a "proper" look-out, and that might possibly be held to be kept by one man. Does this provision thus far repeal the bye-law under the Watermen's Act? They go together up to a certain point, and then the earlier one requires an additional look-out. I need hardly state so well known a proposition that where a new regulation of a new statute deals with an old statute it is no repeal of the older one unless it is inconsistent. I can hardly say that they are inconsistent here. It was pressed by Mr. Grain that it would be curious if two sets of provisions dealt with the navigation and look-out on the Thames. But the matter is really answered for this reason, that, by the Thames Conservancy Act, the Watermen's Company's Act was dealt with and limited in a series of sections, in one of which (58) it is provided that the two Acts are to be read as one. But bye-law 99 of the earlier

(*a.*) Reported by JOHN P. MELLOR, Esq., Barrister-at-Law.

Act was not dealt with, and the clear intention of the Thames Conservancy Act being to leave that Act unaltered, except so far as it affected it, we think it follows that the conviction was right, and must be affirmed.

HAWKINS, J., concurred.

Appeal dismissed, with costs.

Solicitors for the appellants, *Arnold Williams & Co.*

Solicitors for the respondents, *Ayton, Safford, & Kent.*

Q. B. Div.
(Pollock, B., and Hawkins, J.) Nov. 1.

REG. *v.* MCKELLAR.
Ex parte BAKER. (*a.*)

Parliament — Registration of voters — Lodger claim— Description of qualification—Mistake—Power to amend —Parliamentary and Municipal Registration Act, 1878 (41 *&* 42 *Vict. c.* 26), *s.* 28, *sub-sections* 2, 13.

Where, in a lodger claim, the character of the qualification is misdescribed, but the revising barrister is satisfied that the misdescription is the result of a mistake, and that the qualification, upon the facts, is sufficient, he may amend the claim under sub-section 2 *of section* 28 *of the Registration Act of* 1878; *and sub-section* 13 *of the same section, which means that a person claiming in respect of one qualification may not prove for another and distinct qualification, does not apply to prevent the correction.*

Rule *nisi* for a *mandamus* to the revising barrister for the city of Exeter to state a case.

At the revision of the register of voters held in September last certain lodger claims were objected to by Baker on the ground of informality. The revising barrister amended and allowed the claims, and in answer to the application for an order upon him to state a case made a statement to the court which disclosed the following facts:—

Objection was taken to seven lodger claims on the ground that the declaration was not in the form required by the Registration Order, 1889, Schedule 3, Form H., No. 2.

The informality alleged was that in six of the claims the qualification was stated to be the sole use of a bed room "with joint use of dining room and sitting room," and the occupation in the declaration as being "partly sole and partly joint."

Objection was also taken to a seventh lodger claim on the ground that, being for a joint occupation the value stated was £10, whereas it ought to have been £20.

In answer to these objections it was alleged in support of the claims that in the first six cases the claims and declarations had been filled up under a misapprehension as to what facts were necessary to be stated to complete the qualifications; and in the seventh the claim for a "joint" occupation had been made upon a form of claim for a "sole" occupation, and the value stated had been left at £10 instead of being altered to £20.

It was further objected before the revising barrister that he had no power to amend these claims.

The barrister, however, having satisfied himself as to the facts, held that in each of the cases a "mistake" had been made, which, under sub-section 2 of section 28 of the Registration Act, 1878, he had power to amend. He therefore amended in the first six cases by striking out of the claims and declarations all mention of joint occupation, and in the seventh by altering the value stated from £10 to £20. A rule *nisi* for a *mandamus* was subsequently obtained and now came on to be argued.

Section 28 of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), provides that the revising barrister shall have the powers enumerated in the sub-sections, and in sub-section (2) that "he shall correct any mistake which is proved to him to have been made in any list."

Sub-section (13) is as follows: "Except as herein provided, and whether any person is objected to or not, no evidence shall be given of any other qualification than that which is described in the list or claim, as the case may be, nor shall the revising barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same."

J. A. Foote, for the voters, showed cause.—Here all the revising barrister did in each case was to correct a misdescription to make the claim accord with the true facts, which showed that the qualification was good. Such a "correction" of a *bonâ fide* mistake was not within sub-section 13, which only meant that the revising barrister might not amend a claim for one qualification so as to allow it in respect of a different one. The question of mistake was one of fact for the revising barrister.

He cited *Ainslie* v. *Nicholson*, 24 Q. B. D. 144, 38 W. R. Dig. 74.

J. V. Austin, in support of the rule.—It is admitted that in the seventh case the revising barrister had power to amend by altering the amount from £10 to £20. With regard to the others, it is sufficient for the purposes of the rule to show that there is *primâ facie* a question to be argued. What was done in these cases was to alter the "description" or nature of the qualification. It is conceded that under section 28, sub-section 2, of the Registration Act of 1878 the revising barrister has power to correct mistakes, but that sub-section is controlled by sub-section 13, which provides that "no evidence shall be given of any other qualification than that described." That sub-section provides in effect, and the Court of Appeal have held, that there is no power to the revising barrister to make a change in the nature of the qualification: *Foskett* v. *Kaufmann*, 34 W. R. 90, 16 Q. B. D. 279. The claims made here for joint and sole occupation were either for a mixed qualification, unknown to the law and unwarranted by statute, or they were for alternatives of joint and sole occupations, and, therefore, bad as ambiguous between franchises which are entirely distinct, given by different statutes, and unprovided for by any form.

POLLOCK, B.—I think this rule must be discharged. It is clear that the court should not be too astute in picking holes in anything done by the revising barrister within his powers.

The first observation which is to be made is, that in so far as the correction of a mistake under sub-section 2 of section 28 of the Act of 1878 is based on a finding of fact, the court will not interfere where the element of intention in a question of mistake was a question of fact for the revising barrister, who has here found as a fact that there was a mistake in each of these cases. The second observation which I will make is, that it must not be supposed that we are not giving full effect to sub-section 13 of the same section. That section means that a person who claims in respect of a given qualification must not give evidence of another: he must not, for example, claim in respect of building A. and give evidence of building B. In

(*a.*) Reported by JOHN P. MELLOR, Esq., Barrister-at-Law.

Foskett v. *Kaufmann* that was the sort of mischief dealt with, and that decision was necessary to give a proper construction of the Act. But where, as in the present cases, a person has misdescribed the character of his qualification, that objection does not apply. The revising barrister, having found that there was a mistake of this nature, had, therefore, power to amend in each case, and the rule must be discharged with costs.

HAWKINS, J.—I am of the same opinion, and have nothing to add.

Solicitors for the applicants, *Farman & Dumas*, for *Dunn*, Exeter.

Solicitors for the respondents, *Robinson, Preston, & Stowe*, for *Friend & Beal*, Exeter.

Q. B. Div.
(Lord Coleridge, C.J., and Wills, J.) Oct. 25.

MUNRO, *Petitioner*.
BALFOUR, *Respondent*.
MANCHESTER (EASTERN DIVISION) ELECTION PETITION. (*a*.)

Parliament—Election petition—Scrutiny—Particulars—Parliamentary Election Petition Rules, 1868, *rr*. 6, 7.

The respondent in a parliamentary election petition, in which the petitioner claims the seat on grounds for a scrutiny, is not entitled to obtain particulars under rule 6 of the Parliamentary Election Petition Rules, 1868. *Rule 7 applies exclusively to such a case.*

Appeal of the respondent, the Right Honourable Arthur James Balfour, against the refusal of Pollock, B., to order the petitioner, Mr. Joseph Edwin Crawford Munro, to deliver certain particulars.

The petitioner presented a petition against the return of the respondent at the parliamentary election for the eastern division of the borough of Manchester. Paragraphs 1, 2, 3, 4a, and 5 of the petition alleged that the respondent, by agents acting on his behalf, was guilty of bribery, treating, undue influence, and other illegal practices during the election, and that the election and return of the respondent were thereby rendered null and void. Paragraphs 6, 7, 8, 9, 10, 10a, and 11 alleged that many persons who voted at the election for the respondent were guilty of bribery, treating, undue influence, voting twice, and personation, or were disqualified by legal incapacity from voting; that the votes of all such persons ought to be struck off the poll; that the petitioner received a majority of the votes of electors duly qualified to vote, and was duly elected as a member to serve in Parliament for the borough, and ought to have been returned as such member.

The respondent took out a summons for the petitioner to deliver particulars (1) of the names and addresses of the agents of the respondent alleged in paragraphs 1-5 of the petition to have been guilty of the various acts of corruption, and the dates, nature, and character of such acts; (2) of the names and numbers on the register of the persons alleged in paragraphs 6-11 to have been guilty of such illegal practices that their votes ought to be struck off the poll, and the dates, places, and nature of all such illegal practices.

Pollock, B., ordered the petitioner to deliver the particulars asked for with regard to paragraphs 1-5 of the petition, but refused to order the particulars asked for as to the latter part of the petition.

The respondent appealed against this refusal.

Rule 6 of the Parliamentary Election Petition Rules, 1868, is as follows:—Evidence need not be stated in the petition, but the court or a judge may order such particulars as may be necessary to prevent surprise and unnecessary expense, and to insure a fair and effectual trial in the same way as in ordinary proceedings in the Queen's Bench Division, and upon such terms as to costs and otherwise as may be ordered.

Rule 7.—When a petitioner claims a seat for an unsuccessful candidate alleging that he had a majority of lawful votes, the party complaining of or defending the election or return shall, six days before the day appointed for trial, deliver to the master, and also at the address, if any, given by the petitioners and respondent, as the case may be, a list of the voters intended to be objected to, and of the heads of objection to each such vote, and the master shall allow inspection and office copies of such lists to all parties concerned; and no evidence shall be given against the validity of any vote, nor upon any head of objection not specified in the list, except by leave of the court or judge, upon such terms, as to amendment of the list, postponement of the inquiry, and payment of costs, as may be ordered.

Danckwerts, for the respondent.—This is an application under rule 6, not rule 7. The latter rule does apply to cases of scrutiny, but the object of it is to provide information for the court as to the nature of the case. Rule 6, which is quite independent of rule 7, also applies to cases of scrutiny, and under it we are entitled to receive, ten days before trial, the particulars which we ask for: *The Salford Petition*, 19 L. T. N. S. 502; *The Guildford Petition*, 19 L. T. N. S. 528.

Coward, for the petitioner, was not called upon.

Lord COLERIDGE, C.J.—I am of opinion that this application must be refused. The petition first claims that the election of the respondent was void on the ground of bribery by his agents. That is an object to which rule 6 applies, and as to that portion of the petition the respondent has obtained the particulars which he requires. The petition then goes on to claim the seat for the petitioner, because it is alleged that the respondent's majority was gained by a number of votes being given for him which were disqualified or various reasons. It is admitted that rule 7 applies directly to a case of a scrutiny such as this, and it seems to me to be a very plain enactment of the Legislature to the effect that in the case of a scrutiny the petitioner must specify each vote that he attacks, and also state the ground of objection to it, and he is not to be allowed to give evidence as to any other ground of objection. It has been argued, however, that rule 7 does not limit rule 6, that rule 6 is general in its terms, and is to be applied to cases which would also come under rule 7. The effect of that would be to wipe out rule 7 entirely, because every case would come under rule 6, and there would, therefore, be no use for rule 7. I think that the true construction of these two rules is that rule 6 applies to all cases not under rule 7, but that as to these latter rule 7 is exclusive. This case comes under rule 7. The case of *The Salford Petition* is not in point here, because, although that was a case in which a scrutiny only was claimed, yet the petitioner also asked that the election might be declared void if, when the case as to a scrutiny was being gone into, any fact came to light which would have avoided the election if it had been previously known. Under those circumstances Willes, J., thought that rule 6 applied.

(*a*.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

For these reasons I am of opinion that this appeal must be dismissed.

WILLS, J., concurred.

Appeal dismissed.

Solicitors for the petitioner, *Pritchard & Englefield*, for *Boote & Edgar*, Manchester.

Solicitors for the respondent, *Torr & Co.*, for *Hampson*, Manchester.

Q. B. Div. (Collins and Bruce, JJ.) July 18, 20, 1892.

REG. v. MACKENZIE AND OTHERS (JUSTICES) AND LAWRENCE. (a.)

Criminal law—Intimidation—Following a person with a view to compel him to abstain from doing acts which he has a legal right to do—Defective statement of offence in summons and conviction—Certiorari—*Conspiracy and Protection of Property Act*, 1875 (38 & 39 *Vict. c.* 86), *s.* 7—*Bias of justices—Remote interest.*

A summons and conviction under section 7 of the Conspiracy and Protection of Property Act, 1875, *for following a person with a view to compel him to abstain from doing any act which he has a legal right to do, ought to state what was the act which the defendant, by following the informant, endeavoured to compel him to abstain from doing.*

A conviction which did not contain such a statement held to be bad, and an amendment refused, it not appearing that evidence was given at the trial before the justices as to what was the act which the informant was prevented by the conduct of the defendant from doing.

Rule *nisi* for a *certiorari* to bring up, in order that it might be quashed, a conviction of the defendant Johnson Henderson, made by the justices of Sunderland on May 19, 1892, under section 7 of the Conspiracy and Protection of Property Act, 1875. That section provides that "every person who, with a view to compel any other person to abstain from doing, or to do any act which such other person has a legal right to do, or abstain from doing wrongfully and without legal authority; (2) persistently follows such other person about from place to place; or (5) follows such other person with two or more other persons in a disorderly manner in or through any street or road," shall on conviction be liable to pay a penalty or to be imprisoned.

The charge contained in the summons was that the defendant "on the 16th day of May, 1892, at the township of Bishopwearmouth, in the said borough, did unlawfully, with a view to compel the informant, John Thomas Lawrence, to abstain from doing or to do acts which the informant had a legal right to do or abstain from doing, wrongfully and without legal authority persistently follow the informant about from place to place, and followed the informant with two or more other persons in a disorderly manner in or through High-street and West Sunniside in the said borough, contrary to the statute in such case made and provided."

An affidavit made in these proceedings by the four justices who tried the case stated as follows:—Para. 2. "It was proved before us that the complainant, Lawrence, is the agent at Sunderland of the Shipping Federation (Limited) and that the defendant is an official of the National Amalgamated Seamen's and Firemen's Union of Great Britain and Ireland, and that on the date in question the defendant led a large crowd of persons who in a disorderly manner followed the complainant through High-street and Sunniside with a view to compel him to abstain from following his occupation as the agent of the Shipping Federation, an act which he had a legal right to do, and we convicted the defendant of the said offence, and ordered him to be imprisoned for fourteen days with hard labour."

Para. 4. "The solicitor of the defendant objected to the information and summons herein on the ground that they did not disclose what were the acts with a view to compel the informant from doing which the following took place. We were of opinion that, as the offence was charged in the words of the statute creating it, the information and summons were good by virtue of the Summary Jurisdiction Act, 1879, s. 39, and we overruled the objection, and the case proceeded."

The conviction was in the following form:—

"Johnson Henderson (hereinafter called the defendant) is this day convicted before this court for that he, on the sixteenth day of May, 1892, at the township of Bishopwearmouth, within the said borough, unlawfully did, with a view to compel one John Thomas Lawrence to abstain from doing acts which he, the said John Thomas Lawrence, had a legal right to do, wrongfully and without legal authority follow the said John Thomas Lawrence, with two or more other persons, in a disorderly manner in and through certain streets—to wit, High-street and West Sunniside, in the said borough—contrary to the statute in such case made and provided."

The rule *nisi* for the issue of the writ was obtained upon the grounds: (1) That the summons and conviction ought to have specified the acts with a view to compel the informant to abstain from doing which the defendant followed the informant. (2) That some of the convicting justices were interested or biassed.

The case, as regards the alleged bias, rested upon the following facts:—The defendant was a delegate of the Sunderland branch of the Seamen's and Firemen's Union, an association formed with the object (amongst others) of protecting the interests of seafaring men. The informant, Lawrence, was district superintendent of the Shipping Federation (Limited), which was an association of shipowners and other persons and companies connected with the shipping trade formed for the purpose of protecting its members against losses in their trade and other purposes. There was some evidence of the existence for some time before the events out of which this prosecution arose of considerable antagonism between the members of the Union and of the Federation owing to disputes having arisen as to the rate of wages to be paid to seamen taken upon ships at the port of Sunderland. Three out of the four convicting justices owned shares in shipping companies whose ships were covered against certain risks by marine insurance companies which were members of the Federation. None of the justices, however, took any part in the management of the shipping companies, nor were they at the date of the conviction aware that the ships of these companies were covered by the insurance companies or that the insurance companies were members of the Federation.

Walton, Q.C., for the justices, and *Temperley*, for the informant, showed cause against the rule.—As to the alleged bias, the facts are not sufficient to show that it existed, or that it was likely to exist, and bias, in order to disqualify justices from acting, must be really existent: *R.* v. *Rand*, L. R. 1 Q. B. 230, 14 W. R. C. L. Dig. 47; *R.* v. *Farrant*, 36 W. R. 184, 20 Q. B. D. 58. As to the alleged defect in the summons and the conviction, it

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

was unnecessary to specify the acts which the defendant endeavoured to compel the informant to abstain from doing. The description of the offence is substantially within the words of the Act creating it, and section 39, sub-section (1), of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), applies:—"The description of any offence in the words of the Act, or any order, bye-law, regulation, or other document creating the offence, or in similar words shall be sufficient in law." The defect is at all events one which should not be allowed to defeat the proceedings—Jervis's Act (11 & 12 Vict. c. 43), s. 1—and is curable by amendment even at this stage under 12 & 13 Vict. c. 45, s. 7. A far more serious defect was amended after conviction in *R.* v. *Biggins*, 26 J. P. 437.

Asquith, Q.C., and *Scott Fox*, in support of the rule.—This conviction cannot be sustained. A conviction for a statutory offence must show on the face of it every ingredient of the offence as defined by the statute. Here mere "following" of itself is not the offence; it must be following with a view to compelling a person to do or abstain from doing acts which he had a right to abstain from doing or to do; therefore it is necessary to state in the conviction what were the acts which the defendant endeavoured to compel the informant to abstain from doing, in order that it may appear that they were acts of the nature specified in the section. The summons is in an alternative form, and is, therefore, clearly bad; the conviction is bad for not stating the statutory offence in accordance with the above requirements The statutes cited do not cure the defect. Section 1 of Jervis's Act has no application; it only relates to a discrepancy between the complaint and the evidence in support of it. The description of the offence here is not in the words of the Act, or in similar words, and therefore section 39 of the Summary Jurisdiction Act, 1879, does not apply. This is a substantial defect, and the court will not cure it now. In *R.* v. *Biggins* the objection was described as "trashy," and therefore the amendment was allowed (see 26 J. P. 244). As to the bias, there was sufficient evidence that the justices, although not pecuniarily interested in the result of the proceedings before them, were biassed in favour of the interests of shipowners, which were represented by the informant and against the defendant, who was thought to have opposed those interests. "It is a matter of public policy, so far as possible that judicial proceedings should not only be free from actual bias and prejudice of the judges, but that they should be free from the suspicion of bias or prejudice," per Fry, L.J., in *Leeson* v. *General Medical Council*, 38 W. R. 303, at p. 309, 43 Ch. D. 366. The same principle is to be found in *R.* v. *Justices of Hertfordshire*, 6 Q. B. 753, and in *R.* v. *Farrant*.

Cur. adv. vult.

July 20.—COLLINS, J.—In this case I am of opinion that the rule for a writ of *certiorari* should be made absolute on the first ground which was relied on—namely, that the summons and the conviction ought to have specified the acts with a view to compel the informant to abstain from doing which the defendant followed the informant. It seems to me that that defect is one of substance, and not of mere form. The conviction does not follow the words of the summons, but I think that, when one looks at the statute which constitutes the offence, it is clear that both the summons and the conviction are defective, not in mere form, but as not stating the substance of the offence as created by the statute. [His lordship read the summons and conviction, and section, and continued:—] The Legislature might, had it chosen, have made it an offence for one person simply to follow another in a disorderly manner; it has not done so: the following must be with a view to compel another person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing. It would be competent for a defendant, upon a charge of this kind, to prove that his conduct could not have had, or was not intended to have, any such effect. It is, therefore, necessary to state what were the acts which the defendant attempted to compel the informant to abstain from doing; but this conviction merely says that the following was with a view to compel the informant to abstain from doing acts which are not specified: it is therefore defective. It is said that this is a defect which may be cured by amendment. I have looked through the affidavits to see what was actually proved at the trial, for it might be possible to make an amendment in the conviction if the offence were really proved. That is a good test of whether the defect in the conviction is one of substance, for I see that the laxity which appears in the conviction only reproduces the laxity with which the charge under this section was gone into at the trial. [His lordship read paragraph 2 of the affidavit of the justices.] Now that affidavit treats the informant's "following his occupation as the agent of the Shipping Federation" as if it were a single act, which it obviously was not. There appears, in fact, to have been no evidence as to any acts which the defendant attempted to compel the informant to abstain from doing, and consequently the evidence was not sufficient to establish the offence created by the section under which the man was chargeable. On that ground I think that the conviction was bad.

As to the other ground which was relied upon, although it is not necessary to give an opinion, I must say that I do not think the evidence supports that view. It is admitted that the justices had no pecuniary interest in the result of the trial, but it is said that there was bias. They were not the prosecutors either themselves or by their agents, and their connection with the Shipping Federation is so remote that it is difficult to state it in language. Looking at the facts I do not think that the elements necessary for making out a case of bias are established here. The facts upon which the case of bias rests fall very far short of the facts in *Leeson's case*. I think that no sufficient reason has been shown for quashing this conviction upon the second ground which was relied on.

BRUCE, J.—I am of the same opinion. It is quite clear that the gist of the offence created by this section is that the following should be with a view to compel a person to abstain from doing or to do acts which he has a legal right to do or abstain from doing. It was, therefore, necessary for the magistrates to find that the defendant had done this, and to state in the conviction that they had come to that conclusion. Cases were cited which show that under the old law it was necessary to set out in an indictment and to prove all the items which made up the offence. A well-known instance is that of an indictment for profane swearing, in which it was necessary to set out the actual words of the oath used. A question at first arose in my mind as to the effect of section 39 of the Summary Jurisdiction Act, 1879; if this conviction had followed the words of the section creating the offence there would have been some difficulty; but it does not follow the words of the section. It does not even appear that the justices had present to their minds the necessity of proving that what was done was done with a view to compel the informant to abstain from doing certain acts which he had a legal right to do.

As to the other point, I agree with my brother Collins that there was no evidence here of bias on the part of the justices. To establish a case of bias it must be shown that the justices had such a substantial interest in the result of the trial as to make it probable that their judgment would be affected. I do not think that there was anything here to show this.

Rule absolute.

Solicitors for the justices, *Tufnell, Southgate, & Co.*, for *Barker*, Sunderland.

Solicitors for the informant, *Botterell & Roche.*

Solicitors for the defendant, *Watson, Brown, & Co.*, for *J. J. Bentham*, Sunderland.

Court of Appeal

From Chan. Div. (Lord Esher, M.R., and Lopes and Kay, L.JJ.) — Nov. 15.

RYAN *v.* MUTUAL WESTMINSTER CHAMBERS ASSOCIATION (LIMITED). (*a.*)

Specific performance—Landlord and tenant—Residential flat—Covenant to employ porter to perform certain duties—Injunction—Damages.

The defendants granted to the plaintiff a lease of a residential flat, the lease containing a covenant by the lessors to appoint a resident porter who should act as the servant of the tenants of the several rooms in the block, his duties being (inter alia) *to be constantly in attendance in the block, either by himself or, in his temporary absence, by some trustworthy assistant. The defendants appointed as porter a cook, who spent the greater part of his time elsewhere in performing his duties as a cook at a neighbouring luncheon club; and his duties as resident porter were for the most part performed by a boy or a charwoman.*

In an action claiming specific performance of the agreement to appoint a resident porter within the meaning of the covenant, A. L. Smith, J., *held that there had been a breach of the covenant, and granted specific performance.*

Held, on appeal, that this was not a contract of which the court would decree specific performance, and that the plaintiff must be left to his remedy in damages.

Appeal from the judgment of A. L. Smith, J. (sitting for Romer, J.), reported 40 W. R. 379, [1892] 1 Ch. 427.

By a lease, dated the 2nd of July, 1889, the defendants demised to the plaintiff a residential flat for a term of twenty-one years. The building in which the flat was situate contained other flats let for residential and business purposes. The lease was made subject to certain regulations, contained in the schedule thereto, made by the defendants with respect to the duties of the resident porter. By these regulations it was provided that the rooms in each block were, together with the entrance and staircase belonging to it, to be in charge of a resident porter appointed and removable by the defendants. The porter to act as the servant of the tenants of the several rooms in the block. The tenants were to have the right to the general services of the porter resident in their block, within the scope of his general duties, as defined by rule 6. By rule 6 the general duties of the porter, which the tenants were entitled to have performed for them free of extra charge, were as follows: To be constantly in attendance in the section of the building committed to his charge, either by himself, or in his temporary absence by some trustworthy assistant; and to receive and deliver to the several tenants all letters, parcels, and messages, and to receive the keys of the outer doors of the several sets of rooms from the tenants for safe custody on their leaving for the night. The tenants were also to have the right to certain special services of the porter, if required, at a fixed extra charge.

The plaintiff alleged that the defendants had not appointed a resident porter in accordance with the regulations, and that, though a porter had been appointed, he was not constantly in attendance, and that he neglected his duties to the plaintiff as required by the regulations. The plaintiff claimed specific performance of the agreement to appoint a resident porter, and an injunction to restrain them from employing as porter in charge any person who was not resident and constantly in attendance, and able and willing to act as the servant of the plaintiff, according to the regulations; and damages for breach of the agreement. The defendants contended that, if there had been a breach of the agreement, the proper remedy was in damages, and that the court would not decree specific performance of such an agreement.

According to the plaintiff's evidence, one Benton had been appointed by the defendants to act as porter, but rarely opened the front door or answered the bell. The bell was, generally speaking, answered by a charwoman or by a slovenly-looking boy in his shirt sleeves and wearing a workman's apron, and sometimes by Benton's niece. From the evidence of Benton it appeared that he was a cook, and during the first part of his period of employment as a porter had acted as cook at a restaurant in the City. Afterwards he acted as cook between 11 a.m. and 3 p.m. on week days at a luncheon club in Victoria-street, but was in attendance all day on Sundays and at odd times during the week. His wife assisted him in his duties as porter, and he had, during the whole period, employed a boy as assistant.

The learned judge came to the conclusion that there had been a breach by the defendants of the agreement to appoint a resident porter able and willing to perform the duties required of him by the regulations, and granted an injunction and specific performance as claimed; but in case it was subsequently held that this was not the proper remedy, he assessed the damages down to the date of the writ at £25.

The defendants appealed.

Chadwyck Healey, Q.C., and *Swinfen Eady*, for the defendants.

Haldane, Q.C., and *T. R. Warrington*, for the plaintiff.

The following authorities were referred to:—*Rigby* v. *Great Western Railway Co.*, 15 L. J. Ch. 266; *Pickering* v. *Bishop of Ely*, 2 Y. & Coll. C. C. 249; *Lumley* v. *Wagner*, 1 De G. M. & G. 604; *Lane* v. *Newdigate*, 10 Ves. 192; *Brett* v. *East India Shipping Co.*, 12 W. R. 596, 2 H. & M. 404; *Wolverhampton and Walsall Railway Co.* v. *London and North-Western Railway Co.*, L. R. 16 Eq. 433, 22 W. R. Dig. 118; *Rigby* v. *Connol*, 28 W. R. 650, 14 Ch. D. 482; *Whitwood Chemical Co.* v. *Hardman*, 39 W. R. 433, [1891] 2 Ch. 416; *Storer* v. *Great Western Railway Co.*, 2 Y. & Coll. C. C. 48; *Wilson* v. *Furness Railway Co.*, 18 W. R. 89, L. R. 9 Eq. 28; Fry on "Specific Performance."

Lord ESHER, M.R.—The point upon which I am about to decide this case does not seem to me to have

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

been fully brought to the attention of the learned judge in the court below. The case seems to me to come within two recognized rules of the Court of Chancery, which prevent us from decreeing specific performance of such a contract as this. Speaking for myself, I do not think that the case comes within the rule of the Court of Chancery with reference to contracts for personal services. This is a contract between a person who has to employ a servant and a person for whose benefit the servant is to be employed. If the action had been against the servant the rule of the Court of Chancery as to refusing to decree specific performance of such a contract might be applicable. I express no opinion whether it would or not, nor do I express any opinion upon the rule, as it is not before us. This is a contract by a landlord with his tenant to employ a porter, who will perform certain services for the benefit of his tenants. The contract, therefore, is not merely that the landlord shall employ a porter, but that he shall employ a porter who will perform certain specified services. That contract is one and indivisible. The first part of it would be of no benefit to the tenants without the second part. As between landlord and tenant it is one contract. It is a contract to be performed from day to day during the continuance of the tenancy. In the first place, it is a contract which requires constant superintendence. If the court decreed specific performance the carrying out of the decree would require constant superintendence. Such superintendence the Court of Chancery has always declined to give. That, therefore, is a ground upon which the court will refuse to decree specific performance. It was then said that the court will grant specific performance of the term in the contract to employ a porter. That contention runs contrary to another rule of the Court of Chancery, that specific performance of part of a contract will not be granted where the court cannot grant specific performance of the whole. It was said that *Rigby* v. *Great Western Railway Co.* showed that part of a contract might be ordered to be specifically performed. That case, however, decided that where in one instrument there was an independent contract, the court was not prevented from ordering specific performance of that independent part by reason of there being other independent contracts in the same instrument. It was then said that the case came within the exception upon the general rule laid down by the Court of Chancery with reference to railway cases. But that exception in no way abolishes the old rule of the court as to other contracts. With regard to the decision of Lord Eldon in *Lane* v. *Newdigate*, I must decline to follow him in doing indirectly what cannot be done directly. The judgment for specific performance and the injunction granted by the learned judge must be discharged, and judgment must be entered for the plaintiff for £25.

LOPES, L.J.—I am of the same opinion. There are two grounds upon which a court of equity will not give relief by way of specific performance in this case. In the first place, this is one entire contract. The contract is that the landlord will appoint a porter to act for the tenants in the performance of certain duties. In my opinion that contract does not consist of two independent contracts, but is one entire contract. It was said that one part was to appoint a porter, and that this was independent of the other part, as to the performance of the duties. It would be useless to the tenant simply to have specific performance of the part of the contract to appoint a porter, as the porter appointed might be quite incompetent for the performance of his duties. The contract is to appoint a porter who shall perform certain duties. If a court of equity granted specific performance of that contract, it would have to watch its carrying out. That would be against the rule of the Court of Chancery, and it would also be against its rule to grant specific performance of part of the contract where it cannot grant specific performance of the whole contract. In the second place, a court of equity will not grant specific performance if there is another adequate remedy. It seems to me that there is another adequate remedy—namely, damages. Upon a breach occurring an adequate remedy lies in damages.

KAY, L.J.—I am of the same opinion. The remedy by specific performance was originally intended and applied where an action for damages did not afford adequate compensation. The jurisdiction has always been treated as discretionary and has been applied according to well-known and recognized rules. The complaint of the plaintiff here is that the man appointed as porter was not a proper porter, and that the plaintiff did not get the advantages stipulated for, as the porter did not perform those duties which the plaintiff stipulated for. It would be curious if under those circumstances this contract could be divided. The contract was that the tenant should have certain services from the porter. I dissent from the contention that that covenant is divisible. The plaintiff now asks for a remedy under which he may have those duties performed. It was contended for the plaintiff that the court can decree specific performance to this extent, to compel the appointment of a proper porter. The contract, however, is that the tenant shall have the advantage of the duties of the porter, and there is no breach of the contract until the tenant has not had or has been deprived of the duties of the porter. The court will not decree specific performance of such a contract as that. Further, I agree that the court will not decree specific performance of part of a contract where it cannot decree specific performance of the whole. There is an exception to that rule, as was illustrated in the case of *Lumley* v. *Wagner*, namely, that, though the whole contract cannot be ordered to be specifically performed, still a negative stipulation contained in it may be enforced. There the Lord Chancellor said: "I may at once declare that, if I had only to deal with the affirmative covenant of the defendant, J. Wagner, that she would perform at Her Majesty's Threatre, I should not have granted any injunction." There was in that contract, besides the affirmative covenant, a negative term which could be ordered to be specifically performed. There is another exception. The court as a general rule will not order works, such as building works, to be carried out, because the court will not superintend their being carried out, and damages are an adequate remedy. There is an exception in the case of a railway company which has taken land and agreed to do certain works upon the land. There the court will order specific performance of the definite works which the company contracted to do upon taking the land. The present case does not come within either of those exceptions.

There is another reason why the court will not decree specific performance of this contract. The learned judge seems to have found no difficulty in assessing the damages for the breach up to the time of action brought. Why are they not an adequate remedy up to that time? If money compensation is an adequate remedy, as I think it is here, the Court of Chancery treats that as a reason for refusing specific performance.

Appeal allowed.

Solicitor for the plaintiff, *E. F. M. Ryan.*

Solicitors for the defendants, *Troutbeck & Barnes.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Kay, L.JJ.) Nov. 11.

YUNGMANN *v.* BRIESMANN. (*a.*)

Pledge—Detinue—Tender—Waiver.

In an action in detinue for the return of certain goods, Y. alleged that he had pledged the goods with B. to secure an advance. He subsequently requested B. to return the goods, as he had a purchaser for them. B. refused, alleging on his part that the goods had been sold to him. Y. did not tender the amount due under the pledge.

Held, that, assuming the transaction to have been one of pledge, in the absence of a waiver, tender and refusal of the amount due upon the pledge was a condition precedent to the right of action; that B.'s conduct did not amount to a waiver of tender; that his special property in the goods was not, therefore, determined; and that the action would not lie.

Motion by the plaintiff for a new trial, or that judgment, which had been entered for the defendant, should be entered for the plaintiff.

The action was brought in detinue and for an injunction to restrain the defendant from parting with certain pictures, and the plaintiff claimed the return of the pictures, which, he alleged, he had pledged with the defendant as security for certain advances, and for damages for their detention. The defendant alleged that the pictures were sold to him out and out.

The case was tried before Lord Coleridge, C.J., and a jury. It appeared from the evidence of the plaintiff that he had requested the defendant to return him the pictures, because if he did so a friend of his was ready to purchase them, and he would be able then to pay off the amount advanced upon them. The defendant replied that this would be of no use, as the pictures were his absolute property by purchase.

In answer to the Lord Chief Justice the plaintiff admitted that at the time he requested the return of the pictures he was not in a position himself to pay the amount due, except by means of a sale, but that he would be able to do so now if he obtained a decision in his favour that the transaction was one of pledge.

Lord Coleridge, C.J., thereupon held, assuming the transaction to have been one of pledge, and not of sale, that the plaintiff had no right of action, inasmuch as he had made no tender of the amount due, and that there was nothing in the defendant's conduct to excuse him from doing so. His lordship therefore directed a verdict for the defendant, and gave judgment accordingly.

Channell, Q.C., and *P. E. Dove*, for the defendant.—The general property in a chattel pledged remains in the pledgor, and if he tenders the amount due under the pledge, but the pledgee refuses to accept it, the pledgee's special property is determined and the chattel can be recovered at law: see judgment of Privy Council in *Bank of New South Wales* v. *O'Connor*, 14 App. Cas., at p. 282, 37 W. R. Dig. 129. But the pledgee may by his conduct waive his right to tender, and the pledgor will then be in the same position as if he had tendered: *Scarfe* v. *Morgan*, 4 M. & W. 270. The defendant here said that the goods were his absolute property, and that it would, therefore, be of no use to bring a purchaser. We had evidence that the plaintiff was ready and willing to pay the amount within a reasonable time. [LOPES, L.J., referred to *Jones* v. *Tarleton*, 9 M. & W., per Alderson, B., at p. 677. The plaintiff could not be said to be ready unless he had the money in his hand.] We had a purchaser ready. It was not necessary that he should actually have the money in his pocket, as the defendant insisted that the goods had been sold to him. In *Kerford* v. *Mondel*, 8 W. R. Dig. 71, 28 L. J. Ex., at p. 306, Bramwell, B., said that when the defendant in effect said, "I claim these goods in respect of the lien for two different items. You need not trouble yourself to tender one of them, because if you do so I shall not deliver them up," it was a reasonable thing to show that he dispensed with what he owned would be a nugatory tender of the sum he was entitled to receive.

They also referred to *Wallis* v. *Glynn*, 19 Ves. 380; *Boardman* v. *Gill*, note to *Attersol* v. *Briant*, 1 Camp. 410.

Murphy, Q.C., and *J. Eldon Bankes*, for the defendant.—In *Halliday* v. *Holgate*, L. R. 3 Ex. 299, 16 W. R. C. L. Dig. 80, which was a case in which the pledgee had actually sold the goods, Willes, J., delivering the judgment of the court, said (at p. 302) that it would be a contradiction in fact to say that the pledgee consented by his act to revest in the pledgor the immediate interest or right in the pledge, which by the bargain is out of the pledgor and in the pledgee. In such a case, therefore, an action of trover or detinue, each of which assumed an immediate right to possession in the plaintiff, was not maintainable. That case lays down the principle applicable here.

Channell, Q.C., in reply.—[Lord ESHER, M.R.—In order to succeed here you must be entitled to immediate judgment. How do you meet *Halliday* v. *Holgate*, which says that the goods are the pledgor's until paid for?] All that case decided was that the transfer of the pledgee's rights did not determine the special property. It is distinguishable from this in which the pledgee sets up the whole and absolute property.

He also cited *Senécal* v. *Panzé*, 14 App. Cas. 637, 38 W. R. Dig. 27.

Lord ESHER, M.R.—I think this case is really governed by *Halliday* v. *Holgate*. It must be assumed for the purposes of the case that the plaintiff had made a pledge of the goods not amounting to a mortgage. The effect of that is that the general property is in the pledgor, but there is a special property in the pledgee, and the difference between pledge and lien is that in lien no property passes. In this case the pledgor, who has the general property, claims judgment for immediate delivery up to him of the goods by the pledgee, who has the possession and the special property. The question is whether he is entitled to that judgment.

It is admitted he did not tender the amount secured. But he says that he was excused from tender by the conduct of the pledgee, and that the special property of the pledgee was determined by that conduct, and that he (the pledgor) has, therefore the right to immediate possession of the goods. Now is there any authority for that? It has been said in some cases that tender and refusal entitles the pledgor to trover and detinue. But here there was no tender. You cannot tender by saying, "I have not got the money, but I have a friend who will pay if you will say the pictures are mine." You must have the amount then in your hand. Now we know here that the plaintiff not only had not got the money, but had no immediate right to it. But he says he was excused from tender because the defendant said what would have made it absurd. In *Halliday* v. *Holgate* the court said that the pledgor had no right to the goods without paying off the debt, and until

(*a.*) Reported by JOHN P. MELLOR, Esq., Barrister-at-Law.

the debt was paid the whole present interest was in the pledgee. The pledgor would have, therefore, to be ready to pay, and, I am inclined to think, continue to be ready to pay. And it is to be observed that in that case improper dealing with the goods so as to render tender useless was held to be no excuse for not tendering.

I am prepared to hold that the mere fact of the defendants saying, where he holds the special property, that tender is of no use is not an excuse for not tendering, and does not determine his special property. It is part of the pledgor's legal assertion to say "I did tender," but he must also say, "I was ready and willing to pay; and from that time to this was always ready and willing to pay." I think, therefore, that the judgment of the Lord Chief Justice was right, and the appeal must be dismissed.

LOPES, L.J.—In order to succeed in an action of detinue the plaintiff must make out his immediate right to possession. Now that he cannot do here because the special property has passed to the defendant, the pledgee, who has a right to retain the goods until payment. But then it is said that when there has been tender and refusal the property revests in the pledgor and the special property is determined. There is authority for that, no doubt; but tender and refusal are essential. It is clear that in this case there was none. The plaintiff never had the money, and was, therefore, never able to tender or to continue ready and willing to pay. Nor was there a refusal; all the defendant said was, the property in the goods is mine. That, it is said, excused the plaintiff from making tender. I can't adopt that view, for I think that *Halliday* v. *Holgate* is really a stronger case, and that there is nothing here made out like such a tender and refusal as is necessary. I therefore agree that the appeal should be dismissed.

KAY, L.J.—I am of the same opinion. In some cases it was no doubt held that if tender was made of an amount owing on the security of the debt and was refused, the special property was determined and the plaintiff was entitled to recover. In the case of an ordinary mortgage that is certainly not law, because the whole property passed, and the effect of tender is simply to stop the payment of interest; but it has been said that in that case the money must be kept ready, or otherwise the interest would again become payable. But this case is not brought within the class of cases I have referred to by the fact that there was no tender here, for what was done did not amount to a tender and refusal; and there is no authority for saying that a statement that conduct such as that of the defendant in this case would excuse the plaintiff from tendering the money. In fact the case of *Halliday* v. *Holgate* was directly the other way.

Motion refused.

Solicitor for the appellant, *A. J. Evans.*

Solicitors for the respondent, *Kearsay, Hawes, & Walsh.*

From Chan. Div. (Lindley, Bowen, and A. L. Smith, L.JJ.) — Oct. 26, 27; Nov. 7.

LONDON AND NORTH-WESTERN RAILWAY CO. v. EVANS. (a.)

Minerals—Canal—Right of support—Subjacent minerals—Compensation—Lapse of time—Fulfilment of conditions precedent to be assumed—Statutory powers.

Ordinarily, where land is granted by private grant for the construction of specific works, the grant, in the absence of a contrary intention appearing on the face of it, carries by implication the right of reasonable and necessary support for the works to be constructed.

The same principle applies to titles and rights created by Act of Parliament, and, where an express statutory right is given to make and maintain a thing necessarily requiring support, the right to necessary support is, in the absence of a contrary context, implied to accompany the right to make and maintain the thing requiring support; and, in cases where a mode of compensation is provided for the owners of the lands furnishing such support, the reasons for implying that such right of support is intended by the Act are overwhelming.

By a private Act of 1754 the plaintiffs' predecessors in title were empowered to convert a brook and its branches into a navigable river for the use of the public, and to make and maintain such cuts and canals in, upon, and through the lands of owners adjoining as might be proper and requisite for the navigation and carrying out of the undertaking. The Act provided for "the said undertakers, their heirs and assigns, doing as little damage as may be in the premises, and first giving satisfaction to the owners or proprietors of such lands, tenements, and tithes or hereditaments respectively, as shall be digged, cut, removed, or otherwise made use of, or that in any wise shall be diminished, prejudiced, or damaged by or for the carrying on, effecting, or preserving the said navigation, or for maintaining or managing the same," as the commissioners under the Act or a jury should decide.

The undertaking was carried out, and the undertakers paid an annual sum, under the provisions of the Act, to landowners in respect of the lands required and used for the purposes of the canal; but there was in the Act no express power for the undertakers to purchase lands (though persons under disability were authorized to sell lands required for the navigation), and no conveyances of surface lands were ever executed to them.

Under another private Act of 1864 the canal became vested in the plaintiffs. The defendants, who were lessees and owners of coal in the subjacent and adjacent lands over which the canal was constructed, in the ordinary course of working their coal endangered the canal. Upon the plaintiffs asking for an injunction to restrain the defendants from so working their mines as to cause damage to the canal,

Held, that provisions for compensation to those whose lands would be required for the making and maintenance of the canal were to be found in the Act of 1754, authorizing the undertaking; that the right of support required for the canal and the value of the minerals underlying the lands taken and used might have been—whether or not they in fact were—taken into account and estimated in the price to be calculated and given to the landowners before the works were undertaken, had the landowners been sufficiently prescient to demand it; that, after so great a length of time, it must be presumed that all was paid for which was thought worth claiming for, and that all conditions precedent were fulfilled which were requisite to give the plaintiffs' predecessors the necessary right of

(a.) Reported by ARTHUR LAWRENCE, Esq., Barrister-at-Law.

support; and that the plaintiffs were therefore entitled to an injunction.

Decision of Kekewich, J., *reversed.*

Appeal from a decision of Kekewich, J.

The question was, practically, whether a right granted by a private Act of Parliament to make a canal carried with it a right of support for the canal.

By a private Act of Parliament in 1754 (28 Geo. 2, c. viii.), certain persons therein referred to as "the undertakers" were empowered (section 1) to make a certain river or brook called Sankey Brook, falling into the river Mersey, and also certain branches thereof, "navigable, portable, and passable" for boats, flats, and other vessels, "and from time to time to continue, maintain, and use such navigation"; and for that purpose to clear, open, scour, enlarge, or straiten the said river or brook, and the several branches thereof, and, *inter alia*, "to make such new cuts, canals, trenches, or passages for water in, upon, or through the lands and grounds adjoining or near unto the same river," or the said branches, as they should think proper and requisite; to remove all obstructions which might impede the navigation; to dig, take, and carry away soil, clay, gravel, or stone requisite for carrying on and constructing the said works and undertaking in and from the grounds of any person or persons adjoining the said river or brook; and to do all other things as the undertakers should think necessary for making and maintaining the same river or brook, branches, cuts, canals and passages navigable and passable as aforesaid, "the said undertakers, their heirs and assigns, doing as little damage as may be to the premises, and first giving satisfaction to the owners or proprietors of such lands, tenements, tithes, or hereditaments respectively as shall be digged, cut, removed, or otherwise made use of, or that in any wise shall be diminished, prejudiced, or damaged by or for the carrying on, effecting, or preserving the said navigation, or for maintaining and managing the same," as the commissioners thereinafter named should adjudge in case the undertakers should not otherwise agree with the proprietors of such lands, &c.

By section 3 commissioners were appointed for determining questions between the undertakers and owners and occupiers of lands affected by the said navigation; and they were authorized to determine what satisfaction, either by an annual rent or payment, or by a sum of money in gross, any person should have for such part of his lands, &c., as "shall be cut, dug, or removed, or made use of as aforesaid, and for the damage that shall be thereby sustained."

By section 25 the undertakers were required to secure the adjacent lands from being flooded, and to make fences, bridges, and other works for the accommodation of adjoining landowners.

By section 26 it was provided that in certain cases of damage the amount of compensation should be assessed by the commissioners or by a jury.

By section 35 it was enacted that the said river or brook, and the several branches thereof, cuts, and canals, should for ever thereafter be taken to be an open, common, and navigable river from the river Mersey below Sankey Bridge up Sankey Brook and its said several branches and such cuts and canals, and that the public should have free passage along and right of navigating the same upon payment of the tolls authorized by the Act.

The undertaking authorized by the Act was duly completed by the construction of a navigable canal, and by another private Act of 1845 (8 & 9 Vict. c. cxvii.) the canal became vested in the St. Helen's and Runcorn Gap Railway Co., it being enacted that the railway referred to in the Act should be subject to the provisions of any general Act relating to railways which might in the then present or any future session be passed.

By another private Act, in 1864 (27 & 28 Vict. c. ccxcvi.), the canal, then known as the St. Helen's Canal, and also the St. Helen's Railway, became vested in the plaintiffs in the present action, who by that Act were required to keep the canal in repair and in navigable condition; and it was provided that the railway and the canal should be subject to the provisions of any general Act relating to railways or canals then in force or which might be passed.

The Acts contained no reference to mines or minerals in subjacent or adjacent lands, nor any express power for the undertakers to purchase lands, although they empowered persons under disability to sell lands required for the undertaking. No conveyances of surface lands appeared to have ever been executed to the undertakers, but annual payments were paid by them under the principal Act to landowners in respect of lands taken and used for the purposes of the canal.

The defendants were lessees of parts and owners of parts of the coal under part of the lands over which the canal was constructed, and also under adjacent land, which, at the passing of the first-mentioned private Act, was vested in persons who were then the owners of land over which the canal was constructed.

On the 1st of February, 1877, the defendants gave the plaintiffs notice in writing, under the Railways Clauses Consolidation Act, 1845, that they intended to work the coal under the canal, but that they were willing to leave it unworked on receiving compensation. On the 5th of March, 1877, the plaintiffs replied by letter that they claimed support for the canal. They did not offer to make compensation for the mines, and, in fact, no compensation was ever made by the plaintiffs. The defendants proceeded to work the coal, causing subsidences of portions of the bank and bed of the canal thereby.

The plaintiffs brought the present action claiming an injunction to restrain the defendants from working or getting any coal so as to cause damage or injury to the canal, and from otherwise causing any damage or injury to the plaintiffs as owners of the canal; and damages.

Kekewich, J., held that the plaintiffs were not entitled to the injunction asked.

The plaintiffs appealed.

Sir Henry James, Q.C., Cozens-Hardy, Q.C., and *O. L. Clare,* for the appellants.—We ask for an injunction and a declaration of right. The landowner might have prevented the undertakers entering on his land until paid compensation. It must be presumed the landowner was compensated. [LINDLEY, L.J.—The strength of your case is, I think, this: that payment of compensation was a condition precedent to the landowners letting you make the canal, and as the canal is made, compensation must be presumed to have been paid.] In *Roderick* v. *Aston Local Board,* 25 W. R. 403, at p. 405, 5 Ch. D. 328, at p. 332, Jessel, M.R., explained the principle of the decision in *Metropolitan Board of Works* v. *Metropolitan Railway Co.,* 16 W. R. 1117, 17 W. R. 416, L. R. 3 C. P. 612, 4 *Ibid.* 192.

They cited *Benfieldside Local Board* v. *Consett Iron Co.,* 26 W. R. 114, L. R. 3 Ex. 54, per Kelly, C.B., at p. 63; *Consett Waterworks Co.* v. *Ritson,* 22 Q. B. D. 318, 702; *In re Corporation of Dudley,* 8 Q. B. D. 86, 30 W. R. Dig. 120; *Caledonian Railway Co.* v. *Sprot,* 4 W. R. 659, 2 Macq. 449.

Rigby, S.G., Renshaw, Q.C., and *Warrington,* for

the respondents.—[BOWEN, L.J.—Does not the fact of the right to make the canal having been purchased imply a right of support?] There was no severance of the surface from the minerals, and therefore the appellants had no right of support. It is a case here of conflicting rights, and the question is which right is to prevail. The right of support is not absolute, but only such as is reasonable, and it is qualified by the circumstances of each particular case. [They referred to *In re Corporation of Dudley, Consett Waterworks Co.* v. *Ritson, Metropolitan Board of Works* v. *Metropolitan Railway Co.*, and *Roderick* v. *Aston Local Board.*] [BOWEN, L.J.—In the case of the *Metropolitan Board of Works* the board "might, if they thought fit, construct their sewer without requiring any lateral support from the owners of adjacent lands": *per* Bovill, C.J., L. R. 3 C. P., at p. 623.]

Sir Henry James, Q.C., in reply.—It is a general principle that if you grant the use of the surface of land which necessarily requires support, that grant is also a grant of such right of support. If the right of the respondent to compensation has been lost, it has been lost through his own fault.

Cur. adv. vult.

November 7.—LINDLEY, L.J.—I have had the advantage of reading the judgments which are about to be delivered, and I need only say that I concur with them.

BOWEN, L.J.—The plaintiffs, the London and North-Western Railway Co., have succeeded to the ownership of the St. Helen's Canal and to the rights and liabilities of its original proprietors under an old Act of Parliament passed in the year 1754. The defendants are lessees and occupiers of coal mines in the subjacent and adjacent lands over which a branch of the canal has been constructed, and, in the ordinary course of working their coal, are endangering this branch. Thereupon the London and North-Western Railway Co. ask for an injunction to restrain the defendants from so working their mines as to cause damage to the canal. The plaintiffs contend that, together with an express right to make and to maintain their canal, the Act of 1754 conferred on them by implication the right to such support as was necessary for the existence of the canal and its branches. The right to make the canal, they argue, was subject to the condition precedent of their making compensation to the owners of the lands taken or used for the purposes of the canal. Such compensation, they urge, was paid to the predecessors in title of the defendants; and, thereupon, the necessary right of the support requisite for the due maintenance of the canal was acquired. The defendants, on the other hand, allege that the compensation so paid was in respect only of the actual lands taken, but nothing was paid for minerals, and that, if the plaintiffs succeed in their present claim, the defendants, as owners of the minerals, will have been prevented from using in a legitimate and ordinary manner what still is their own property. How far the predecessors in title actually received compensation is a question that will hereafter be examined in the judgment to be delivered by my brother A. L. Smith. Meanwhile, it is desirable clearly to state the point of view from which the construction of the Act of Parliament, upon which the question in this case mainly turns, ought to be approached.

In dealing with an ordinary grant of lands it is undoubted law that, where such grant is made for a specific purpose, such as the construction on the lands of a house, canal, railway, or other permanent work, the grant, in the absence of a contrary intention appearing on its face, carries with it by implication the right of reasonable and necessary support for the works so to be erected from the subjacent or adjacent lands of the grantor. This maxim of law and of good sense applies whether the grant is voluntary or under the compulsory powers of a statute—see *Elliott* v. *North-Eastern Railway Co.*, 11 W. R. 604, 10 H. L. Cas. 333; *Caledonian Railway Co.* v. *Sprot.* When we pass from private grants between individuals to titles and rights created by an Act of Parliament, the exact subject-matter is altered, but similar rules of good sense and law obtain when we have to interpret sections which do not expressly decide the matter. These canons do not override the language of a statute where the language is clear; they are only guides to enable us to understand what is inferential. In each case the Act of Parliament is all-powerful, and, when its meaning is unequivocally expressed, the necessity for rules of construction disappears and reaches its vanishing point. Where the intention of the Legislature has been left to be collected from principles of reason, there are one or two obvious principles which have to be borne in mind. One such maxim, similar to that which has been alluded to as governing the case of private grants, seems obvious also with regard to Acts of Parliament. Where an express statutory right is given to make and maintain a thing necessarily requiring support, the statute, in the absence of a context implying the contrary, must be taken to mean that the right to necessary support of the thing constructed shall accompany the right to make and to maintain it. More especially would this seem reasonable when the thing to be constructed is one of public advantage and utility, in which the public are to have rights. The maxim of good sense and law so stated becomes applicable with more or less stringency according to the scope of the Act of Parliament. On the other hand, the Legislature cannot fairly be supposed to intend, in the absence of clear words to the contrary, that one man's property shall be confiscated for the benefit of others, or of the public, without any compensation being provided for him in respect of what is taken compulsorily from him. Parliament in its omnipotence can, of course, override or disregard this ordinary principle as it can override the former, if it seems fit to do so, but it is not likely that it will be found disregarding it, without plain expressions of such a purpose.

These two maxims or principles appear to bear on the construction of statutes like the present, and may be called canons of construction, not because they are inflexible doctrines, but because they are doctrines of sound sense and obvious justice, to be borne in mind in dealing with legislation, which cannot be supposed, unless it so explicitly states, to neglect what is reasonable and businesslike on the one hand, or what is natural justice upon the other. It is evident that when both a right to make and maintain a work necessarily requiring support is given, and a mode of compensation also is provided for those whose lands will have to furnish such support, the two maxims work in harmony, and are not drawn into conflict with one another. The reasons for supposing, in the absence of a controlling context, that the Act designed the right of necessary support to be enjoyed seem in such a case to become overwhelming. When no right of compensation is furnished by the Act the case is different. The two maxims, then, appear to draw us in different directions, and their antinomies have to be adjusted by a careful examination of the statute itself. It is by the light of these two principles when they coincide in favour of one view of the statute, by their adjustment and reconciliation when they appear to conflict, that various cases have been decided, falling

on one side or the other of the line, according to differences in the statutes which have to be construed; such cases, for instance, as *The Metropolitan Board of Works* v. *The Metropolitan Railway Co.*, as explained by Sir G. Jessel, M.R., in *Roderick* v. *Aston Local Board, In re the Corporation of Dudley*, and in *The Benfieldside Local Board* v. *Consett Iron Co.* If in the present case compensation for the right of support has been in fact provided for by the Act of 1754, the two maxims of good sense, so far from creating a conflict of reasoning, both will operate in favour of the plaintiffs' claim to the right of support, and the point to be decided upon the present appeal will become reasonably clear.

For reasons which have been elaborated by my brother A. L. Smith, with which I agree, and which I will leave to him to state at length, it seems to me that in the present case apt words of compensation for those whose lands would be required for the making and maintenance of the canal are to be found in the statute of 1754. The words "first making satisfaction to the owners of such lands as shall be made use of" ought to be reasonably construed as wide enough to secure such just compensation. It is true that at the date of the Act the minerals were not thought to be of value, and were not taken into account in assessing the actual compensation exacted. But if the right of support was not substantially measured in the price given for the lands taken and used, it might have been demanded and estimated in the price had the owners been sufficiently prescient; and after this length of time it must be assumed that all was paid for which was capable of calculation or measurement and that was thought worth claiming by the owners, and that all conditions precedent have been fulfilled which were requisite to give the canal proprietors the right to the necessary support for the maintenance and making of their canal. The appeal accordingly ought to succeed, and the injunction ought to be granted to the plaintiffs, with the costs of the action both in the court below and in this court.

A. L. SMITH, L.J.—The question to be determined in this case is whether the undertakers, who were empowered by the Act of 28 Geo. 2, c. viii. (1754), to convert Saukey brook, in the county of Lancaster, and its branches into a navigable river for the use of the public, and also to make and maintain such new cuts and canals in, upon, and through the lands of owners adjoining as might be proper and requisite for the navigation and carrying out of the contemplated undertaking, acquired the right of subjacent support by virtue of that Act from the lands underneath such new cuts and canals, or whether the landowners possessed of the minerals lying under the cuts and canals are entitled to win them in the ordinary and accustomed manner, even though by so doing they let down the surface and destroy the cuts and canals. It may be taken, without referring to the Acts passed since the Act of 1754, that, if the undertakers under that Act obtained the right to subjacent support, the present plaintiffs have also such right. It is settled law that where minerals are severed from the surface by deed, instrument, or Act of Parliament, the mineral owner is not entitled to let down the surface, unless by the deed, instrument, or Act of Parliament by which the minerals are severed it appears that the surface owner has parted with the right of support, or, in other words, that the mineral owner's right to get the minerals is thereby limited to getting them in such a manner as not to occasion injury to the surface owner. If authority were wanted, the cases of *The Caledonian Railway Co.* v. *Sprot; Bell* v. *Love*, 10 Q. B. D., at p. 558; and *Davis* v. *Treharne*, 29 W. R. 869, 6 App. Cas., at p. 466, will suffice.

But it is said by the Solicitor-General for the defendants that, though this may be so, it does not apply to the present case, because by the Act of 1754 there had been no severance of the surface from the minerals, and in this he is correct, for by that Act no property in the surface soil is vested in the plaintiffs, nor is there any severance of surface at all from the minerals. It is a correct proposition of law that when an Act of Parliament empowers undertakers to make and maintain works for the benefit of the public upon the land of others, and such works of necessity require the support of the subjacent soil, and the Act provides for compensating the landowners for damages, both to the surface and subjacent minerals, by reason of the execution of the contemplated works, then, unless there is something in the Act to the contrary, a necessary implication arises that the Act gives to the undertakers a right to subjacent support for the works authorized to be constructed and maintained. In stating this proposition I do not wish to be understood as holding that nothing less than the above will suffice to raise the implication of the right to subjacent support, but this case does not, in my opinion, necessitate an inquiry as to what (if anything less) will suffice. In my judgment, if the conditions above stated are to be found in an Act of Parliament, a necessary implication does arise that the undertakers are entitled to subjacent support for their works as against the mineral owner below. This proposition appears to be me one which is irresistible, for it is impossible to suppose in the premises mentioned that the Legislature contemplated that the mineral owner might let down and destroy the works authorized to be constructed for the benefit of the public.

The case of *In re Corporation of Dudley*, before my brothers Denman and Watkin Williams, whose decision was affirmed on appeal by this court, was decided upon this principle. In that case the Corporation of Dudley were empowered by the Public Health Act, 1875, to construct a sewer through, under, and upon the lands of Earl Dudley. By the Act Earl Dudley was entitled to claim compensation for damages sustained by him in being deprived of the free power to work his minerals subjacent to the sewer. It was held that, in these circumstances, the earl was under obligation to preserve to such sewer subjacent support. Denman, J., in his judgment, said: "It appears to me a matter of common-sense inference that, where a statute for the public benefit gives such a power as this to persons laying down such things as sewers, it must at the same time give them a right not to be undermined by persons having minerals underneath." It must be remembered that in that case the right to compensation was given to the mineral owner, and Denman, J, had this in his mind when he made the statement above. The case of *The Benfieldside Local Board* v. *The Consett Iron Co.* was decided upon similar grounds.

The question next for consideration is—Does the Act of 1754 contain the conditions above stated? The Act not only empowers the undertakers to make and maintain the cuts and canals for the benefit of the public, but, by sections 25 and 29, it enacts that they shall erect and maintain sufficient bridges over the cuts and canals as the commissioners shall direct. It enacts (section 35) that the brook, cuts, and canals shall for ever after the passing of the Act be an open, common, and navigable river for all the King's people upon payment of tolls; and section 53 points definitively to some of the public advantages likely to arise from the undertaking. It is manifest that the cuts,

canals, and other works contemplated by the Act of necessity required the support of the subjacent soil, and cannot be maintained without, and section 1 of the Act provides for compensating landowners in the following terms:—"The said undertakers, their heirs and assigns, doing as little damage as may be in the premises, and first giving satisfaction to the owners or proprietors of such lands, tenements, and tithes, or hereditaments respectively as shall be digged, cut, removed, or otherwise made use of, or that in any wise shall be diminished, prejudiced, or damaged by or for the carrying on, effecting, or preserving the said navigation, or for maintaining or managing the same" as the commissioners shall adjudge. By section 3 the commissioners were to settle and determine what satisfaction, either by an annual rent or payment, or by a sum of money in gross, every person should have for such part of their lands, tenements, tithes, or hereditaments as should be cut, dug, removed, or made use of, and in certain cases a jury was to be summoned to assess such damages and recompense to be awarded to the owners and occupiers of such lands, tenements, tithes, or hereditaments as should be used for, or damnified by, or by means of the said intended navigation or works.

It seems impossible to hold, as the Solicitor-General invited us to do, that this right to compensation was limited to surface damage, and I cannot doubt that, if on or about the date of the construction of the works it had been thought worth while to make a claim for loss thereafter to be suffered by the landowner by his being deprived of his right to remove minerals in the same way he would have been able to do without the works, such a claim ought to have been received and adjudicated upon under the provisions for compensation above set forth. It is true that the claim which the landowners and occupiers then made appears to be for surface damage only, and that payment for such has been continued down to the present time, but that fact does not establish that the compensation clauses did not confer upon the landowner the right to be compensated for damage about to be done to the value of his minerals, if any, or that the clauses ought not, consequently, to be read in the way their language imports. The Solicitor-General urged that the canal proprietors had always heretofore mended the canal and its banks when subsidences occurred; but Sir H. James stated that since 1877, when the subsidences began to be serious, the mendings had always been done under protest, and that now the point was brought up for adjudication. The case of *The Metropolitan Board of Works* v. *The Metropolitan Railway Co.*, on appeal, was cited as an authority against the plaintiff's right to subjacent support, but when the facts of that case are ascertained it will be seen that, in the first place, the sewer could have been constructed without the lateral support which was there claimed, and that there was no right to compensation given to the person against whom the lateral support was claimed. Sir G. Jessel points this out in the case of *Roderick* v. *Aston Local Board*, 5 Ch. D., at p. 332. In my judgment the requisites necessary to support the proposition of law above stated are proved to exist in this case, and the plaintiffs are entitled to the relief sought, and this appeal must be allowed. The plaintiffs are entitled to the agreed damages, £900, and to an injunction restraining the defendant from working so as to injure the plaintiffs' canal, and to the costs of the appeal, and in the court below.

Appeal allowed.

Solicitor for the appellants, *C. H. Mason.*

Solicitors for the respondents, *Paterson, Snow, Bloxam, & Kinder*, for *W. H. Brook*, Warrington.

From Prob. Div. & Adm. Div. (Lord Esher, M.R., and Lopes and Kay, L.JJ.) — Dec. 12.

"THE DART." (*a.*)

Practice—County court—Admiralty action—Judgment of county court varied by divisional court—Appeal to Court of Appeal—Leave to appeal—Judicature Act, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 45—*County Courts Act,* 1875 (38 *&* 39 *Vict. c.* 50), *s.* 10—*County Courts Act,* 1888 (51 *&* 52 *Vict. c.* 43), *s.* 188, *sub-section* 5.

Where a divisional court of the Probate, Divorce, and Admiralty Division alters on appeal the judgment of a county court in an admiralty action, an appeal lies without leave from the judgment of the Divisional Court to the Court of Appeal, notwithstanding the repeal of section 10 *of the County Courts Act,* 1875, *by section* 188 *of the County Courts Act,* 1888.

Appeal by the defendants from the judgment of a divisional court in admiralty.

The action was brought on the admiralty side of the Rochester County Court by Joseph Westwood and others against the owners of the sailing barge *Dart.* The county court judge gave judgment in favour of the defendants. The plaintiffs having appealed, the Divisional Court (Sir Francis Jeune and Bruce, J.) reversed the decision of the county court judge, and refused the defendants leave to appeal to the Court of Appeal.

The defendants appealed.

Pyke, Q.C. (*H. Stokes* with him), for the plaintiffs, took the preliminary objection that no appeal lay.—The case is governed by section 45 of the Judicature Act, 1873, which enacts that the determination of an appeal from a county court by a divisional court shall be final unless special leave to appeal to the Court of Appeal shall be given by the Divisional Court. Here such leave was refused by the Divisional Court. The County Courts Admiralty Jurisdiction Act, 1868, provided, by section 29, that "there shall be no appeal from a decree or order of the High Court of Admiralty of England made on appeal from a county court, except by express permission of the judge of the High Court of Admiralty." This section was repealed by section 12 of the County Courts Acts, 1875, and section 10 of that Act substituted the following provision in its place:—"There shall be no appeal from a decree or order of the High Court of Admiralty of England made on appeal from the county court when such decree or order affirms the judgment of the county court, except by express permission of the judge of the High Court of Admiralty. When upon an appeal the High Court of Admiralty alters the judgment of the county court no leave to appeal to her Majesty in Council shall be necessary." The jurisdiction of her Majesty in Council over appeals from the High Court of Admiralty is now vested in this court: Judicature Act, 1873, s. 18, sub-section 5. Under the County Courts Act, 1875, there would have been an appeal in the present case: *The Lydia*, 37 W. R. 161, 14 P. D. 1. But the whole of the County Courts Act, 1875, is now repealed by section 188 of the County Courts Act, 1888. There is now no statutory provision dealing specially with the power of appealing from a judgment of a divisional court in admiralty on an appeal from a county court. Therefore section 45 of the Judicature Act, which deals with county court appeals generally, must apply to this case.

Bucknill, Q.C. (*J. C. Gordon* and *H. S. Q. Henriques* with him), for the defendants.—The Judicature Act of

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

1873 came into operation on the 1st of November, 1875; the County Courts Act, 1875, came into operation on the 2nd of November, 1875. Section 45 of the Judicature Act is inconsistent with section 10 of the County Courts Act, 1875. Therefore, so far as the inconsistency goes, the former section must be taken to have been repealed the day after it came into operation. After the passing of the County Courts Act, 1875, section 45 of the Judicature Act had no force so far as concerned admiralty appeals in which the judgment of the county court was altered. Then section 188 of the County Courts Act, 1888, repealed the County Courts Act, 1875; but sub-section 5 of that section provided that the repeal was not to revive any enactment not in force at the date of the repeal. Therefore section 45 of the Judicature Act, not being an enactment then in force so far as concerned admiralty cases, in which the Divisional Court altered the judgment of the county court, was not revived. As there is now no enactment which precludes an appeal in such a case as this, the general right of appeal given by section 19 of the Judicature Act applies.

Lord ESHER, M.R.—I am of opinion that an appeal lies in this case.

LOPES, L.J.—Section 10 of the County Courts Act, 1875, is different from and inconsistent with section 45 of the Judicature Act. The two sections cannot be read together. After the passing of the County Courts Act, 1875, section 45 of the Judicature Act did not apply to an admiralty appeal, where the Divisional Court varied the judgment of the county court. Then section 188 of the County Courts Act, 1888, in repealing the County Courts Act, 1875, expressly provides that the repeal is not to revive any enactment not in force at the commencement of the Act. Therefore section 45 of the Judicature Act is not revived so far as regards admiralty appeals where the Divisional Court has varied the judgment of the county court. I am of opinion that an appeal lies.

KAY, L.J., concurred.

Objection overruled.

The court proceeded to hear the case, and in the result the appeal was dismissed.

Solicitors for the plaintiffs, *Ingledew, Ince, & Colt*, for *Basset & Boucher*, Rochester.

Solicitors for the defendants, *Lowless & Co.*

High Court of Justice.

Chan. Div. Stirling, J. } Oct. 25; Nov. 2.

In re ABBOTT.
PEACOCK *v.* FRIGOUT. (*a.*)

Will—Power of appointment—Remoteness—Rule against perpetuities—Effect of invalidity of power on subsequent limitations.

A testatrix by her will bequeathed a sum of money to trustees upon trust for her stepdaughter C. A. for life, with remainder to her husband for life, and after the death of the survivor for the children of the marriage as the parents or the survivor of them should appoint, and in default of appointment for all the children of the marriage who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry under that age, share and share alike. At the death of the testatrix C. A. was unmarried, but she had since married F., and she and her husband were now living. The question was raised whether the trusts of the sum of money were to any, and what, extent void, having regard to the rule against perpetuities.

Held, that, even assuming that the power of appointment conferred upon a husband of C. A. who might survive her might be invalid, the trusts in favour of the children, in default of appointment, were not thereby invalidated, inasmuch as the intention of the testatrix was that the money should go to C. A.'s children unless their interests were effectually displaced by the exercise of the power of appointment.

Adjourned summons.

The testatrix, Sarah Abbott, widow, by her will, dated the 6th of December, 1890, made a bequest in the following form: "I give and bequeath the sum of £1,000 to and for the benefit of my goddaughter Anna, the wife of Sidney Willis, of 50, Acacia-road, St. John's Wood. And I direct my trustees to invest the said sum of £1,000 in their names in any investment allowed by law for trust funds, and to hold the same respectively upon trusts for the benefit of the said Mrs. Sidney Willis and her husband and family as follows: that is to say, upon trust to pay the income to the wife for her life for her separate use without power of anticipation, and after her death to the husband for life, and after the death of the survivor upon trust for such one or more of the children of the marriage as the parents or the survivor shall by deed or will appoint, and in default of appointment for all the children of the marriage who, being sons or a son, shall attain the age of twenty-one years or, being daughters or a daughter, shall attain that age or marry under that age, share and share alike, but subject to hotchpot in respect of any appointed share, and in default of any children upon trust for such persons as the wife shall by deed or will appoint, and in default of appointment for the persons who would, under the Statute of Distributions, be entitled to the personal estate of the wife if she had died intestate and without having been married." The testatrix afterwards bequeathed a sum of £3,500 to each of the children of her late husband, naming them, and amongst others Catherine Abbott, and she directed that the said sums should not be paid to any of her said stepchildren, being sons, until he should have completed his twenty-fifth year, and that the shares of such of her said stepchildren as might be daughters should be invested by her said trustees, and held by them upon the same or similar trusts corresponding to those expressed of and concerning the legacy of £1,000 given to her goddaughter Anna, the wife of Sidney Willis.

At the time of the death of the testatrix Catherine Abbott was unmarried. She had since married, and was now the wife of Augustus Frigout.

This summons was taken out by the trustees of the will for the determination of the question whether the trusts declared of the sum of £3,500, bequeathed by the said Catherine, Mrs. Frigout, as aforesaid, were to any, and what, extent void having regard to the rule against perpetuities.

Beale, Q.C., and *Fossett Lock*, for the trustees and the children.—The limitations over in favour of the children are valid, and are not affected by the invalidity of the power of appointment, should it be invalid. The husband here must be ascertained in the lifetime of the wife, and the power is good. *In re Harvey, Peek* v. *Savory*, 39 Ch. D. 289, 37 W. R. Dig. 203; *In re Frost*, 38 W. R. 264, 43 Ch. D. 246; and *In re Hargreaves, Midgley* v. *Tatky*, 38 W. R. 470, 43 Ch. D. 401, are distinguishable, for they are

(*a.*) Reported by W. A. G. WOODS, Esq., Barrister-at-Law.

cases of absolute powers given to persons who might never come into existence.

Buckley, Q.C., and *MacSwinney*, for Mrs. Frigout.—The limitations after the life interests are void, for although they are in favour of persons whose lives commence in the wife's lifetime, the selection is to be made by the parents or the survivor of them. Suppose the husband married after the testatrix's death were to survive his wife, he might, as such survivor, exercise the power and the estate would be tied up beyond the period allowed by law. The power of appointment itself is invalid. The fact that the children have come into existence has nothing to do with it. The test is whether it is possible that the determination of the persons to take would be suspended during the time of a life not in existence at the testatrix's death. The principle of *In re Harvey, Peek* v. *Savory* and the other cases cited applies here. The gift to the children is an original one in case of a contingency happening. [STIRLING, J., said that *Slark* v. *Dakyns*, 23 W. R. 118, L. R. 10 Ch. App. 35, showed that the gift over was not invalidated by the invalidity of the power of appointment. He also referred to *Webb* v. *Sadler*, 21 W. R. 394, 8 Ch. App. 419.] The limitations in *Slark* v. *Dakyns* are not similar to those in the present case.

They also mentioned *In re Thatcher's Trusts*, 26 Beav. 369, 8 W. R. Ch. Dig. 104.

Hastings, Q.C., for Mrs. Whitehead, tenant for life of the residue.

Ashton Cross, for Mr. Frigout.—The husband's life interest is valid.

Cur. adv. vult.

Nov. 2.—STIRLING, J., referred to the will, and continued:—The question which I am called upon by the summons to decide is whether the trusts by the will declared of the legacy of £3,500 are to any, and what, extent void within the rule against perpetuities. The objection to the validity of the trusts arises on the trust in favour of such one or more of Mrs. Frigout's children as the parents or the survivor of them shall by deed or will appoint. It is said that Mrs. Frigout might have married, or (if she become a widow) may hereafter marry, a husband who was not living at the death of the testatrix; that such husband may survive her and be in a position to exercise the power of appointment conferred on him as such survivor, and that as the result of this the property would or might be tied up for a greater period than the duration of a life or lives in being at the death of the testatrix and twenty-one years after that event; and it is contended that, not only is the power of appointment bad, but that the trusts in default of appointment are bad also. The powers of appointment conferred on Mrs. Frigout jointly with her husband, and on her if she survives her husband, appear to me to be valid; but the powers purported to be conferred on a husband of hers who may survive her may be, and I will assume are, open to objection. The main question which I have to consider is whether the trusts in default of appointment are thereby invalidated.

It is unquestionable that any limitation depending or expectant upon a prior limitation which is void for remoteness is invalid. The reason is that the persons entitled under the subsequent limitation are not intended to take unless and until the prior limitations are exhausted; and as the prior limitation, which is void for remoteness, can never come into operation, much less be exhausted, it is impossible to give effect to the intentions of the settlor in favour of the beneficiaries under the subsequent limitation: see *Robinson* v. *Hardcastle*, 2 T. R. 241; *Routledge* v. *Dorril*, 2 Ves. jun. 357; *Beard* v. *Westcott*, 5 B. & Ald. 801, Turn. & R. 25, and especially the comments of Lord St. Leonards on the last-mentioned case in *Monypenny* v. *Dering*, 2 De G. M. & G. 145, at pp. 181, 182. Speaking of the case of *Beard* v. *Westcott* he said that the Court of King's Bench held that "the gift over was void, not because it was not within the line of perpetuity, but expressly on the ground that I have adverted to—namely, that the limitation over was never intended by the testator to take effect unless the persons whom he intended to take under the previous limitation would, if they had been alive, have been capable of enjoying the estate, and that he did not intend that the estate should wait for persons to take in a given event, where the person to take was actually in existence but could not take."

This reasoning does not necessarily apply to limitations in default of appointment. In many, if not in most, cases of such limitations the intention is that they should take effect unless displaced by a valid exercise of the preceding power of appointment. For example, in *Webb* v. *Sadler*, 21 W. R. 394, 8 Ch. App. 419, where the donees of a limited power of appointment purported to exercise it by appointing to trustees upon such trusts as A. B., one of the objects of the power, should, with certain consents, appoint, and, in default of and subject to any such appointment, upon certain trusts that were within the power, it was held by the Court of Appeal that although the power of appointment purported to be conferred on A. B. was void, the trusts in default of appointment were valid. Lord Selborne, L.C., at p. 426, says: "The next question is, whether the subsequent appointments, 'in default of and subject to any such limitation or appointment,' containing dispositions in favour of the son, are so connected with the void power that, the void power failing, they fail also. It seems to me that such a construction would be expressly contrary to the declared intention. The declared intention is, that unless estates that would displace this gift to a son are created in favour of other persons by means of the power, then the son is to take under this part of the instrument; and if the power is void, then no such estate could be created, and the event never could arise which alone was meant to prevent the gift in favour of the son taking effect. The words 'and subject to' confirm this view. If it had been intended to create a charge, and the gift made to the son were 'subject to the charge,' then, if the charge did not arise, the son would have taken it free from that charge."

Although the words "subject to" do not occur in this case, it does not seem to me that the absence of them is material. The gift is in common form—viz., to the wife for life, with remainder to the husband for life, with remainder to the children of the marriage as the parents, or the survivor of them, should appoint, and in default of appointment for the children at twenty-one, or as regards daughters on marriage; and I think the intention was that the fund should pass to such of Mrs. Frigout's children as, being sons, should attain twenty-one, or, being daughters, should attain that age or marry, unless the interests then vested in their favour were effectually displaced by means of the power. If the power is to any extent invalid, the only result would be that these interests can never be displaced; it is not contended that these interests are in themselves obnoxious to the rule against perpetuities, and in my opinion the trusts in default of appointment are valid.

During the argument I was strongly under the im-

pression, which I still retain, that this very point had been repeatedly decided in accordance with the view which I have just expressed. I have searched for such cases, but have only been able to discover one—viz., *Wollaston* v. *King*, 17 W. R. 641, L. R. 8 Eq. 165, decided by Giffard, L.J., when Vice-Chancellor, and it may be right that I should make a few remarks on that case. There a testatrix having power under her marriage settlement to appoint a fund in favour of her children, appointed a portion of the fund to her son for life with remainder to such persons as she should by will appoint, and in default of appointment for the three daughters of the marriage. Then she appointed further portions, and the will contained an ultimate residuary gift in favour of the three daughters. There is no judgment, but after the argument the Vice-Chancellor held that the power of appointment given by the will to the son was void for remoteness, but that the trust fund was well appointed to the three daughters of the testatrix under the residuary appointment. It is to be observed that the same persons take under the residuary gift as in default of appointment, so that the Vice-Chancellor had not to decide on the effect of the gift in default. Further, the power of appointment by will to strangers could only be valid on the footing of its being for the benefit of the child, but, as pointed out by Lord Selborne in *Morgan* v. *Gronow*, L. R. 16 Eq. 1, 21 W. R. Dig. 176, in such case the gift would be dependent on a condition that could only be ascertained beyond the perpetuity limits, and consequently the case might be treated as one of a limitation expectant on a limitation which is itself too remote. I propose, therefore, to declare that the trusts in default of appointment are valid; beyond this it seems unnecessary to go.

Solicitor for all parties, *H. A. Dowse*.

Chan. Div.
Romer, J. } Nov. 8, 9, 10.

TUCKER *v.* VOWLES. (*a.*)

Vendor and purchaser—Plots sold by reference to plan—Printed form of agreement—Building scheme—Restrictive covenants, whether implied as governing the whole estate.

When plots forming part of a building estate are purchased, having been selected by reference to a plan showing a number of building plots with a house on each, and a printed form of contract for sale containing restrictive covenants is used, but with written variations in the purchaser's particular case, the purchaser is not justified in assuming the existence of a building scheme with restrictive covenants like his own binding on all the other plots.

The plaintiffs bought at a fee farm rent several plots, part of a building estate, having been shown a plan of the various plots, each with a house upon it. In the course of the negotiations they were informed by the vendors that the houses to be placed on the plots were to be of a value of not less than £800 each, and that on certain plots a stable might also be erected. They signed a printed form of agreement, with written variations, one of the printed clauses being to the effect that a purchaser should not place on his plot any building other than a dwelling-house of not less than £800 value, except a greenhouse.

The plaintiffs, having built a dwelling-house of the required value on each of their plots, obtained conveyances of their plots, whereby they covenanted not to alter the external elevation of any of their dwelling-houses, and not to place any other building on any of their plots except a greenhouse.

The defendant, one of the vendors, subsequently acquired the interest of his co-vendor in some other plots, facing those of the plaintiffs, and erected thereon a billiard room, conservatory, and stables for the use of his own house. He did not thereby commit a breach of any covenant contained in the conveyance to him.

Held, that the plaintiffs had no right to assume, when they purchased their plots, the existence of a building scheme, with restrictive covenants similar to their own, binding on every plot, and had no right of action against the defendant in respect of the buildings erected by him.

Trial of action.

In or about the year 1885 the defendant and another person named Shorland purchased some land at Clifton, near Bristol, amounting to six acres or thereabouts, which they proceeded to develop as a building estate by disposing of the greater part of it in plots as building sites at fee farm rents. A block plan, which had been prepared for the approval of the local sanitary authority, represented the property as divided into a number of plots, each containing a semi-detached dwelling-house, but no other building; and a tracing of part of this plan was hung up in the office of the vendors' solicitor for reference by intending purchasers. The plaintiffs, being desirous of obtaining part of the property, were, in the course of their negotiations with the vendors for that purpose, shown this tracing, by reference to which they selected the plots which they ultimately purchased; and they were informed by the vendors that the houses to be built on the respective plots were to be of the value of at least £800 each, and that on certain plots, which were pointed out to them on the plan, stables might be erected. They entered into and duly signed a contract with the vendors whereby they agreed to purchase four of the plots, the contract being contained in a printed form, which had been used in most of the sales of plots which had previously been made, and which provided that the grantee would erect upon each plot a dwelling-house worth not less than £800, and would not erect any other building except a conservatory in the rear of such dwelling-house, and to be of a specified height. The plaintiffs, having erected on each of the four plots a dwelling-house of the stipulated value, obtained conveyances thereof, whereby they entered into restrictive covenants not to alter the external elevation of their dwelling-houses, and not to erect on any of their plots any building other than a conservatory. The defendant, having built and being in occupation of a dwelling-house, for his own use, facing the plaintiffs' plots, proceeded to acquire two or three other plots adjoining his own, and to erect upon them a billiard-room, a conservatory, and a stable, also for his own use.

The plaintiffs, alleging that the whole estate was governed by the building scheme referred to, and that no buildings should be erected on any plot but such as were shown on the above-mentioned plan and permitted by the contract, claimed a mandatory injunction requiring the defendant to remove his billiard-room, conservatory, and stable. Conflicting evidence was given as to the verbal representations made to the plaintiffs before entering into their contract; and the defendant submitted that there was no more than a scheme for the development of the property as a residential estate.

Chadwyck Healey, Q.C., and *Seddon*, for the plaintiffs.—The building scheme which is admitted to have existed must be ascertained by reference to the plan shown to intending purchasers and to the printed form of contract. As to the right of a purchaser of one of several building plots to the benefit of the

(*a.*) Reported by C. HERBERT BROWN, Esq., Barrister-at-Law.

covenants entered into by other purchasers see *Renals* v. *Cowlishaw*, 26 W. R. 754, 28 *Ibid.* 9, 9 Ch. D. 125, 11 *Ibid.* 866. The absence of a covenant by the vendors is immaterial where each purchaser is to enter into restrictive covenants, and the vendors intend to sell the whole estate: *Nottingham Patent Brick and Tile Co.* v. *Butler*, 34 W. R. 405, 15 Q. B. D. 261, 16 *Ibid.* 778, 33 W. R. Dig. 231. Nor is it material that the common obligation of all the purchasers was not contained in conditions at a sale by auction: *Spicer* v. *Martin*, 37 W. R. 689, 14 App. Cas. 12. An implied agreement as to building upon the plots may be ascertained from the transaction, though there is no express covenant: *Mackenzie* v. *Childers*, 38 W. R. 243, 43 Ch. D. 265.

Bowes v. *Law*, 18 W. R. 640, L. R. 9 Eq. 636, and *Collins* v. *Castle*, 36 W. R. 300, 36 Ch. D. 243, were also referred to.

Neville, Q.C., and *Waggett*, for the defendant.—The plan and printed form of agreement had nothing to do with any building scheme, but were prepared for other purposes. The latter was altered in writing to suit the case of each purchaser. The defendant is not bound by any such scheme as is alleged, and has broken no restrictive covenant in the conveyance to him.

Chadwyck Healey, Q.C., replied.

ROMER, J.—In my judgment this action must be dismissed. The plaintiffs' case is that there was at the date of their purchase a building scheme on the estate of the vendors, of which the plaintiffs' properties form part, binding on each plot, and therefore binding on the plots on which the defendant has built in the manner complained of, under which scheme each plot was to be bound by restrictions on building similar to those contained in the printed form of contract. To entitle the plaintiffs to judgment they must also show that such scheme, if there was one, was communicated to them or either of them, or that they were led to believe in the existence of such a scheme, and that the intention was that each one of the several purchasers of the different lots should be bound by, and should, as against the others, have the benefit of the covenants to be entered into by each of the purchasers. No doubt the vendors at that time contemplated selling the estate in building lots, generally speaking, and substantially according to the plan deposited with the sanitary authority, and that the houses to be erected on the estate should be of a good class, and, again speaking generally, of not less than £800 value. I think it may also fairly be said against them that they contemplated that as to many of the lots there should be some more or less restrictive covenants, and probably in many cases covenants somewhat similar to those into which the plaintiffs entered. But beyond this I do not think there ever was at the date I am considering, or at any time, a definite building scheme formed by the vendors, even to the effect that each plot should of necessity have one house upon it of a certain value, to which they intended to enforce rigid adherence. Nor do I think that the plaintiffs or either of them can be held to have been entitled, from any representations made, or from the plan which was seen by them, or at any rate by one of them, or from the fact that the body of the agreement signed was printed, to assume or to believe in the existence of any such definite building scheme as is suggested. On the contrary, I find that no inquiry was made by the plaintiffs or either of them as to the plan, that no representation of any kind was made by or on behalf of the vendors with respect to this printed agreement, and that the plaintiffs when they signed the agreement saw in their own case that the printed form in many respects was altered to suit the circumstances of their own special contract. And, lastly, I am satisfied on the evidence that it was not the intention that each one of the purchasers of these several lots should be bound by, or should as against the others have the benefit of, the covenants into which the plaintiffs entered in their agreement or any similar covenants.

No case has been cited at all like the present one. The court is asked to decide that if a vendor prepares a plan of a building estate showing lots with houses marked upon them, and a purchaser is shown that plan or sees it, and then his agreement with regard to a plot purchased by him happens to be on a printed form with alterations, the purchaser is entitled to assume that the whole estate is governed by a building scheme that each plot shall be definitely and without variation built upon strictly in accordance with the indications on the plan, and, moreover, that each plot shall be governed of necessity by the printed portions of his agreement. I think that to come to such a conclusion as this would be unjust.

I think this case fails for the reasons I have given, and the action must be dismissed, with costs.

Solicitors, *Ley, Lake, & Ley*, for *J. B. C. Burroughs*, Bristol; *Guscotte, Wadham, & Daw*, for *Lawrance & Williams*, Bristol.

Chan. Div.
Vaughan Williams, J. } Nov. 19; Dec. 3.

In re REAL ESTATES CO. (LIMITED). (*a.*)

Company — Winding up — Jurisdiction — Transfer of liquidation proceedings — Court without bankruptcy jurisdiction—Building society—City of London Court —Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 1, *sub-section* (5); *s.* 3, *sub-section* (1)—*Order of Lord Chancellor of the* 29*th of November*, 1890—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 96.

There is no jurisdiction to order the transfer of the winding-up proceedings of a limited company which is being wound up under the Companies (Winding-up) Act, 1890, *to the City of London Court, the last-mentioned court being excluded from having jurisdiction to wind up under the Companies (Winding-up) Act*, 1890.

This was a summons by C. J. Stewart, the official receiver and provisional liquidator of the Real Estates Co. (Limited), for an order that all further proceedings in the liquidation of the company might be transferred to the City of London Court, where the winding-up proceedings of the Liberator Permanent Benefit Building Society were being carried on. It was stated in support of the application that the company was formed for the purpose of taking over properties of which the Liberator Society held mortgages, and that the assets of the company consisted of equities of redemption of small value, and that in order to realize the assets of the society it would be convenient to sell in many cases with the concurrence of the company, and the cost of the concurrence of the company would be materially diminished if the liquidation were in the same court as that in which the liquidation of the society was being carried on. The Liberator Society was established under the Building Societies Act, 1874. An order had been made to wind up the Real Estates

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

Co. in the High Court subsequently to the order to wind up the Liberator Society. The summons had been issued at the request of Mr. Commissioner Kerr. The application was made in both liquidations.

Theobald, for the summons.

Buckley, Q.C., and *Whinney*, for mortgagees of the Real Estates Co., opposed the summons for transfer. They admitted that they had no *locus standi* to appear on the summons, but were allowed to address the court in opposition to the summons. They suggested that the winding up of the company should be continued in the High Court, and the winding up of the Liberator Society transferred to the High Court.

The summons was heard on the 19th of November, and judgment delivered on the 3rd of December.

December 3.—VAUGHAN WILLIAMS, J.—This is a summons by the Real Estates Co. which asks that all further proceedings in the liquidation may be transferred to the City of London Court. I should have been extremely anxious if I had had the power to make the order asked for on this summons, because I am told that the company is very intimately connected with the Liberator Society, which is being wound up in the City of London Court, and it seems a desirable thing to do to have this company wound up by the same authority as that which is winding up the Liberator Society, which is really the principal matter, while this company is merely a subsidiary matter. I have, however, arrived at the conclusion that I have no power to make the transfer. The power of transfer which I have is given to me by section 3 of the Companies (Winding-up) Act, 1890, which enacts that (sub-section 1) "the winding up of a company or any proceedings therein may at any time and at any stage, and either with or without application from any of the parties thereto, be transferred from one court to another court, or may be retained in the court in which the proceedings were commenced, although it may not be the court in which the proceedings ought to have been commenced."

Now, in my judgment the word "court" necessarily means a court having jurisdiction under the Act to wind up, and, in my judgment, I have no power to transfer these proceedings to the City of London Court unless that court has jurisdiction to wind up, for if it did not the order would be futile, and the City of London Court, notwithstanding the order of transfer, would have no jurisdiction to continue the proceedings. It seems to me that there is no jurisdiction, the matter being governed by the provisions to which I will presently refer.

Sub-section 5 of section 1 of the Companies (Winding-up) Act, 1890, provides that "the Lord Chancellor may, by order, exclude a county court from having jurisdiction under this Act, and, for the purposes of such jurisdiction, may attach its district, or any part thereof, to the High Court or to any other county court, and may revoke or vary any such order. In exercising his powers under this section the Lord Chancellor shall provide that a county court shall not have jurisdiction under this Act unless it has for the time being jurisdiction in bankruptcy." An order has been made by the Lord Chancellor, dated November 29, 1890, to the following effect:—"A county court which, at the time of the coming into operation of the Companies (Winding-up) Act, 1890, is excluded from having jurisdiction in bankruptcy, shall be excluded from having jurisdiction under the Companies (Winding-up) Act, 1890, until further order, and the district of any such county court shall, for the purposes of jurisdiction under the Companies (Winding-up) Act, 1890, be attached, until further order, to the court to which that district is attached at the time of the coming into operation of this Act for the purposes of jurisdiction in bankruptcy."

That being so, the question is whether the City of London Court was, at the time of coming into operation of the Act of 1890, excluded from having jurisdiction in bankruptcy.

Section 96 of the Bankruptcy Act, 1883, provides as follows:—"The London Bankruptcy District shall, for the purposes of this Act, comprise the City of London and the liberties thereof, and all such parts of the metropolis and other places as are situated within the district of any county court described as a metropolitan county court in the list contained in the third schedule." The City of London Court is not mentioned in the third schedule, but the district over which it has jurisdiction is part of the district referred to in section 96 of the Bankruptcy Act, 1883. It seems to me, therefore, that, the City of London Court having no jurisdiction to wind up, I have no power to transfer these proceedings to that court. Although the question is not raised on this summons, it has been suggested that the proceedings in the City of London Court in the matter of the Liberator Society should be transferred to this court. But in my opinion there is no power to make such a transfer.

That appears to be the effect of the decision of North, J., in *In re The London and Suburban Bank*, 40 W. R. 326, [1892] 1 Ch. 604, where he held that a society registered under the Industrial and Provident Societies Act, 1876, is not within the Companies (Winding-up) Act, 1890, and cannot be wound up under that Act, and that such a society can only be wound up by the proper county court under the provisions of the Act of 1876 and the County Court Acts. The county court is also the court having jurisdiction to wind up building societies registered under the Act of 1874. In these circumstances I cannot take any step to bring these two liquidations together in a manner which it would be a benefit to all persons concerned that they should be.

Solicitors, *Thorne & Welsford; Lawrance, Waldron, & Webster.*

Q. B. Div. (Pollock, B., and Hawkins, J.) Nov. 3.

COWAP (*Appellant*) *v.* ATHERTON (*Respondent*). (*a.*)

Licensing Acts—Sale during prohibited hours—"Bonâ fide traveller"—Licensing Act, 1874 (37 & 38 *Vict. c.* 49), *s.* 10.

A man left his home on a Sunday morning and walked three-quarters of a mile to a railway station, and thence took the train to another station about two and a half miles off, where he was employed as a porter. He afterwards left the station and walked to certain licensed premises, where he was served with beer. The licensed premises were less than a mile from the station where he was employed, but more than three miles from his residence.

Held, that he was a bonâ fide *traveller within section* 10 *of the Licensing Act*, 1874.

Special case stated by the justices for the County of Chester.

At a court of petty sessions held at Daresbury, in Cheshire, the appellant, the holder of a licence for the "Horns Inn," Little Leigh, was convicted of unlawfully selling intoxicating liquor to one Halsey

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

during the time when the appellant's licensed premises were required by the Licensing Act, 1874, to be closed, viz., at 9.45 a.m. on a Sunday. Halsey was a porter in the employ of the London and North-Western Railway Co. His place of employment was at Acton Bridge Station, but he resided at Hartford, at a distance of more than three miles from the appellant's licensed premises by the nearest public thoroughfare. Early on the Sunday morning in question Halsey left his home, where he had slept on the previous night, walked to Hartford Station, a distance of three-quarters of a mile, and thence took the train to Acton Bridge Station, which was about two miles and a half from Hartford Station. After 8 a.m. Halsey had an interval of two hours, during which he was free from his work, and he walked along the road from Acton Bridge Station to the Horns Inn, which was less than a mile from the station. He entered the appellant's licensed premises, and was served with bread, cheese, and beer. The justices convicted the appellant, but stated this case for the opinion of the court.

Poland, Q.C., and Pickford, for the appellant.

Wightman Wood, for the respondent.

The following cases were referred to in the course of the arguments:—*Oldham* v. *Sheasby*, 60 L. J. M. C. 81, 40 W. R. Dig. 124; *Dames* v. *Bond*, 55 J. P. 503; *Taylor* v. *Humphreys*, 9 W. R. 705; *Atkinson* v. *Sellers*, 28 L. J. M. C. 12, 7 W. R. C. L. Dig. 53; *Peplow* v. *Richardson*, 17 W. R. 410, L. R. 4 C. P. 168.

POLLOCK, B.—I am of opinion that this conviction was wrong, and must be quashed. The only question is whether a person who is travelling *bonâ fide* may prolong his journey for the purpose of obtaining refreshment. Whether that is done habitually or only on one occasion is immaterial. This man, having done his work, was, in my opinion, entitled to go on to the appellant's premises, which were more than three miles from his house, for the purpose of obtaining refreshment. That was done *bonâ fide* by him, and not for the purpose of tippling, and therefore he was a *bonâ fide* traveller within the words of the Act.

HAWKINS, J.—I am of the same opinion. If Halsey's account of the matter is true and honest, and we must assume that it is, the case comes directly within the law as laid down in *Oldham* v. *Sheasby*.

Conviction quashed.

Solicitor for the appellant, *Calley*, for *Browne*, Warrington.

Solicitors for the respondent, *Field, Roscoe, & Co.*, for *Greenal & Buckton*, Warrington.

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams, J.) — Oct. 28.

In re SMITH.
Ex parte MASON. (*a.*)

Bankruptcy—Receiving order—Arrears owed by debtor for gas — Discontinuance of supply by company—Refusal to continue supply at request of official receiver unless arrears paid—"Owner" or "occupier" of premises—Gas Acts, 1860 *and* 1871—*Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *ss.* 9, 70.

At the date of the receiving order the debtor was in arrear in respect of gas supplied to his premises during the previous quarter, and the company in consequence cut off the supply, and declined to reconnect it at the request of the official receiver until the arrears were paid. The official reciver paid the amount claimed under protest. On application by the trustee in the bankruptcy for repayment,

Held, that the official receiver could not be said to be owner or occupier of the premises within section 11 *of the Gas Act*, 1871, *and was, therefore, not entitled to call on the company to supply him with gas, and that the application of the trustee must fail.*

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

Application by the trustee in the bankruptcy for an order that a sum of £173, paid under protest by the official receiver to the South Metropolitan Gas Co., should be repaid.

The debtor, John Smith, was the owner of the Bon Marché at Brixton, and a receiving order was made against him on the 22nd of February, 1892.

The debtor was in arrear for the gas used in his business in respect of the quarter ending at Christmas, 1891, in the sum of £173 due to the South Metropolitan Gas Co., and on the 20th of February, 1892, he sent a cheque for the amount to the company.

This cheque was not presented at the bank until the 24th of February, 1892, after the receiving order had been made, and payment was in consequence refused.

An officer of the gas company thereupon called at the debtor's premises in respect of the matter, and on the debtor signifying his inability to give cash for the cheque, the company cut off the gas.

Information of this was given by the debtor to the official receiver, who wrote to the gas company guaranteeing payment for any future supply, but the company declined to reconnect the gas until the arrears had been paid.

The official receiver eventually paid the £173 under protest, and application was now made by the trustee in the bankruptcy for the repayment of this sum.

Tindal Atkinson, Q.C., and *Muir Mackenzie*, for the trustee.—The question turns really upon the construction of the sections of the Gas Acts. The section mainly applicable is section 11 of the Act of 1871, which provides that the undertakers shall, upon being required so to do by the owner or occupier of any premises, give and continue to give a supply of gas for such premises, subject to certain conditions. I do not think it can be argued that the official receiver could be said to be the "owner," but I submit he falls within the word "occupier" of the premises. If the official receiver was occupier he had a right to demand a supply of gas and the company was bound to supply it. The position of the official receiver is defined by section 70 of the Bankruptcy Act, 1883, and he can fairly be described as the occupier of the estate. The business is very frequently no longer managed by the debtor, and he might really leave it.

They referred to the Metropolitan Gas Act, 1860, ss. 14, 17, 19, and to *In re Thomas*, 36 W. R. 143, 4 Morrell's Bankruptcy Cases, 295.

Herbert Reed, Q.C., and *Mellor*, for the South Metropolitan Gas Co.—The *status* of a person against whom a receiving order is made has been decided. His property is not divested: *Rhodes* v. *Dawson*, 34 W. R. 240, 16 Q. B. D. 548. The wording of the Gas Acts is really conclusive of the present case. The official receiver cannot in any sense be called an occupier.

VAUGHAN WILLIAMS, J.—I have come to the con-

clusion that the gas company are right in their contention in this matter, and that the trustee is wrong. No doubt if the matter were to come before the Legislature again strong arguments would be urged for acquiring some provision to enable a receiver, under the circumstances of the receiver in the present case, to insist on a supply of gas without paying the arrears of the debtor against whom the receiving order is made. But I have no right to strain the Act of Parliament, and to insert into it by construction provisions which are not there in fact. It is conceded that the official receiver is not entitled to call on the gas company to supply him with gas unless he is an occupier or owner within the meaning of section 11. It is also conceded that there cannot be two owners or occupiers of the same undivided premises at the same time. That being so, it is plain the official receiver cannot claim the supply of gas as such official receiver unless he can say that the occupation of the debtor has determined. It is plain that the occupation of the debtor has not determined. The case of *Rhodes* v. *Dawson* shows that his estate is unaltered by the making of the receiving order. The same premises continue to be vested in him as before. But it was further said that the contract had been put an end to. I do not agree to that. Therefore we have it that the estate remained the same and the contract remained the same, and by that it seems to me that the occupation of the debtor remains the same. I do not know whether there might be a possible case where a debtor might abscond and leave his premises vacant under such circumstances that he would no longer be occupier. But there is no suggestion of that here, and the debtor was occupier in fact, notwithstanding the making of the receiving order and consequent appointment of the official receiver by virtue of the statute. The motion of the trustee must, therefore, be refused.

Application refused.

Solicitor for the trustee, *T. A. Bartrum.*

Solicitors for the gas company, *Hickling Washington, & Pasmore.*

C. C. R.
(Lord Coleridge, C.J., A. L. Smith, L.J., Pollock, B., and Cave and Bruce, JJ.) Aug. 6, 1892.

REG. *v.* VILLENSKY. (*a.*)

Criminal law—Receiving stolen goods—Resumption of possession by the prosecutor after discovery of the larceny—Subsequent receiving—24 & 25 Vict. c. 96, s. 91.

Goods were intrusted to carriers for delivery to a consignee; it was discovered by the carriers that one of their servants had stolen them in transitu, *and had re-addressed them to the prisoners. The carriers ordered another servant of theirs to deliver them to the prisoners at the place to which the thief had addressed them, and placed them in a van for the purpose of such delivery. The goods were accordingly delivered to the prisoners, who received them knowing that they had been stolen. In the indictment the property in the goods was laid in the carriers.*

Held, that the carriers had resumed possession of the goods, and that, therefore, when the prisoners received them they were not stolen property, and the prisoners could not be convicted of feloniously receiving them.

R. *v.* Dolan, *Dears. C. C.* 436, *followed.*

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

Case stated by the chairman of the Court of Quarter Sessions of the county of London, as follows:—

Jacob Villensky and Mark Villensky were charged before me upon an indictment charging them with having feloniously received two dozen nightgowns of the goods and chattels of Carter, Paterson, & Co., before then feloniously stolen. Clark, the actual thief, pleaded "guilty" to the first count in the same indictment, charging him with the larceny of the same goods from Carter, Paterson, & Co.

It appeared from the evidence that the goods in question were packed in a parcel consigned by Messrs. McIntyre & Co., of the City of London, to Messrs. Crisp & Co., of Holloway, and the parcel was delivered by the consignors to Carter, Paterson, & Co., who are common carriers, for conveyance to the consignees. At the time of its delivery to the said carriers it had an address label upon it showing the name of the consignors as well as of the consignees.

In the ordinary course it arrived at the Goswell-road depôt of Carter, Paterson, & Co., and there also in the ordinary course it was, together with many other parcels, unloaded from the van in which it had been brought. Clark (the co-defendant who pleaded "guilty" to the larceny) was a carman in the employ of Carter, Paterson, & Co, and took part in the unloading, and was seen by Roberts, a fellow-servant, to remove the parcel from that part of the unloading platform which was appropriated for Holloway parcels and transfer it to the part appropriated for Spitalfields parcels.

Roberts, on examining the parcel, found on it a label addressed to "Jacobs & Co., Hanbury-street, Spitalfields." The prisoner Jacob Villensky resided and carried on business there as a chandler with the other prisoner Mark Villensky (who is his son), and it appeared that they were known by the name of "Jacobs."

Roberts reported to Carter, Paterson, & Co.'s superintendent, Mr. Waters, his finding of the parcel thus addressed.

Mr. Waters inspected it, and gave directions that it should be replaced in the Spitalfields part of the platform where Roberts had found it, and that a special delivery-sheet should be made out according to the label, "Jacobs & Co., Hanbury-street, Spitalfields," and that the parcel should be forwarded in a van to that address. In consequence of further directions from Mr. Waters two detectives travelled in the van to Hanbury-street. It did not appear that either Mr. Waters or Roberts knew at this time who were the consignees to whom the parcel had been addressed, and neither the consignors nor the consignees were informed of the substitution of the false address, nor of the consequent action of Mr. Waters, nor was Clark, the thief, informed of it.

The parcel was received by both the Villenskys in Hanbury-street under circumstances pointing clearly to the conclusion of complicity with the co-defendant Clark, and knowledge on their part that it had been stolen.

Upon that point no question arises.

At the conclusion of the evidence I inquired of the counsel for the prosecution whether he would desire that the indictment should be amended by substituting the names of the consignees, Crisp & Co., as the owners of the property for those of the bailees, Carter, Paterson, & Co. He declined to ask for any amendment.

Counsel for the defence then objected that there was no case to go to the jury, inasmuch as at the time the parcel was received by the Villenskys it had ceased to be stolen property, the bailees, Carter,

Paterson, & Co., having recovered actual possession of it.

He cited, in support of this view, *R.* v. *Dolan*, Dears. C. C. 436, and *R.* v. *Schmidt*, 14 W. R. 286, L. R. 1 C. C. R. 15.

It appearing to me, however, that the present case was distinguishable from those, I overruled the objection, and I drew attention to the definition of the offence and to the words in the indictment following the statute "before then feloniously stolen" and "knowing the same to *have been* feloniously stolen."

The jury convicted both the Villenskys of feloniously receiving, but I postponed sentence and admitted them to bail pending the decision of the Court for the Consideration of Crown Cases Reserved upon the validity of the objection taken.

The question for the opinion of the court is whether that objection is, upon the facts above stated, a valid one or not. If valid the conviction to be quashed, if not valid it will stand.

Slade Butler, for the prisoner, cited *R.* v. *Dolan*, and was stopped by the court.

G. M. Cohen, for the prosecution.—The goods here had not come back into the possession of the owners; that distinguishes the present case from *R.* v. *Dolan* and *R.* v. *Schmidt*, and the conviction should stand.

Lord COLERIDGE, C.J.—I think that this case is perfectly clear, and is covered by the case of *R.* v. *Dolan*. The prosecution, no doubt, have all the morals on their side, but unfortunately the law is not with them. The goods were stolen in the first instance, but the carriers, in whose name the prosecution was carried on, took them back and sent them away in a special van, giving instructions to their carter as to their delivery, and sending two detectives with them. It is perfectly clear that by this action they resumed possession of the goods, and, therefore, that the conviction cannot stand.

A. L. SMITH, L.J.—The only question is whether at the time the prisoners received these goods they were stolen property. That they were at first stolen there is no doubt, but the prosecutors afterwards resumed possession, and therefore when the prisoners received the goods they were not stolen.

POLLOCK, B.—I am of the same opinion. The case is concluded by *R.* v. *Dolan*, which seems to me to be not only good law, but sound sense also. To say that these prisoners can be convicted of feloniously receiving these goods because the words of the Act are "knowing the same to have been feloniously stolen" would be to make it an offence to receive goods which have at any past time been stolen.

CAVE, J.—I am of the same opinion. *Dolan's case* is directly in point, and is an authority with which I entirely agree.

BRUCE, J.—I agree.

Conviction quashed.

Solicitor for the prisoner, *D. A. Romain.*

Solicitor for the prosecution, *James Popham.*

Court of Appeal

From Q. B. Div. (Lindley and Bowen, L.JJ.) [and Q. B. Div.] — Dec. 8.

JAY *v.* JOHNSTONE. (*a.*)

Limitation, Statutes of—Judgment debt—3 & 4 *Will.* 4, *c.* 27, *s.* 40—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8—*Judgments Registration Act*, 1864 (27 & 28 *Vict. c.* 112).

Notwithstanding the Act 27 & 28 *Vict. c.* 112, *judgments come within section* 8 *of the Real Property Limitation Act*, 1874, *and, in the absence of part payment or acknowledgment in writing, are barred by the lapse of twelve years.*

Appeal from an order of Bruce, J., at chambers, refusing leave to the personal representatives of the deceased plaintiff to continue proceedings upon a judgment obtained against the defendant in 1878, upon the ground that the judgment debt was barred by section 8 of the Real Property Limitation Act, 1874, the question being whether an ordinary judgment debt was barred after twelve years.

The action was tried in 1878 before Thesiger, L.J., and a jury at Cambridge, and resulted in a verdict and judgment for the plaintiff for a sum of about £5,000. Proceedings had never been taken to enforce this judgment, nor had there been any acknowledgment or part payment.

In 1881 the plaintiff died, and in 1891 the defendant died. The executors of the defendant had become possessed of a large sum of money, and the personal representatives of the plaintiff now sought leave to be added as parties to, and to continue, the proceedings on the judgment obtained in 1878. The executors of the defendant resisted this application, and the master refused the application on the ground that the judgment debt was barred after the lapse of twelve years by reason of section 8 of the Real Property Limitation Act, 1874. The representatives of the plaintiff appealed.

Section 8 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), provides: "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued," &c.

The appeal was heard on the 1st and 2nd of November, 1892.

Montague Lush, for the appellants.—The question is whether the limitation applicable to ordinary personal judgments, such as the present, is twelve years, as provided by section 8 of the Act of 1874, or whether it is not twenty years. Section 40 of 3 & 4 Will. 4, c. 27, was identical with section 8 of the Act of 1874, except that in the Act of Will. 4 the period of limitation was twenty years, whereas in section 8 of the Act of 1874 it is twelve years. Otherwise the two sections are identical. The Act 3 & 4 Will. 4, c. 27 referred exclusively to land, and the reason why judgments came under the twenty years' limitation in section 40 of that Act was because all judgments were then a charge upon land. From the time of the Statute of Westminster the Second, to the 27 & 28 Vict. c. 112, passed in 1864, judgments were a charge upon land, and became so, the moment

(*a.*) Reported by R. C. MACKENZIE, Esq., and Sir SHERSTON BAKER, Barristers-at-Law.

the judgment was signed. So that when the Act 3 & 4 Will. 4, c. 27 was passed all judgments were a charge upon land; and when Shadwell, V.C., in *Watson* v. *Birch*, 15 Sim. 523, decided that the word "judgment" in section 40 of 3 & 4 Will. 4, c. 27, applied to judgments generally, whether they affected land or not, the reason of that decision was that at that time all judgments were a charge upon land. In 1864 the 27 & 28 Vict. c. 112 was passed, and section 1 of that Act declared that judgments should no longer bind the land, until the land had been actually delivered in execution. Henceforward judgments ceased to be a charge on land, and the reason of the decision of the Vice-Chancellor in *Watson* v. *Birch* no longer applies. With the knowledge of this Act before them, the Legislature in passing the Act of 1874 might have expressly said that the word judgment there included all judgments, whether a charge on land or not. But they did not do so, which shows that they did not intend that judgments generally should be included in the Act of 1874. When Collins, J., decided this point in *Hebblethwaite* v. *Peever*, 40 W. R. 318, [1892] 1 Q. B. 124, he did so on the authority of *Watson* v. *Birch*, which is no longer applicable. The proper period of limitation is twenty years, as provided by section 3 of 3 & 4 Will. 4, c. 42 for actions of covenant or debt upon any bond or other specialty.

Finlay, Q.C., and *Eve*, for the respondents.—The case comes within section 8 of the Act of 1874, and the limitation applicable is twelve years. When a legal term has received a judicial interpretation, and when the Legislature afterwards uses that term, it must be taken that they have used the term in the meaning placed upon it by the judicial decision. This canon of construction was laid down by the Court of Appeal in *Greaves* v. *Tofield*, 28 W. R. 840, 14 Ch. D. 563. Applying that here, we find that in 1847 Shadwell, V.C., in *Watson* v. *Birch*, held that "judgment" in section 40 of 3 & 4 Will. 4, c. 27, applied to judgments generally; therefore, when in 1874 the Legislature reproduce in section 8 of 37 & 38 Vict. c. 57 the identical words of section 40 of the Act of Will. 4, and use the same word "judgment," it must be taken that they so use the word with the judicial meaning already placed upon it by Shadwell, V.C. This shows that section 8 of the Act of 1874 applies to all judgments. As to the argument that the limitation applicable here is the twenty years given by section 3 of 3 & 4 Will. 4, c. 42, it must be remembered that this Act was passed in the same year, and soon after the 3 & 4 Will. 4, c. 27, which expressly dealt with judgments, and it is inconceivable that, when the Legislature had expressly dealt with judgments in section 40 of chapter 27 of 3 & 4 Will. 4, they should also intend judgments to be included in section 3 of chapter 42, without any mention whatever of judgments in that section.

They referred to *Sutton* v. *Sutton*, 31 W. R. 369, 22 Ch. D. 511; *Ex parte Tynte*, 28 W. R. 767, 15 Ch. D. 125; and *Hebblethwaite* v. *Peever*.

Lush, in reply.

Lord COLERIDGE, C.J.—This case has been argued extremely well by Mr. Lush, but I confess I am unable to see any answer to the very short judgment I am about to pronounce, which appears to me to be founded upon principle and authority. The Act of 1874 limits the time for bringing actions and proceedings upon judgments to twelve years. It does that by way of reference to an Act of Will. 4, which had given twenty years. It is a well-known principle of construction, sanctioned by the Court of Appeal in *Greaves* v. *Tofield*, that where a subsequent Act uses a legal term, and that legal term has had put upon it a judicial interpretation, the Legislature uses the legal term in the sense affixed to it by legal interpretation. 'Judgment' in the Act of Will. 4 has received from Shadwell, V.C., such an interpretation. The word so interpreted is used by the Legislature in 1874, and it must be taken that the Legislature used the word 'judgment' in the sense in which Shadwell, V.C., construed it—that is to say, as including a judgment such as is now in dispute. I think that argument is clear and conclusive.

It is said, however, that there is an intermediate Act between the Act of Will. 4 and the Act of 1874, which has for certain purposes altered the word "judgment," and made the word "judgment" not to include land, and that, therefore, although this interpretation was placed on the word by the Vice-Chancellor in 1847, when it is said that judgments were a charge upon land, the same interpretation ought no longer to be placed on it as a judgment is no longer a charge on land. That result would be to my mind absurd; we must proceed upon certain well-known legal principles, and it seems to me that having got a decision founded on the grounds I have stated, the intermediate Act, which says nothing about limitation, does not affect limitation. Then we have a subsequent Act using the very same words as the Act of Will. 4, and this subsequent Act is to be construed according to legal principles by the light of legal interpretation. The Act of Parliament makes an end of the case, and ascertains that twelve years is for this sort of judgment, as well as for every other sort of judgment, the time in which the action or proceeding is to be brought. Not only are we proceeding upon well-known principles, but we have the authority of Shadwell, V.C., an authority never disputed since that time, and we have also a careful judgment of my brother Collins (*Hebblethwaite* v. *Peever*) to the same effect. We are therefore deciding in accordance with law, in accordance with the established principle of construction, and in accordance with the two decided cases. I think, therefore, the appellants' view must fail.

WILLS, J., concurred.

The representatives of the plaintiff appealed.

Witt, Q.C., and *Montague Lush*, for the appellants.—When the 3 & 4 Will. 4, c. 27, was passed judgments were charges on land. By 27 & 28 Vict. c. 112 they ceased *per se* to bind the land: *Sheppard* v. *Duke*, 9 Sim. 567; *Watson* v. *Birch*; *Sutton* v. *Sutton*; *In re Frisby, Allison* v. *Frisby*, 38 W. R. 65, 43 Ch. D. 106; *Hebblethwaite* v. *Peever*; *Willaume* v. *Gorges*, 1 Camp. 217; *White* v. *Parnther*, 1 Knapp. 179; *Henry* v. *Smith*, 2 Dr. & War. 381; *Hunter* v. *Nockolds*, 1 Mac. & G. 640. Under 3 & 4 Will. 4, c. 42 you have twenty years on a specialty. Therefore, if you have only twelve on a judgment, you will, by obtaining judgment on a covenant, shorten the period of limitation from twenty years to twelve. [LINDLEY, L.J.—There is no doubt that the Act 3 & 4 Will. 4, c. 42 was passed over by the Legislature. I do not know if it was intended or not.] In the case of a judgment for payment by instalments, time would run from the date of the judgment, not from the date when an instalment became payable; for there may be "a present right to receive" before there is a present right to enforce: *Hornsey Local Board* v. *Monarch Investment Building Society*, 38 W. R. 85, 24 Q. B. D. 1. If the respondents are right, nothing a creditor can do will stop the statute from running, unless he gets part payment or acknowledgment in writing, or

brings a new action. In no case between 1864 and 1874 was the question ever raised.

Finlay, Q.C., and *Eve*, for the respondents, were not called on.

LINDLEY, L.J.—This appeal is brought from a decision of the Divisional Court, and the question raised is an extremely important one—namely, whether any proceedings can be taken to enforce a judgment after the lapse of twelve years, there having been no payment or acknowledgment. Certainly there are difficulties arising from the course the Legislature has taken in dealing with the subject, and it is necessary to say a few words about the course of legislation. In the year 1833 Parliament, for some reason or other, passed two Acts relating to limitation. One was 3 & 4 Will. 4, c. 27, which relates to actions for the recovery of land, and also (section 40) to actions for the recovery of money. Then there is 3 & 4 Will. 4, c. 42, another Act which relates to specialties and certain other debts. Why the two were not blended in one I do not know, nor did it matter, because the time limited for the recovery of both classes of debts, and for bringing both classes of actions, was the same—namely, twenty years.

Whilst that was the state of the law the question arose, and came before Shadwell, V.C., which is the Act of Parliament which governs judgments? "Judgment" is specially mentioned in 3 & 4 Will. 4, c. 27, and not in the other Act, though, being a specialty, it might be, and *primâ facie* would be, included in 3 & 4 Will. 4, c. 42. But Shadwell, V.C. (in *Watson* v. *Birch*), determined that, upon the true construction of these two statutes, the statute which related to judgments was 3 & 4 Will. 4, c. 27, s. 40. Taking that view, he held that a judgment twenty years old could not be enforced even as against the personal estate of the judgment debtor. So he construed the Act in this way: not only cannot you enforce it against his real estate, but you cannot enforce it against his personal estate. That has been accepted and acted upon by everybody without question ever since, and the law, as settled by that decision and by other decisions which followed it, was to the short effect that under that Act a judgment was barred after twenty years.

Now it is very true that in 1833 and long afterwards judgments were charges on real estate and payable out of real estate, and it is very true that by reason of a change in the law relating to the registration of judgments a modification was introduced. In 1864 the law relating to the registration of judgments, which was well known to be extremely intricate and extremely troublesome, was simplified, and a judgment ceased to be a charge on land. Instead of it the writ of *elegit* was registered, and then, and not before, was there any charge in respect of the judgment debt; the practical effect of which was to render it unnecessary for purchasers of land to search for judgments. All they had to do was to search for writs; and another alteration was that a judgment *per se* did not operate as a charge so as to entitle a judgment creditor to priority. But it would have been straining the Act 27 & 28 Vict. c. 112, which was passed for the purpose, and for the sole purpose, of improving the law relating to registration, to construe it so as to give effect to a totally different matter—namely, to alter the time within which a judgment could be enforced. So that I apprehend that, notwithstanding the alteration made in the registration of judgments by the Act of 1864 (27 & 28 Vict. c. 112), the true construction of the Act 3 & 4 Will. 4, c. 27, was in no way altered. There is no case which shows that after the Act 27 & 28 Vict. c. 112 the construction of the Act of 1833 was altered, and I do not think it was.

Now we come to the Act of 1874, which is the present Act relating to the time for enforcing judgments. The key to that Act of Parliament is to be found, not in section 8, but in the preamble and in section 9. The preamble is this: "Whereas it is expedient further to limit the times within which actions or suits may be brought for the recovery of land or rent, and of charges thereon." Section 9 says: "From and after the commencement of this Act," 3 & 4 Will. 4, c. 27 "shall remain in full force, and shall be construed together with this Act, and shall take effect as if" the period of twelve years had been substituted in such Act instead of the period of twenty years. The purpose is as clear as it can be. It is to substitute twelve years for twenty years in certain sections (including section 40) of the previous Act. It is not to change the meaning of the words used in the old Act, but to preserve it. I do not say that that is the whole, for there is a section relating to trusts, which has nothing to do with the case before us. Section 8 of the Act of 1874 is the one which more immediately applies to this case. Section 8 simply repeats the old language of 3 & 4 Will. 4, c. 27, s. 40, and runs thus [the Lord Justice read the section, and continued:—] There is not a sign of any intention to alter the meaning of any of the words in that section and give them a meaning which they had not got, except to substitute twelve years for twenty years. The answer to the very ingenious argument we have heard is this, that it proceeds upon a mistake as to the effect of the Act of 1864 and upon a mistake in construing that Act so as to affect the Statute of Limitations, with which it had nothing at all to do. The argument is this, that in 1864 judgments ceased to be charges on land and therefore the Statute of Limitations ceased to affect them. But the fact is that in one sense they continued to be charges on land. That is the point. I am conscious of the perplexity in which people are put by the present state of the law on this subject. The cause of that perplexity is that in 1833 Parliament passed two Acts dealing with limitation, and that it has since altered one of them, but not the other. To adopt this argument would be to produce an effect never dreamt of by any one, and would be to reverse the course of decision for the last fifty years.

BOWEN, L.J.—I am of the same opinion.

Solicitor for the appellants, *H. J. Comyns*.

Solicitors for the respondents, *Eardley Holt, Hulbert, & Hussey*.

From Q. B. Div. (Lindley, Bowen, and A. L. Smith, L.JJ.) — Nov. 29.

SIMON & CO. v. SEDGWICK. (*a*.)

Insurance, marine—Voyage—Risk—Distinction between insured voyage and risks insured—Deviation clause.

In construing an open policy of marine insurance in order to ascertain what risks are covered by the policy, it must first be ascertained what the voyage insured is. If the goods lost never were upon the insured voyage, then the policy never attached; and the fact that the policy contains a deviation clause is immaterial.

Consignors, at Bradford, of the goods in question, effected, through their agents at Liverpool, a marine policy of insurance from the Mersey to any port in Portugal or Spain "this side Gibraltar, and (or) at and

(*a*.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

from thence to any place in the interior, including all risks by any conveyance whatsoever from the time of leaving the warehouse in the United Kingdom until on board, . . . and all risks of every kind until safely delivered at the warehouse of the consignees." The policy contained the following marginal clause:—"Deviation and (or) change of voyage . . . not included in the policy, to be held covered at a premium to be arranged." The consignees were merchants at Madrid, and the consignors intended that the goods should be shipped at Liverpool for Seville and carried thence by land to Madrid. By the blunder of the consignors' agents the goods were in fact declared and shipped at Liverpool on board a vessel bound only for Carril and Huelva, on the west coast of Spain, and for Carthagena and other ports on the east coast of Spain. The bills of lading of the goods in question were made out for Carthagena. The consignors only discovered the mistake after the vessel had sailed. The vessel was lost between Liverpool and Carril, a part of the voyage common to vessels bound either for the west or the east coast of Spain.

Held, that the goods in question never were upon the insured voyage; that, consequently, the policy never attached; and that the underwriters were not liable to pay the consignors the amount of the goods in question.

Appeal by the plaintiffs from the judgment of Wright, J., at the trial of the action without a jury.

The action was brought on a marine policy of assurance on merchandise and sundries "as interest may appear or be hereinafter declared . . . lost or not lost at and from the Mersey or London to any port in Portugal and (or) Spain this side Gibraltar, and (or) at and from thence by any inland conveyances to any place or places in the interior; including all risks by any conveyance whatsoever from the time of leaving the warehouse in the United Kingdom until on board, in craft to or from vessel or vessels, of lighters on the rivers or elsewhere, of fire whilst awaiting shipment in docks, warehouses, hulks, or elsewhere, and (or) in transit of transhipment, of steam navigation, and all risks of every kind until safely delivered at the warehouses of the consignees, and including all liberties per bills of lading . . . of and in the good ship called. . . ." The policy contained the following marginal clause: "Deviation and (or) change of voyage, and (or) transhipments, not included in this policy, to be held covered at a premium to be arranged."

The plaintiffs in the action were manufacturers at Bradford, and the policy (which was an open policy and in the ordinary Lloyd's form) was made out in the name of insurance brokers on behalf of the plaintiffs; the defendants were the underwriters of the policy. The policy was dated the 18th of February, 1891. On the 27th of February and on the 2nd of March, 1891, the plaintiffs forwarded to Liverpool four packages (forming the subject-matter of the present action) of goods; the first package was sent by the Leeds and Liverpool Canal, and the other three by rail. The consignees of the goods were merchants at Madrid. The plaintiffs instructed their agents at Liverpool to insure the goods, and stated that the goods were going from Liverpool *viâ* Seville to Madrid. The plaintiffs' goods were, in fact, through some blunder, shipped by the plaintiffs' agent on board the vessel *Lope de Vega* (and the name of that vessel was afterwards—viz., on the 18th of March declared, and inserted in the policy) to be delivered to the consignees at Carthagena. The voyage of *The Lope de Vega* was first for Carril and Huelva on the west coast of Spain, and thence for Malaga and Carthagena on the east coast of Spain. She sailed from Liverpool bound for those places on the 7th of March, and was lost between Liverpool and Carril.

The plaintiffs claimed £425, the amount of their interest under the policy in respect of the four packages of goods.

Wright, J., at the trial of the action, gave judgment for the defendants.

The plaintiffs appealed.

Cohen, Q.C., and *English Harrison*, for the appellants.—The goods were shipped for Carthagena. The vessel by which they were shipped was totally lost before it got to Carril, a port on the west coast of Spain. The goods are covered by the policy: *Rodocanachi* v. *Elliott*, 21 W. R. 810, L. R. 8 C. P. 649. [They were stopped.]

Joseph Walton, Q.C., and *Archibald H. Hamilton*, for the respondents.—The policy only attached to goods shipped from the Mersey to a port in Spain or Portugal this side Gibraltar. [A. L. SMITH, L.J.—Suppose the goods were lost in the canal going from Bradford to Liverpool; do you say the policy does not attach?] Yes; the policy would not then cover the goods, as there had been no appropriation of a shipment from the Mersey to a port in Spain or Portugal this side Gibraltar. The goods must have been forwarded on the voyage which the policy was intended to cover in order that the policy should attach. The voyage must be first defined before the words "excluding" or "including" become applicable. The policy is a marine policy, and it is marine risks substantially that are insured against. The governing words are those which limit the risks to marine risks, and the other words are subsidiary. If the marine voyage had been abandoned altogether, could it be said that the policy attached? A voyage means primarily the sea transit from one port to another; though the risks covered would include as well subsidiary risks inland.

Cohen, Q.C., in reply.—The *terminus ad quem* has never been altered, and unless the other side can show that the *terminus ad quem* was abandoned the policy attaches. [BOWEN, L.J.—It is put against you that it was an essential part of the *terminus ad quem* that the goods should be unloaded at a port this side Gibraltar. There may be more than one terminus; there may be a marine terminus and a land terminus, but the marine terminus is to govern.] The insured voyage is that in respect of which the underwriters insured the risk. The policy here includes the risks from any place in the United Kingdom to Liverpool, and the insured voyage would be included therein. The goods were on the insured voyage the moment they left Bradford.

LINDLEY, L.J.—[The Lord Justice read the policy above set out, and also the marginal clause therein, and proceeded:—] The real question we have to consider is whether this policy did, or did not, ever attach to the goods sent by the person for whom this policy was effected from Bradford, under the following circumstances: The goods were intended by the merchants (the plaintiffs) to go to Madrid; and I think the correspondence shows that they were intended to go to Madrid by the mode in which similar goods of the plaintiffs had gone before—*i.e.*, *viâ* Liverpool and Seville. Unfortunately these goods were not shipped from Liverpool to any port west of Gibraltar, but by some blunder they were shipped to a port east of Gibraltar—namely, Carthagena, one of the places to which the vessel on which they were shipped was going. That port was not a port such as is described in the words of the policy—*i.e.*, "a port in Portugal or Spain this side Gibraltar." The ship was lost between Liverpool and Carril; the ship was going first to Carril and then, as I understand, to a port in the south, which would be the place for

discharging the goods if they were going to Seville, then the ship was going on through the Straits of Gibraltar to Carthagena and other places.

Mr. Cohen says that, upon the true construction of this policy, it was a policy from Bradford to Madrid. If it be so, then I think his opponents do not deny that the underwriters would be liable; but it is contended on their behalf that this is not a policy from Bradford to Madrid at all, and after consideration, I have come to the conclusion that the view of the underwriters is right, for the following reasons.

What are the risks included in the above policy? It is an insurance from the Mersey to some port in Spain this side Gibraltar, and unless these goods were insured for that voyage there is nothing to bring in these risks at all. The argument for the plaintiffs must first start with this, that the goods were insured from Liverpool to some place this side Gibraltar. They never were, and the plaintiffs cannot extend the policy to cover risks not included in the voyage for which these goods were insured. That appears to me to be the short and conclusive answer to Mr. Cohen's argument. In other words, this policy is not a policy from Bradford to Madrid, and the plaintiffs are unable, by reason of the blunder which has been committed, to bring themselves within the risks which are included in a voyage for which these goods are insured. I think the view taken by Wright, J., is right. I did not take the same view at first, but I do now. I think this policy never attached, and, that being so, the marginal clause about deviation or change of voyage does not affect the case.

BOWEN, L.J.—I am entirely of the same opinion. The real fate of the appeal depends upon the answer we give to the question, "Did this policy ever attach?" The policy when construed seems to me to be tolerably clear. We start with this, that the policy is a marine policy to begin with—a land journey being superadded to it, but forming part of the entire journey which the goods are to make, and the duration of the risk becomes applicable accordingly to the entire journey.

The first thing we have to do is to discover what the voyage or journey is which is to be insured. We must do that in order to see what voyage or journey the duration of risk is applicable to, in order to consider what risks are included by enumeration under the policy.

The voyage is a distinct thing altogether from the enumeration of the risk. The voyage here seems to me to be fixed by words which it is impossible to extend, and which it is impossible to misunderstand. It is, "At and from the Mersey and (or) London, both or either to any port or ports in Portugal and (or) Spain this side Gibraltar." So much for the words which define the initial marine transit, to which is superadded the land transit, "and (or) at, and from, thence by any inland conveyance to any place or places in the interior, including all risks by rail and per steamer between Lisbon and Oporto." It seems to me that the terminus with which the voyage or journey begins is the "Mersey and (or) London, both or either." Then there is a terminus with which the marine transit is to end, which is an essential part of the definition of this journey, "To any port or ports in Portugal, and (or) Spain this side Gibraltar." Again, there is a further terminus, which is fixed for the land journey, which is superadded, "any place or places in the interior." Now the policy remains to a great extent a marine policy; it is not a marine policy which ends as soon as the sea is crossed, but a marine policy to which is superadded a land transit which is intended to be covered by the period during which the goods are to be protected. But the voyage is defined as clearly as a voyage can be defined.

Now we all know the general history of the extension of the protection which the policy provides for the goods, by the enumeration of risks slightly outside the marine transit. Mr. Hamilton referred to that, and I think he was correct in saying that it was by slow growth that risks outside the sea journey have been swept under—so to say—the shelter of the policy. In fact, as no one can recollect better than Mr. Cohen—at the time of the French War, twenty years ago—the common form of policy was a point which gave rise to the greatest interest on the part of the profession, and many lawyers were consulted about that particular form of policy and the liabilities it was supposed to create. But the truth is that in construing the whole of the obligations and protections to which the policy applies, you must first keep distinct in your mind what the voyage is, and what the definition of the risks. One arrives first at the definition of the voyage, and then applies the definition of the voyage to the enumeration of the risks.

Now, here the goods started from Bradford, and it has been contended that the moment they started from Bradford they were upon the insured voyage. If the goods had ever been upon the insured voyage, it seems to me that the risk during the time that they were between Bradford and Liverpool would have been covered as incidental to and supplementary to the insured voyage. But we have here a conclusive fact that the goods never were upon the insured voyage. Accordingly the risk between Bradford and Liverpool never could be incidental or supplementary to it. It is not necessary to decide what would have been the case supposing the goods, after having been specifically appropriated by a contract of carriage to the insured voyage, were injured or lost during the transit between Bradford and Liverpool. It is not necessary to decide that case. In this case the facts here show conclusively that the goods were never specifically appropriated to the insured voyage, because the person who had the control of the goods—the person who had the power of fixing the voyage on which the goods were ultimately to go—fixed the voyage outside the policy; and if that is so, the policy never attached, and it follows that the clause as to deviation and change of voyage cannot affect it.

Now it has been said that this is a technical point. The particular case certainly seems a hard case. But it is a most important one, from a business point of view. I cannot conceive a more important point, nor can I conceive one which might lead to more mischief if we were to loosely construe this contract in order to assist a particular owner of goods. We cannot do that when we are dealing with an insurance contract. Men of business depend upon a correct interpretation of the law, and we shall be adopting a course which in the long run is more conformable to justice and fair dealing if we keep it to its channel, than if we in any particular case stretch the law in order to protect a particular plaintiff.

SMITH, L.J.—This is an action brought under a Lloyd's policy to recover for a total loss of goods at sea. That is the claim. The defence is that the goods never were upon the voyage insured by the policy, and were never covered by the policy, and that the policy therefore never attached. That is the issue. Wright, J., has held that the defendants are right; and, although at first sight this does appear, considering the facts of the case, a somewhat technical defence, I quite agree with what has fallen from Bowen, L.J., that that does not make it any the less incum-

bent upon us to put the proper construction upon this policy. Now a good deal of this policy is in the old form, as far as I can gather, and the point to ascertain first of all is, What is the voyage covered by the policy, in order to ascertain whether the policy attaches to the goods in question.

Now this policy begins that the plaintiffs are insured at and from the Mersey to the west coast of Spain, and (or) at and from the west coast of Spain to places in the interior of Spain. Now, that is the voyage which is contemplated in this policy. Then how does the policy go on? When you get what the voyage is, then come the risks which are to be included in that voyage; and as I read this policy, when you once get the goods upon the voyage in question, then the risk which the underwriters undertake covers the risk from the warehouse to the ship in this country, and from the ship to the warehouse in the other country. But unless you get the goods started upon, or allocated by contract—as Bowen, L.J., says, and I adopt that phrase—to go upon the insured voyage, in my judgment this policy does not attach. Now it is said here that this policy attached, no matter what voyage the goods ultimately might go upon, immediately the goods left Bradford. I do not read the policy in that way at all; until you get the contemplated voyage, and the goods upon that contemplated voyage, in my judgment this policy does not attach; and it is a mistake to read in here that this policy is at and from Bradford to the east coast of Spain. It is at and from the Mersey to the west coast of Spain, and when you get that voyage, then it is that the risks attached to the goods between Bradford and the Mersey. It seems to me that until this policy attached—and this is conceded on both sides—the marginal clause about deviation and change of voyage does not apply at all. In my opinion Wright, J., was right in holding that the underwriters' defence was correct, and that these goods never were at risk upon the insured voyage, and that, therefore, the policy never attached.

Appeal dismissed.

Solicitors for the appellants, *Botterell & Roche.*

Solicitors for the respondents, *Walton, Bubb, & Co.*

High Court of Justice.

Chan. Div. } Nov. 11, 15, 16.
Chitty, J. }

ECCLESIASTICAL COMMISSIONERS *v.* TREEMER. (*a.*)

Lease for lives—Sub-lease—Surrender of lease—Renewal of lease—Ecclesiastical Commissioners—Recovery of possession—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 2—Interesse termini—4 *Geo.* 2, *c.* 28, *s.* 6.

C., the owner in fee and predecessor in title of the plaintiffs, in 1805 *granted a freehold lease of land for three lives. The lessees in* 1807 *sub-demised part of the land for a term determinable on the dropping of the last of the three lives, which occurred in* 1874. *The lessees in* 1832 *surrendered their lease, and on the next day took a new lease for lives, the last of which dropped in* 1891. *This lease was by common law demise, and bore an indorsement of livery of seisin. The defendant, claiming through the sub-lessees, had been, since* 1874, *when the sub-lease expired, in actual possession of the lands comprised therein without title. In an action to recover possession,*

Held, that the lease of 1832, *being a valid lease by virtue of* 4 *Geo.* 2, *c.* 28, *s.* 6, *operated to pass an estate to the lessees; and therefore the plaintiffs' reversionary estate did not become an estate in possession within the meaning of the Real Property Limitation Act,* 1874, *until* 1891, *when the last life in the lease dropped; and, therefore, that the plaintiffs' right to recover was not barred under that Act, and the plaintiffs were entitled to recover.*

The expression "interesse termini" *is never used with regard to a freehold lease, to which it has no application.*

Ecclesiastical Commissioners *v.* Rowe, 29 *W. R.* 159, 5 *App. Cas.* 736, *distinguished.*

Action.

This was an action by the Ecclesiastical Commissioners to recover possession of land at Ealing.

In 1805 the then Chancellor of the Cathedral Church of St. Paul, London, and parson of the parish church of Ealing granted a freehold lease for three lives of the glebe lands and hereditaments of which he was seised in fee simple. The last of the lives dropped in 1874.

In 1807 the lessees under that lease granted a sub-lease of part of the property for ninety-nine years, determinable on the dropping of the lives in the principal lease. This sub-lease therefore expired in 1874.

In 1832 the persons then entitled to the lease of 1805 surrendered the lease to the chancellor, and by an instrument dated the day after the surrender a new lease was granted to the same parties for other lives. This lease was by common law demise, and bore an indorsement of livery of seisin. The last of these lives dropped in 1891.

The plaintiffs, claiming through the chancellor, whose title accrued to them on his death in 1839, by virtue of the Act 3 & 4 Vict. c. 113, had ever since received the rent reserved by the lease of 1832.

In July, 1871, the persons then entitled to the premises comprised in the sub-lease of 1807 purported to sell the same as the owners thereof in fee simple, and the same were, in April, 1872, conveyed accordingly; the defendant Treemer and the persons through whom he derived his title had remained in possession ever since without paying any rent, and now claimed to be entitled in fee simple, on the ground that the plaintiffs' title accrued in 1874, and their right to recover was barred by virtue of the present Statute of Limitations.

The Real Property Limitation Act, 1874, s. 2, enacts that no person shall bring an action to recover land but within twelve years after the time at which the right to do so first accrued to him, and, as to estates in reversion or remainder, that the right to bring such an action shall be deemed to have first accrued at the time when such estate became an estate in possession by the determination of the prior particular estate; but if the person last entitled to the particular estate was not in possession when his interest determined, no such action may be brought by any person becoming entitled in possession but within twelve years after the time at which the right to bring such action first accrued to the owner of the particular estate, or within six years after the time when the estate of the person becoming entitled in possession became vested in possession, whichever shall be the longer period.

Byrne, Q.C., and *B. B. Swan*, for the plaintiffs.—No right of entry accrued to us until the determination of the lease of 1832—*i.e.*, until 1891, when the last of the three lives for which it was granted dropped.

Levett, Q.C., and *H. Terrell*, for the defendant.—

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

The plaintiffs' right of entry accrued in 1874 on the dropping of the last life in the lease of 1805 and the sub-lease: See 3 & 4 Will. 4, c. 27, ss. 3, 5, 8, and 37 & 38 Vict. c. 57, ss. 1, 2. On the surrender in 1832 of the lease of 1805 the lessor had a reversion in the estate expectant on the determination of the sub-lease; the lease of 1832 passed a mere *interesse termini*, that is to say, only a right of entry; therefore, the plaintiffs had in 1874, in virtue of the reversion then vested in them, a right of entry on the determination of the sub-lease in 1874, when the *interesse termini*, created by the lease of 1832, ought to have been converted into a present term by delivery of possession. [CHITTY, J., referred to 8 & 9 Vict. c. 106, s. 9.] This surrender was prior to the Act of 1845, which does not affect it. [CHITTY, J., referred to Blackstone's Definition of an Estate in Reversion, vol. 2, marginal p. 175.] The lease of 1832, then, did not create a tenancy till entry: see Shepherd's Touchstone, 7th ed., by Preston, vol. 2, pp. 276, 303, 324; Co. Litt. 46*b*; Bac. Abr., vol. 4, p. 844 (M.). Until entry under the lease the lessor has power to bring ejectment: *Doe d. Rawlings* v. *Walker*, 5 B. & C. 111. The statute 4 Geo. 2, c. 28, s. 6, simply removes the inconveniences of the common law: see the opinion of Lord Tenterden, C.J., in *Doe d. Palk* v. *Marchetti*, 1 B. & Ad., at p. 721, and does not operate to confer any estate. *Corpus Christi College* v. *Rogers*, 49 L. J. Ex. 4, 28 W. R. Dig. 133, and *Ecclesiastical Commissioners* v. *Rowe*, 29 W. R. 159, 5 App. Cas. 736, see Lord Selborne's speech especially, are in our favour. Moreover, though there is an indorsement of livery of seisin on the lease of 1832, the lessor, being out of possession, could not give seisin: see Perkins' Profitable Book, s. 221, and Shepherd's Touchstone, vol. 1, p. 213. The livery is, therefore, not a good livery, and the lease is consequently invalid.

Swan, in reply.—If the sub-lease had been surrendered, there would have been no question as to the validity of the new lease, and, in virtue of the statute of 4 Geo. 2, the new lease is as valid as if the sub-lease had been surrendered; therefore the new lease granted the reversion expectant on the determination of the sub-lease, and the lessees were for all purposes landlords of the sub-lessees. The lease of 1832 operated to pass an estate, not a mere right. And, with regard to livery of seisin, there is a presumption now of the tenant having consented to seisin being given in 1832, and with the tenant's consent there could be a good livery by the lessor: see Shepherd's Touchstone, "Feoffments," vol. 1, p. 206. We have six years from the determination of the lease of 1832, or twelve years from 1874 for bringing our action: see *Pedder* v. *Hunt*, 35 W. R. 371, 18 Q. B. D. 565.

Reference was also made in the course of the argument to *Coe* v. *Clay*, 5 Bing. 440; *Drury* v. *Macnamara*, 4 W. R. 50, 5 Ell. & B. 612; *Jinks* v. *Edwards*, 4 W. R. 303, 11 Ex. 775; Co. Litt. 270*b*; and Platt on Leases, vol. 1, pp. 691, 788.

CHITTY, J.—This is an action by the Ecclesiastical Commissioners claiming possession of lands at Ealing, of which the Chancellor of the Cathedral Church of St. Paul, London, and parson of the parish church of Eling (now Ealing), in the county of Middlesex, was seised in fee simple in his corporate capacity. The defendants raised the Statute of Limitations as a defence to their claim. The plaintiffs said that their right to recover possession first accrued in 1891. The defendants, on the other hand, said that the plaintiffs' right first accrued in 1874, and, if that right first accrued in 1874, then the statute, which was a twelve years' statute, now constituted a bar to the action. If the defendants are right as to that, the statute is clearly a bar to the plaintiffs' action. No question was raised before me in argument on section 29 of 3 & 4 Will. 4, c. 27.

The facts are not in dispute. The chancellor in 1805 granted a freehold lease of (*inter alia*) the premises sought to be recovered for three lives, the last of which dropped in 1874, the date to which the defendants' argument relates. The tenants in 1807 sub-leased part of the property for a term of ninety-nine years, determinable on the dropping of the three lives, for which the lease of 1805 was granted. The sub-lease ran out in consequence in 1874. In 1832 there was a surrender by the persons entitled to the lease of 1805 to the chancellor. At the same time, but, as was usual, by an instrument dated the following day, the chancellor granted a new lease for three lives. This lease was consequently a freehold lease. The last of these lives dropped in 1891, and that is the date from which the plaintiffs say that their title accrued. The plaintiffs, who take the title of the chancellor under 3 & 4 Vict. c. 113, have received, since his reversionary title accrued to them in 1839, the rent reserved on the new lease of 1832 to its termination in 1891. The defendants have, however, since 1874, when the sub-lease expired, been in actual possession of the land comprised in the sub-lease without paying any rent, which is equivalent to saying without having any lawful title.

I shall first mention some points which were referred to in argument, but dropped. It was said that there passed by the lease of 1832 only an *interesse termini*. I challenged counsel to produce any authority, either from cases or text-books, to show that that phrase was applicable to the case of a freehold, and no authority could be produced. It is plain that the phrase extends only to the interest which a termor has before taking possession by force of the lease which has been made to him. I referred to Litt., s. 459, and Coke's commentary thereon, particularly 270*b*, where he points out the diversity of a lease for life and for years with reference to entry on land. I could, if necessary, multiply authorities on this point, but I am satisfied that the expression is never used with regard to a freehold lease. The object, of course, was to show that no estate passed under the new lease of 1832, but a mere right to take possession.

Then there was the argument about livery of seisin. There is the usual indorsement of livery on the lease of 1832. Livery of seisin was required at that time for the perfecting of a lease which was to take effect at common law and not in virtue of the Statute of Uses. But it was said that the indorsement was imperfect, and therefore void, because it was not shown that the *terre* tenant—that is, the person in possession under the sub-lease of 1807—had assented to the livery of seisin of the land, and Perkins' Profitable Book, s. 221, was cited for the purpose of supporting that proposition. But, the deed being more than thirty years old, I am of opinion that not only was there, as is shown by the indorsement on the lease, livery of seisin, but that the livery was valid. The principle *omnia præsumuntur rite acta* applies to such a matter, and I think that the tenant under the sub-lease must be taken to have assented to livery of seisin, if his assent was required (about which there may be a question, having regard to the statute of Geo. 2). This point was raised also for the purpose of showing that no estate passed by the new lease of 1832.

Now I refer to the 6th section, which is the important section of 4 Geo. 2, c. 28. In my opinion it will be seen from that enactment that entry on the land for the purpose of perfecting the new lease as against those who held under the sub-

remuneration. The costs of the Treasury and the particular costs of the liquidator in reference to the proceedings for the application of the deposits must be paid out of the deposits, and the residue must be apportioned amongst the meritorious creditors of the company. The case of *In re Lowestoft Tramways Co.* does not touch the point which I have had to decide.

Solicitors, *Atkinson & Dresser; Hare & Co.; Richard Free.*

Chan. Div. } Nov. 10.
North, J. }

In re SOUTH HAMPSHIRE RAILWAY AND PIER ACT, 1891.

Ex parte CHAMBERS. (*a.*)

Railway company—Parliamentary deposit—Abandonment of undertaking—Release of deposit—Jurisdiction—Parliamentary Deposits and Bonds Act, 1892, *s.* 1.

Summons by the persons who had made a parliamentary deposit on behalf of a railway company for a transfer of the deposit. The company had acquired no land and raised no capital. Their powers of compulsory purchase had expired. They had passed a resolution to abandon the undertaking. The time limited by their Acts for the completion of the undertaking had still three years to run.

Held, that, under the Parliamentary Deposits and Bonds Act, 1892, *s.* 1, *the court had no jurisdiction to order a transfer of the deposit fund until the time limited for the completion of the undertaking had arrived.*

Adjourned summons.

The South Hampshire Railway and Pier Co., under certain Acts of Parliament, obtained powers to construct a railway, &c., in Hampshire. Under these Acts a sum of £7,488 was deposited with the Paymaster-General to secure the completion of the undertaking. This sum, after providing for the compensation of landowners, &c., was to be forfeited to her Majesty if the undertaking was not completed within a specified time.

The said undertaking not being carried out, the South Hampshire Railway and Pier Act, 1891, extended the time limited for the completion of the works to 1895, and also by section 8 made provisions for the release of the deposit fund. The public Act of 1892 entitled the Parliamentary Deposits and Bonds Act, 1892, s. 1, sub-sections 1, 2, and 3, completely cover section 8 of the railway company's private Act, and provides as follows:—

Section 1, sub-section 1.—"Where in pursuance of any general or special Act of Parliament . . . moneys or securities have been deposited with . . . the Paymaster-General to secure the completion by any company of any undertaking authorized by Parliament . . . and the undertaking has not been completed within the time limited in that behalf, the High Court may, notwithstanding anything in any such general or special Act, order that the moneys or securities . . . or any part thereof, be applied towards compensating any landowners . . . whose property has been interfered with . . . by the commencement, construction, or abandonment of the undertaking. . . ."

Sub-section 2.—"Subject to payment of any such compensation, and notwithstanding any provision as to forfeiture to the Crown, the High Court may, if a receiver has been appointed . . . or the undertaking has been abandoned, order that the deposit fund . . . be paid to the receiver. . . ."

Sub-section 3.—"Subject to such application as aforesaid, the High Court may, after such public notice as to the court seems reasonable, order that the deposit fund . . . be paid . . . to the depositors."

The company had acquired no land, had given no notice for that purpose, and had raised no capital. The time limited by their special Acts for the compulsory purchase of land had expired. The company had passed a resolution that the necessary steps be taken to abandon the undertaking and obtain the retransfer of the fund deposited.

This was an application by Messrs. C. & W. Chambers that the fund deposited now standing to the credit of *ex parte* C. & W. Chambers on behalf of the South Hampshire Railway and Pier Co. might be transferred to the said C. Chambers.

J. D. Fitzgerald, for the summons.—The undertaking has been abandoned. It is now out of the company's power to complete the works. The court can, therefore, order the return of the deposit fund.

Broomfield, for the company, supported the application.

NORTH, J.—I do not see that I have jurisdiction in this case. This company would, according to the old law, have forfeited the money deposited unless it avoided doing so by obtaining an Act of Parliament called an Act of Abandonment. Certain relaxations have been made in the law, and changes have been made in the company in this respect, but I need not go into them, for the public Act of 1892 goes quite as far as the company's private Act. [His lordship then read the Parliamentary Deposits and Bonds Act, 1892, s. 1, and continued:—] Now the time given to the company for completion of their works does not expire until 1895, that is to say, there are three years yet to run, and there is nothing to indicate that the undertaking could not be completed within that time, although it is probably correct that the company could not complete it under their existing powers. But, still, I do not consider that the court has jurisdiction where the time limited for the completion of the undertaking has not expired. It is said it is strange if the Legislature has said you must wait, and the deposit-money must be tied up. But the only question I have to decide is, Have I jurisdiction? And I am of opinion that the power given by the Act to the court cannot be exercised until the time limited has arrived.

Solicitors, *Fowler & Co.*

(1893) 1 CH. 948.

Chan. Div. } Oct. 25.
North, J. }

In re PERKINS (DECEASED).
PERKINS *v.* BAGOT. (*a.*)

Will—Construction—Power of appointment exercised subject to condition—Excess of power—Fraud on power—Hotchpot clause—Intention.

A testator devised real estate on trust for sale and conversion, and directed a third of the proceeds of the sale to be held on trust for each of his daughters for her life, and after her death in trust for such of her children or their issue born in her lifetime as she should by will or deed appoint, and, failing any such appointment, in trust

(*a.*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

(*a.*) Reported by G. B. M. COORE, Esq., Barrister-at-Law.

for all her children in equal shares. A general hotchpot clause followed. The testator then directed two other funds to be held by his trustees on the same trusts. One of the testator's daughters by will appointed part of the trust moneys to her two sons on condition that they should resign a benefit accruing to them under their father's will (whereby the residuary estate of the testatrix, which was given to a stranger, would be enlarged), and, failing their compliance with this condition, the testatrix appointed the fund to one of her daughters.

Held, that the appointment was a fraud on the power, and that the share must go as if unappointed.

Alexander *v.* Alexander, 2 *Ves. sen.* 640, *discussed.*

Held also, that the testator's intention was not to create three funds, but one fund, and that, therefore, there was one general hotchpot clause applying to the whole share of the issue of testator's daughter in the moneys accruing to them under his will.

By his will, dated the 6th of December, 1851, Henry Perkins devised his freehold hereditaments at Hanworth, Feltham, in the county of Middlesex, to the use of his son Algernon Perkins for life, with divers limitations over in favour of his issue, and in the event of the failure of such issue (which event occurred) to the use of his trustees on trust for sale and investment. And he directed his trustees to "stand possessed of and interested in one-third part of the said last-mentioned trust moneys upon trust" "that they shall and do pay the annual income thereof unto my daughter Sophia Paley, the wife of Thomas Paley, Esq., for her sole and separate use," and after the death of the said Sophia Paley testator declared that his trustees should "stand and be possessed of and interested in the said one-third part of the said trust moneys in trust for all and every or such one or more exclusively of the others or other of the children or more remote issue of the said Sophia Paley (such issue to be born in her lifetime) as the said Sophia Paley shall by will or deed appoint, and in default of such appointment, and in so far as no such appointment shall extend, in trust for all and every the children and child of the said Sophia Paley who, whether in her lifetime or after her decease, being sons or a son shall attain the age of twenty-one years, or being daughters attain that age or marry under it, and if there be but one such child the whole to be in trust for such one child." Testator then declared that another equal one-third portion of the said trust moneys should be held on the same trusts for another daughter, Selina Scriven, and her issue, and continued: "And as to the remaining one-third part of the said trust money upon such or the like trusts, and with, under, or subject to such or the like powers and provisions, in all respects in favour of or relating to my daughter Matilda, the wife of Edward Bagot, her children or child or more remote issue, and with such restrictions or qualifications during the lifetime of the said Matilda Bagot as are hereinbefore declared in favour of, or for the benefit of, or relating to the said Sophia Paley, and her child or children or more remote issue, of or concerning the one equal third part, the trusts whereof are firstly hereinbefore declared of the said trust moneys, and the annual income thereof, in the same manner in all respects as if the same trusts, powers, and provisions had been here repeated, with the substitution of the name of the said Matilda Bagot for that of the said Sophia Paley." The usual hotchpot clause followed in reference to the shares of the said Sophia Paley, Selina Scriven, Matilda Bagot, and their respective issue in the said trust moneys. The testator then bequeathed a sum of money designated in his will as the "note account" "with, under, and subject to the same powers, provisions, and declarations" as he had declared concerning the clear proceeds to arise from the sale of his said hereditaments at Hanworth in the event of the failure of issue of his said son. The testator also appointed that a fund known as the Randall Fund, over which he had a power of appointment after the death of one Elizabeth Randall, should on the happening of that event be transferred to his trustees to be held by them on the same trusts.

The testator, H. Perkins, died on the 15th of April, 1855, and his will was proved on the 23rd of April, 1855. E. Randall died on the 19th of March, 1860. Matilda Bagot had four children—Ponsonby Bagot, Villiers Spencer Bagot, Evelyn Harriet, wife of A. W. Bernal, and Ethel Jane, the wife of G. Paton—all of whom attained the age of twenty-one years. Under or by virtue of certain deeds of appointment and other instruments executed by Matilda Bagot, E. H. Bernal, and E. J. Paton respectively, the whole of the share of Matilda Bagot and her issue in the trust moneys other than the Randall Fund stood limited, as to £21,300 in trust for E. H. Bernal for her life, with remainder to her issue, and as to £21,300 in trust for the trustees of the marriage settlement of Jane Paton. Portions of the Randall Fund had also been appointed by Mrs. Bagot to each of her four children. Under the will of her deceased husband E. Bagot, dated the 7th of September, 1870, and two codicils thereto dated the 8th of January, 1872, and the 24th of October, 1872, respectively, Mrs. Bagot was entitled to the possession of certain furniture, or if sold to the interest of the money arising from such sale, and her two sons above named were entitled to such furniture or the principal of such money at her decease. The furniture was sold in Mrs. Bagot's lifetime.

Mrs. Bagot, by her will, dated the 5th of March, 1881—after reciting the powers of appointment vested in her under the will of her father, the said H. Perkins, and after reciting that she had appointed the greater part of the trust moneys in favour of her two daughters, Evelyn Harriet Bernal (since deceased), the wife of Augustus W. Bernal, and Ethel Jane Paton, the wife of George Paton, respectively, and that the only part of the said one-third share in the stocks, funds, and securities then remaining unappointed consisted of a sum of £713 10s. 10d. Consolidated £3 per Cent. Annuities—in pursuance and in exercise of the power and authority to her limited and of all other powers and authorities enabling her in that behalf, appointed that the said sum of £713 10s. 10d. Consolidated £3 per Cent. Annuities, and all other the trust moneys, stocks, funds, and securities over which she had a power of appointment under the will of her father, and which had not been appointed by her as aforesaid, should after her decease be held by the trustees or trustee for the time being of the said will upon trust for her sons, Ponsonby Bagot and Villiers Spencer Bagot, in equal shares on condition "that they give up all claim to the proceeds of the sale of the effects of the house in Dover, and sign a release to my executors to all claims of any portion of the produce of the sale within three calendar months of my decease." In the event of their refusing to comply with the condition, testatrix directed the share to be held in trust for E. J. Paton absolutely. The general scope of testatrix's will was to benefit Charles Edward Ormerod, a stranger to her family, whom she appointed one of her executors and residuary legatee.

The testatrix died on the 31st of July, 1889, and her will was proved on the 31st of December, 1889. At her death the interest of her family in the Randall Fund consisted of £713 10s. 2¾d. Three per Cent. Consolidated Annuities, and a sum

of £913 10s. 2¾d., part of a sum of £10,000 advanced on mortgage by the trustees of the will of H. Perkins, deceased. The sons refused to sign any release to the defendant's executor of their claim for the value of the furniture against testatrix's estate. A summons was taken out by the trustees of the will of H. Perkins to determine the following points:—

(1) Whether the power of appointment exercised by the will of Mrs. Bagot was a valid exercise of the power, and whether or not it was subject to the condition aforesaid.

(2) Whether, in the event of the said appointment being invalid, the representatives of E. H. Bernal or E. J. Paton could participate in the fund without bringing into hotchpot all sums previously advanced or appointed to them under the will of H. Perkins.

Coltman, for the plaintiffs, stated the facts.

Clark, for the sons.—This is a case in which the exercise of the power is good, and only the condition void. The rule laid down in *Alexander* v. *Alexander*, 2 Ves. sen. 644, applies.

We also rely on *Sadler* v. *Pratt*, 5 Sim. 632, and *Watt* v. *Creyke*, 3 Sm. & Giff. 362.

Bramley and *Sebastian*, for the representatives of the daughters.—The cases cited cannot apply here. In those cases it was possible to distinguish between the execution of the power and the excess. Here it is not. The sole object of the testatrix was to benefit Ormerod, and if possible to augment her residuary estate by depriving her sons of the proceeds of the sale of the furniture which her husband intended for them. She exercised her power of appointment solely to benefit a stranger to the power, and thus committed a fraud on the power. The appointment and the condition are alike bad, and the share must go as if unappointed: *Hay* v. *Watkins*, 3 D. & W. 339; *Duke of Portland* v. *Sopham*, 12 W. R. 697, 11 H. L. 32; *In re Marsden*, 7 W. R. 520, 4 Drew. 594; *Whelan* v. *Palmer*, 36 W. R. 587, 39 Ch. D. 648; Farwell on Powers, 342.

NORTH, J.—The first question arises under the will of Mrs. Bagot. [His lordship read the parts of the will bearing on the question, and continued:—] She directs that the sum of money shall be held on trust for her sons, Ponsonby Bagot and Villiers Spencer Bagot. Had the will stood here the appointment would have been good; but she continues, "on condition that they give up all claim to the proceeds of the sale of the effects of the house in Dover and sign a release to my executors of all claims to any portion of the produce of the sale within three calendar months of my decease." [His lordship then referred to the will of E. Bagot, deceased, and pointed out that it gave the testatrix's sons a right to be paid the amount of the value of the furniture from the residuary estate of the testatrix.] She has, by appointing to her sons this sum of £713, given them the sum on the terms that a claim against her estate should be given up by them. If her sons had accepted these terms her residuary estate would have been increased for the benefit of Ormerod. This is not a case in which the condition is bad and the appointment good. Her sole object is to relieve her own estate. On this express condition, and on no other, does she appoint to them. This is a case in which she was abusing her power and making an exercise of it for her own purposes—in short, committing a fraud on the power, although she may not knowingly have been doing anything fraudulent. The words of Lord Hardwicke in *Alexander* v. *Alexander* apply here. On p. 644 he lays down: "The execution of a power may be good in part and bad in part. The ground and principle of all this is that when there is a complete execution of a power, and something *ex abundanti* added which is improper, then the execution shall be good, and only the excess void; but when not a complete execution of the power, when the boundaries between the excess and execution are not distinguishable, it will be bad." If we apply these remarks to this case it will be apparent that the exercise of the power is bad. Here I cannot say that I see any boundaries that can possibly be drawn between the excess and the execution. The sole object for which the testatrix exercised her power was to benefit a stranger. The condition was not *ex abundanti*, but absolutely inseparable from the execution of the power.

The facts in *Sadler* v. *Pratt* were different. In that case a lady having four children by her first husband and three by her second, and having power to appoint a fund among the former only, appointed it amongst all her children equally, and declared that if her children by her first husband should refuse to share the fund with her other children, the whole fund should go to her youngest child by her first husband. It was held in that case that the appointment was not wholly void, but that the first class of children took each one-seventh of the fund under it, and that the other shares went to them as in default of appointment." In that case it was clear that four-sevenths had been well appointed, and the other three-sevenths not. But in the present case the lady whose will I am considering has appointed the fund simply to benefit her residuary legatee. I must hold, therefore, that the appointment fails as being a fraud on the power, and that the fund goes as if unappointed.

As to the second point [his lordship proceeded to read the clauses in H. Perkins' will]. We have here three separate funds: (1) The fund derived from the sale of the real estate; (2) the fund known as the note account; (3) the fund known as the Randall Fund.

I am asked to read the will as if the hotchpot clause was inserted separately after each fund. Now the will says nothing of the sort, although when the testator does intend trusts to be repeated he uses precise language. The absence of such language is very noticeable.

What I take it he does, is not to deal with these funds as three separate funds. He directs the two latter funds to be handed over to the trustees of his real estate to be held by them on the same and not on similar trusts as he had declared with reference to the proceeds of the sale of his real estate. He has not made separate settlements of the two last funds, but he has added the two last funds to the first and given them to its trustees, and applied the same trusts. In my opinion the trusts as to the funds in the hands of trustees are declared once for all, and not three times or by way of reference. I cannot imagine why, when he directed the three funds to be paid to his trustees for the same objects, he should yet have wished to keep them separate. There is, therefore, one general hotchpot clause applying to all the shares of Matilda Bagot's issue in the trust fund arising under the will of the testator.

Solicitors, *Marson & Sons; Dunster & Chapman.*

(1899) 2 Ch. 562
re Dryden (1900) 2 Ch 567.

Chan. Div. Kekewich, J. } Nov. 16.

In re HAWES.
In re BURCHELL.
BURCHELL *v.* HAWES. (*a.*)

Husband and wife — Separate property — Mortgage— Trustee—Same hand to pay and to receive—Statute of Limitations (3 & 4 *Will.* 4, *c.* 27), *s.* 40.

Where a married woman was under a will entitled for life for her separate use to the income of a sum of money which the trustee of the will had lent to the husband on the security of a mortgage of two freehold houses, and the husband and wife had lived together in amity for a period of more than twenty years after the date of the mortgage, and during that time the husband had never paid any interest on the mortgage debt, or given any written acknowledgment of the mortgage to the mortgagee-trustee for the wife,

Held, that the husband retained the interest as a gift from the wife; that it was the same hand to pay and to receive; that, therefore, no payment over was requisite; and, consequently, that the Statute of Limitations did not run, and the mortgage was still subsisting.

Adjourned summons.

Letitia Hawes, by her will, dated the 25th of October, 1839, and by a codicil thereto dated the 10th of June, 1842, bequeathed a sum of £300 to trustees on trust to invest and to pay the interest to her daughter Sarah Burchell for life for her separate use without power of anticipation, with remainder to Sarah Burchell's children as therein mentioned. The testatrix died on the 6th of January, 1845, and her will was proved on the 4th of March following.

The only trustee of the will who ever acted was Thomas Hawes, and he advanced this sum of £300 to John Burchell (the husband of Sarah Burchell) upon the security of two freehold houses, which were conveyed by John Burchell to Thomas Hawes by indenture of mortgage dated the 28th of May, 1847.

On the 11th of April, 1869, John Burchell died, having by his will (which was executed two days before his decease and proved on the 7th of August following) devised the two freehold houses on trust for his wife Sarah Burchell for life, with remainders over.

During the life of John Burchell no interest was ever paid by him to Thomas Hawes as mortgagee and trustee for Sarah Burchell, nor was any acknowledgment of the mortgage or liability thereunder signed by him.

Sarah Burchell was aware that she was entitled to have such interest paid, but, according to the evidence, never asked for it, because, living with her husband, she said they "did not keep two pockets."

On the 12th of March, 1873, Mary Ann Hawes, a daughter of John Burchell, and one of the persons entitled in remainder under his will, mortgaged all her interest in the two freehold houses (consisting of one-fourth) to the Maldon Loan Co. (Limited), who eventually foreclosed, foreclosure being made absolute on the 15th of January, 1887.

In October, 1888, the Maldon Loan Co. (Limited) entered into a contract with James Fuller, a defendant in this summons, to sell to him their interest in the freehold houses, and on the 17th of December, 1888, the company and their liquidator conveyed the property to him.

The contract for sale to James Fuller contained a reference to the mortgage of the 28th of May, 1847, and a condition that the purchaser should assume that all claims in respect of the debt of £300, and all interest thereon, were barred by the Statute of Limitations, and that the legal estate in the freehold houses was, at the time of his death, vested in John Burchell, and at the time of the purchase in Mrs. Sarah Burchell for her life, and subject thereto in the trustee of the will of John Burchell.

Sarah Burchell died on the 28th of December, 1890.

On the 28th of April, 1892, the two freehold houses were sold by the plaintiff in this summons, which was subsequently taken out to determine who was entitled to the proceeds of sale.

One of the main questions to be decided was as to whether or no the mortgage of the 28th of May, 1847, was still subsisting.

Yate Lee, for the plaintiff (a daughter of Sarah Burchell), and

J. K. Young, for defendant nephews and nieces (all of whom would take shares if the mortgage was not statute barred).—The mortgage is still subsisting. It is well settled that where it is the same person to pay and receive there is no need to pay over. The only question in this case is, Did the husband receive as agent for the wife?

They cited *Burrell* v. *Lord Egremont*, 7 Beav. 205; *Topham* v. *Booth*, 35 W. R. 715, 35 Ch. D. 607; *Edward* v. *Cheyne*, 13 App. Cas. 385, 36 W. R. Dig. 172; *In re Flamank*, 37 W. R. 502, 40 Ch. D. 461.

A. Rotheram, for the defendant James Fuller.—The mortgage is statute barred. The wife might at any time during the life of her husband have enforced her right to have the interest paid to her personally, but she did not do so, and in consequence the statute ran and the mortgage is now barred.

KEKEWICH, J.—My thanks are due to Mr. Young and Mr. Rotheram for the clear and concise way in which they have argued this case without introducing any extraneous matter.

I hesitate to refer to *Topham* v. *Booth*, being my own decision, or to say whether its doctrines should be or should not be, extended, and I would rather deal with the matter before me independently of that case. The real question turns on the period of the first twenty years—that is sufficient for the statute if the statute is running—and during that time Mrs. Burchell was no doubt entitled to have the interest paid to herself, and had she chosen to do so she could have enforced her right.

That is a factor in the case, and Mr. Rotheram has argued that the fact that she did not do so strongly favoured his contention that the mortgage is extinct. But to my mind it turns the other way.

I rest my judgment on the doctrine laid down in *Caton* v. *Rideout*, 1 Mac. & G. 599, as stated by Kay, L.J., in *In re Flamank*, as the leading authority on the point: "It has always been held that while a husband and wife are living together in perfect amity, as these were, the receipt by the husband of the separate income of the wife may be treated as a gift of that separate income to him to be applied for the joint benefit of himself and his wife, as for the maintenance of their household and the like." That passage refers of course to actual receipt, and no doubt it is difficult to prove that here. The question is whether, the husband being both the hand to pay and the hand to receive on behalf of the wife, that doctrine applies. I cannot see any reason why it should not. The judge has to use his knowledge of what reasonable people do, and to apply that knowledge reasonably, preventing the strict technical doctrines of the court being too rigidly applied. If

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

year by year a husband, living in amity with his wife, has to pay to his wife money for her separate use, and does not do so, both parties possibly keeping accurate accounts, with entries of receipts and payments, the law presumes that the husband retains the money with the wife's consent. Under these circumstances, I hold that the husband and wife were the same hand, the husband receiving on behalf of the wife, and that the mortgage is still subsisting.

Solicitors, *Storey & Cowland*, for *Crick & Freeman*, Maldon; *E. Bromley*, for *Cunnington, Son, & Orfeur*, Braintree.

Q. B. Div.
(Lord Coleridge, C.J., and Wills, J.) Nov. 17.

JAMES (*Appellant*) *v.* MASTER (*Respondent*). (*a.*)

Public health—Sanitary authority—Bye-law—Plan of building—Deviation from plan.

A bye-law of a sanitary authority, made under section 157 *of the Public Health Act*, 1875, *required that a plan showing the dimensions of the several parts of any proposed building should be sent to, and approved by, the sanitary authority before the work of building was commenced.*

The respondent sent in plans of a proposed building, which were approved by the sanitary authority. In the course of building he deviated from the plans sent in by altering the height of the floors of the building.

Held, that the respondent had committed a breach of the bye-law.

Special case stated by two justices of the peace for the county of Glamorgan.

The appellant was the clerk to the Merthyr Tydfil Local Board of Health, and in that capacity summoned the respondent before a court of summary jurisdiction to answer the following charge, viz.:—That he "did erect a building within the district of the Merthyr Tydfil Sanitary Authority, without sending to such authority complete plans and sections of every floor of such building as required by the bye-laws of the said authority."

The proceedings were taken under bye-law 93 of the board's bye-laws, which was, so far as is material, as follows:—93. Every person who shall intend to erect a building shall give to the sanitary authority notice in writing of such intention, and shall, at the same time, deliver or send complete plans and sections of every floor of such intended building, which shall be drawn to a scale of not less than one inch to every eight feet, and shall show the position, form, and dimensions of the several parts of such building.

Under another bye-law the sanitary authority had power to remove, alter, or pull down any work to which any of the bye-laws relating to new buildings might apply if such work were done in contravention of any such bye-laws. After hearing the evidence the justices found that the respondent had sent in plans, and that the plans had been accepted by the board; that the buildings as erected deviated from the plans sent in, in that in two instances the height of the floors had been reduced from 10 ft. 6 in. to 10 ft., and a portion of an attic had been made smaller; that the deviations did not infringe any of the bye-laws of the board. The justices were of opinion that there had been no breach of bye-law 93, and dismissed the summons, but stated this case for the opinion of the court.

Upjohn for the appellant, contended that there had been a breach of the bye-law, inasmuch as the building as erected deviated from the plans sent in and approved.

The respondent did not appear.

Lord COLERIDGE, C.J.—I am of opinion that the decision of the justices was wrong, and the case must be sent back to them in order that they may convict the respondent. By their bye-law the sanitary authority require a proper plan of proposed buildings to be sent to them. In this case a plan was sent, and approved by the sanitary authority. Then in the course of the execution of the works, the builder changed his mind and made certain alterations in the building. These alterations may have been made quite *bonâ fide*, and may not contravene any bye-law, but the plan of them has not been submitted to the sanitary authority, so there has been a breach of bye-law 93, and the magistrates were wrong in not convicting the respondent.

The case must go back.

WILLS, J.—I agree.

Case remitted to justices.

Solicitors for the appellant, *Schultz & Son.*

Q. B. Div.
(Lord Coleridge, C.J., and Wills, J.) Nov. 3.

TATAM *v.* REEVE. (*a.*)

*Gaming—Bets—Money paid by plaintiff at defendant's request for lost bets—Plaintiff no party to the betting—Right of plaintiff to recover money so paid—*8 *&* 9 *Vict. c.* 109—*Gaming Act*, 1892 (55 *Vict. c.* 9), *s.* 1.

Section 1 *of the Gaming Act*, 1892, *enacts that "any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by* 8 *&* 9 *Vict. c.* 109, . . . *shall be null and void, and no action shall be brought or maintained to recover any such sum of money."*

Held, that money paid by the plaintiff at the request of the defendant, in settlement of sums which were in fact bets made and lost by the defendant, the plaintiff himself being no party to the betting, comes within this section as money paid "in respect of" contracts rendered null and void by 8 *&* 9 *Vict. c.* 109, *and that, therefore, the plaintiff is not entitled to recover the money so paid by him.*

Summons referred to the court by Charles, J., at chambers, on the undertaking by both parties that the decision of the court on the summons was to be taken as the decision of the action.

The action was brought to recover the sum of £148, money paid by the plaintiff to the use of the defendant at his request, particulars of which were indorsed upon the writ.

The plaintiff took out a summons for leave to sign judgment under order 14. This leave was refused by the master, who gave unconditional leave to defend, and on appeal by the plaintiff to the learned judge at chambers, the summons was referred to the court, both parties agreeing that the hearing on the summons should be treated as the hearing of the action.

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

The facts as set out in the affidavits were these: On the 4th of July, 1892, the plaintiff received from the defendant the following letter: "Dear Mr. Tatam,—Kindly settle the enclosed account for me, as I don't know where to find all the men and I have to catch an early train to Henley.—Yours truly, H. REEVE." Enclosed in this letter was a slip of paper containing the names of four persons with a sum of money opposite the name of each, and these were the sums which the plaintiff was requested by the defendant to pay for him. These sums, amounting in all to £148, were paid on the same day by the plaintiff to the persons named on the list, and it was admitted that the sums so paid by the plaintiff at the request of the defendant were for bets on horse races, which had been made by the defendant and lost to the persons to whom the payments were made. In the affidavit filed by the plaintiff he said that the amounts paid by him were not in respect of any bets made by him on behalf of the defendant, and that he simply paid them on the defendant's request as contained in the letter of the 4th of July, and that he was not in any way liable to pay them. The defendant in his affidavit merely said that he relied on the Gaming Act, 1892. There was no statement in the affidavits as to whether the plaintiff knew or did not know that the payments made by him were in payment of lost bets.

Section 1 of the Gaming Act, 1892 (55 Vict. c. 9), provides: "Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act 8 & 9 Vict. c. 109, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money."

Bosanquet, Q.C., and *Lynden Bell*, for the plaintiff.—The payment here was a payment made by the plaintiff at the request of the defendant, and that raises an implied contract by the defendant to repay the money. The payment was not made by the plaintiff, "under or in respect of" any agreement null and void by 8 & 9 Vict. c. 109, so that there is no payment which comes within the Gaming Act, 1892. The words of the section in the recent Act are "paid by him." Now here there was no sum paid by the plaintiff "under or in respect of" any betting transaction, for the sum paid by him was so paid at the request of the defendant, the plaintiff himself not being a party to the betting. The Gaming Act, 1892, was meant to meet the case of *Read* v. *Anderson*, 32 W. R. 950, 13 Q. B. D. 779, and that being so, it does not touch the present case, as in *Read* v. *Anderson* the plaintiff was an actual party to the betting, whereas in this case the plaintiff was no party to the betting. That completely distinguishes *Read* v. *Anderson* from the present case. The money was paid here under a contract implied by the request to pay and therefore does not come within the statute.

Morton Daniel, for the defendant, was not heard.

Lord COLERIDGE, C.J.—I have no hesitation at all in deciding this case, and it seems to me that judgment must be given for the defendant. If a person, with full knowledge of what is called a debt of honour, chooses to trust another, then he must do so at his own risk, and with the knowledge that he must suffer if the other person repudiates the debt. The old Act was discussed in the well-known case of *Read* v. *Anderson*, in which Lord Esher, M.R., emphatically dissented from the other members of the court, and I entirely agree with the dissent of the Master of the Rolls in that case, for that decision really cut in upon the Gaming Act, 8 & 9 Vict. c. 109, as it was a decision to the effect that a person might do by another what he was prohibited from doing himself. However, that was the decision of the Court of Appeal, and that was an end of it.

Then there was an Act of Parliament passed in the present year to amend the 8 & 9 Vict. c. 109, and this Act enacts: [His lordship then read section 1 of the Act]. The facts here are that the plaintiff was requested by the defendant to pay certain sums of money mentioned in a slip, and the plaintiff paid these sums, and as a matter of fact these sums were for bets made and lost by the defendant. It was said that these sums were not paid in respect of bets. I cannot agree with that view. It is true they were not paid "under" an agreement rendered null and void by the 8 & 9 Vict. c. 109, there being no betting between the plaintiff and the defendant, but they were paid "in respect of" betting contracts null and void under 8 & 9 Vict. c. 109. In respect of what were these payments made by the plaintiff, if not in respect of these betting transactions? I decide this case with the less hesitation as I think the plaintiff knew the purpose of these payments. If he had been deceived into making payments in respect of a matter he knew nothing about, I should have hesitated and been sorry to come to the conclusion to which I have come. I think, however, the plaintiff knew very well the nature of the transaction, and therefore he must take the risk.

I am of opinion that there should be judgment for the defendant.

WILLS, J.—I am of the same opinion. It was argued for the plaintiff that the only object of the statute 55 Vict. c. 9 was to get rid of the decision in *Read* v. *Anderson*. If that were the only object of the Act then it would not touch the present case, as the plaintiff here did not make the bets, as in *Read* v. *Anderson*. I asked what meaning was to be given to the words "in respect of" as well as the word "under." It was said by both the learned counsel for the plaintiff that the words "in respect of" meant the same thing as "under." I do not think that is so, but the words "in respect of" must mean something different from the word "under." It seems to me it makes no difference whether the plaintiff knew or did not know what these payments were for, for in either case the payments were equally payments made "in respect of" contracts or agreements null and void under 8 & 9 Vict. c. 109. If the plaintiff had been misled by the defendant, it may be that the defendant would be estopped from setting up the defence of the statute, but it is not necessary to decide the question, as, upon reading the affidavits, I have not the slightest doubt that the plaintiff knew what these transactions were for. I think, therefore, there must be judgment for the defendant.

Judgment for the defendant.

Solicitors for the plaintiff, *Thorneycroft & Willis.*

Solicitor for the defendant, *T. R. Apps.*

Q. B. Div. (Wright, J.) Dec. 3.

CHURCH v. SAGE.
FROY (CLAIMANT). (*a.*)

Bill of sale—Building agreement—Assignment of building agreement, with plant and materials as security

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

for loan—Whether such assignment is, as regards plant and materials, a bill of sale—Bills of Sale Acts, 1878 (41 & 42 *Vict. c.* 31), *s.* 4, *and* 1882 (45 & 46 *Vict. c.* 43), *s.* 8.

A document assigning to a stranger, as security for a oan, a building agreement made between the assignor (a builder) and a landowner, together with all plant and materials then on the premises, or which might be brought on the premises, but giving no express power of seizure or sale in case of default of payment, though the mortgagee had power in certain events to take possession of plant and materials, and complete, is a bill of sale as regards such plant and materials, and requires registration; otherwise such document, as regards the plant and materials, will be void.

Climpson *v.* Coles, 38 *W. R.* 110, 23 *Q. B. D.* 465, *distinguished.*

Interpleader summons heard by Wright, J., in court, raising the question whether a document assigning a building agreement, together with the plant and materials, is a bill of sale.

Sage, the debtor, who was a builder, being in want of money to complete certain buildings, assigned all his interest in certain building agreements made between himself and the owners of the land on which the buildings were being erected, together with all the plant and materials on the premises or which were to be brought on the premises during building, as security for money lent or to be lent.

There was no express power of seizure or sale in default of the money not being paid. In case default was made by the mortgagor in proceeding with all due diligence with the erection and completion of the buildings, or in case the mortgagor should become bankrupt or insolvent, or make or execute any deed of composition or arrangement with his creditors, then the mortgagee was to be entitled to take possession of the premises and all plant and materials and complete.

An interpleader summons was taken out between an execution creditor and the claimant, to whom the execution debtor had made the assignment, and on the hearing of this summons it was contended on behalf of the execution creditor that the assignment of the building agreements was in fact, as regards the plant and materials, a bill of sale, which required registration under the Bills of Sale Acts, and was, therefore, void for want of such registration. On behalf of the claimant it was contended that the document was not a bill of sale, and did not require registration as such, and that, therefore, the claimant had a good title under the assignment.

J. E. Bankes, for the claimant.

G. H. Mallinson, for the execution creditor.

Cur. adv. vult.

Dec. 3.—WRIGHT, J., delivered the following written judgment:—It has long been settled that an ordinary building agreement between a landowner and a builder is not brought within the Bills of Sale Acts as regards plant and materials merely by reason of a provision in it that the plant and materials, when brought upon the land, are to be considered as annexed to the land or are to become the property of the lessor: see *Brown* v. *Bateman*, 15 W. R. 350, L. R. 2 C. P. 272; *Blake* v. *Izard*, 16 W. R. 108; *Ex parte Newitt*, 29 W. R. 344, 16 Ch. D. 522; *Reeves* v. *Barlow*, 32 W. R. 672, 12 Q. B. D. 436. The ground of these decisions appears to be that such a provision is in effect a contract that the chattels are to vest absolutely in the lessor as part of the land, or in him as landowner, and that such a contract is not similar to the assignments or assurances specified in the Bills of Sale Acts. The same authorities show that such a provision in such an instrument is not a mere licence to take possession of the chattels as security for a debt, and is not, in such an instrument, an agreement giving a mere right in equity to the chattels. The document, however, which is now in question is not of that kind. It is not an agreement between landowner and builder, but is a mere mortgage by a builder of his interest in a building agreement to a stranger to secure money advanced by the stranger to enable the builder to carry out the building agreement, and is subject to all the ordinary incidents of a mortgage. It purports to assign the plant and materials now or hereafter to be brought on the ground, or adjoining thereto, to the lender absolutely, subject to redemption, and authorizes him, in case the builder impairs the security by delay in building, &c., "to enter on the land and complete the buildings, and for that purpose to take possession of the land and of all plant and materials thereon." In the absence of authority I should have thought that this was a legal assignment of the existing plant and materials; either an equitable assignment, according to the doctrine laid down in *Reeve* v. *Whitmore*, 12 W. R. 113, 33 L. J. Ch. 63, or an agreement whereby a right in equity to the chattels, or a charge or security upon them, was created. I think that the observations of the Court of Appeal in *Reeves* v. *Barlow*, 12 Q. B. D., at pp. 441-2, were intended to apply only to ordinary building agreements, and not to mortgages of the present kind. Apart from other authority, I should be of opinion that this mortgage requires registration as a bill of sale in respect of the plant and materials. But the case of *Climpson* v. *Coles*, 38 W. R. 110, 23 Q. B. D. 465, decided by Denman and Stephen, JJ., in 1889, after all the other cases cited, raises a difficulty. In that case the document in question was a mortgage, and the court, no doubt, appear to have expressed the opinion that the same considerations applied to that mortgage as in the case of an ordinary building agreement. But they did not decide the case on that ground, and there are two circumstances which appear to me to distinguish that case from this. In the first place, so far as can be gathered from the reports, the mortgagor appears to have been the owner of the land. In the second place, his covenant was that the plant and materials to be brought upon the premises should be considered as immediately attached to, and forming part of, the fee simple of the premises. This provision seems to bring the case directly within the principle of *Brown* v. *Bateman*, and the cases which followed it, and was probably the ground of the expressions to which I have referred in *Climpson* v. *Coles*. That case, therefore, is not an authority against the view I have taken. There must be judgment for the execution creditor, with costs, as regards the plant and materials, and the claimant must pay the expenses of the sheriff.

Judgment for the execution creditor.

Solicitor for the claimant, *W. H. Marshall.*

Solicitors for the execution creditor, *Brown, Son, & Vardy.*

Court of Appeal

From Chan. Div. (Lindley, Bowen, and A. L. Smith, L.JJ.) — Dec. 2.

In re BEDDOE.
DOWNES *v.* COTTAM. (*a.*)

Trustee — Costs — Practice — Appeal — Jurisdiction — Charges and expenses—Ord. 65, *r.* 1—*Judicature Act,* 1873 (36 *&* 37 *Vict. c.* 66), *s.* 49.

A trustee of real estate unsuccessfully defended a common law action of detinue of title deeds brought by the legal tenant for life of the estate, and was ordered as defendant to pay the costs of the action. The trustee subsequently took out an originating summons in the Chancery Division for administration of the trust estate, in which he asked for, and obtained from the judge by whom the administration proceedings were heard, an order authorizing payment to him out of the trust estate of all the costs in the common law action.

Held, that the costs of the common law action were not, and could not be dealt with as, "costs" in the administration proceedings, but could only in the administration proceedings be dealt with as "charges and expenses"; that the order of the judge in the administration proceedings was therefore not an order as to "costs only," which, by ord. 65, *r.* 1, *and section* 49 *of the Judicature Act,* 1873, *would be within his unappealable discretion; and, accordingly, that a right of appeal lay on the part of the beneficiaries from the above order.*

Charles *v.* Jones, 35 *W. R.* 88, 33 *Ch. D.* 80, *discussed.*

In re Chennell, Jones *v.* Chennell, 26 *W. R.* 595, 8 *Ch. D.* 492, *approved.*

Held, also (varying the decision of Kekewich, J.), *that the trustee was not entitled, and ought not, to be recouped out of the trust estate all the costs of the common law action, inasmuch as a trustee was only entitled to be indemnified out of his trust estate against all costs, charges, and expenses reasonably, as well as honestly, incurred.*

Appeal from Kekewich, J.

Sarah Beddoe, by her will, devised her real estate to the plaintiff, Downes, upon trust to suffer and permit a Mrs. Savage to receive the rents thereof for her life, and after her death upon trust to sell and divide the proceeds amongst numerous beneficiaries, of whom the defendant, C. B. Cottam, was one.

The testatrix died in February, 1885, and shortly after her death the plaintiff Downes, being then the sole surviving executor and trustee of the will, obtained possession of the title deeds of the real estate, the rents of which were received by, or were paid to, Mrs. Savage for some years.

In February, 1889, Mrs. Savage was minded to sell the estate, as tenant for life under the Settled Land Act, 1882, and accordingly applied, through Cottam, who was acting as her solicitor, to the plaintiff for the title deeds. The plaintiff, acting on the advice of his solicitor, A. P. Trow, refused to give up the deeds, claiming to be entitled to their custody as trustee of the will.

After some correspondence on the subject had passed between Cottam and Trow, Mrs. Savage, on March 1, 1889, brought an action—*Savage* v. *Downes*—in the Queen's Bench Division, against Downes for detinue of the deeds. Trow, as solicitor for Downes, thereupon consulted counsel as to the course to be pursued. The opinion of counsel, as it appeared from documentary evidence extending from March 7 to March 25, was to the effect that he had with much hesitation come to the conclusion that Mrs. Savage was under the will legal tenant for life, and therefore entitled to the custody of the deeds. Counsel suggested that a summons might be taken out in the common law action (*Savage* v. *Downes*) to stay the action for the purpose of an originating summons being taken out in the Chancery Division to determine the point, and in the event of the summons to stay being unsuccessful, he recommended an allegation being added to the statement of defence in the action of detinue, that the defendant Downes had been advised that the point was doubtful but submitted to act as the court might direct. On the 30th of March accordingly Downes took out a summons in the common law action to stay the action; the summons was dismissed, and the costs of it were made costs in the action. On the 7th of April Downes delivered his statement of defence in the common law action, containing the allegation suggested by counsel. On the 24th of April, after some correspondence, in the course of which Cottam, as solicitor of Mrs. Savage, more than once urged Trow, as solicitor for Downes, to hand over the deeds and pay the costs of the action, the deeds were handed over to Cottam on an undertaking being given to return them if the property was not sold. The common law action for detinue came on for trial before a commissioner at assizes on the 13th of August, and judgment was given for the plaintiff, with costs to be paid by the defendant Downes; the learned commissioner in giving judgment, however, stated that, if he had to deal with the question whether Downes, as trustee, was entitled to retain or charge these costs against his trust estate, he saw on the materials before him nothing unreasonable in Downes' conduct which ought to deprive him of the costs on the ground that he had acted in an unfair or improper manner, or had done that which, as trustee, he was not warranted in doing. The total costs of the common law action were taxed at £139 1s. 2d.—viz., £82 13s. 6d. being the plaintiff's (Mrs. Savage's) costs, and £55 17s. 8d. being the defendant's (Downes) costs.

In August, 1891, the life tenant, Mrs. Savage, died. On the 9th of February, 1892, Downes, the trustee, took out as plaintiff an originating summons in the Chancery Division for the administration of the estate of the testatrix, Sarah Beddoe, by which he asked to have it declared that he was entitled to payment out of the trust estate of the above-mentioned sum of £139 1s. 2d., and to the costs of the originating summons. Cottam, as one of the residuary devisees, was made a defendant to the summons, and was appointed to represent the other *cestui que trusts* on the hearing of the summons. He opposed the application.

Kekewich, J., on the hearing of the originating summons, made an order authorizing the payment of the above-mentioned sum of costs in the common law action, to the trustee out of the trust estate, and also the costs of the originating summons.

From this order Cottam appealed.

Cottam appeared in person, and contended that the costs of the Queen's Bench action had been occasioned by the unreasonable conduct of the trustee in refusing to give up the title deeds, and that the trustee was not entitled to receive payment of those costs out of the trust estate.

Renshaw, Q.C., and *Herbert Lake,* for the trustee, the plaintiff Downes.—The trustee in refusing to give up the deeds only acted on the advice of his counsel and solicitor. Counsel advised that the point as to who was entitled to the custody of the deeds was

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

doubtful. The trustee, therefore, did not act unreasonably in defending the common law action, and ought to be allowed the costs of that action out of the trust estate as charges and expenses properly incurred. Further, we take the point that no appeal lies on the part of a beneficiary from an order of a judge of the High Court allowing a trustee costs out of the trust estate. The costs of the Queen's Bench action were costs of "proceedings in the Supreme Court" within ord. 65, r. 1, and were, therefore, within the discretion of Kekewich, J.; and, having regard to section 49 of the Judicature Act, 1873, no appeal lies from the order of Kekewich, J. On this point they cited *Charles* v. *Jones*, 35 W. R. 88, 33 Ch. D. 80.

Cottam was called on to argue the point as to jurisdiction.—*Charles* v. *Jones* dealt only with "costs" in the proper sense of that term, not with "charges and expenses." [LINDLEY, L.J., referred to the passage in the judgment of Cotton, L.J., in *Charles* v. *Jones*, beginning "a small point has been raised," and ending "the appellant, therefore, is not injured by this part of the order": 35 W. R., at p. 89, 33 Ch. D., at p. 82-3]. The case of *In re Chennell, Jones* v. *Chennell*, 26 W. R. 595, 8 Ch. D. 492, shows that there is a distinction between "costs" and "charges and expenses" for the purpose of considering whether an appeal lies; and it was never intended in *Charles* v. *Jones* to act contrary to *In re Chennell*. The costs of the Queen's Bench action in the present case are not "costs," but "charges and expenses." [LINDLEY, L.J.—I have looked at the entries in the registrar's book of *Charles* v. *Jones*; the order made by Bacon, V.C., in that case says nothing about "charges and expenses"; it only relates to the defendant's "costs of this action, including his costs properly incurred as mortgagee"; nor is there anything about "charges and expenses" in the order of the Court of Appeal in that case.]

Renshaw, Q.C., and *Lake*, in reply on the question of jurisdiction.—The case of *In re Chennell* was decided on the construction of ord. 55, r. 1, of the Rules of 1875, the words of which are different to the words of ord. 65, r. 1, of the Rules of 1883. The word "costs" in ord. 65, r. 1, includes "charges and expenses"; there is nothing in ord. 65, r. 1, to limit the words "costs of, and incident to, the administration of trusts," to costs of administration incurred in the litigation; these words apply to and include an administration of a trust outside the court: Seton on Decrees, 4th ed., vol. 2, part 1, pp. 1040, 1063. No appeal lies from an order as to costs only: *Harris* v. *Aaron*, 25 W. R. 353, 4 Ch. D. 749. In *Charles* v. *Jones* the costs dealt with included some costs outside the mortgagee's costs of the action. [LINDLEY, L.J.—In *Charles* v. *Jones* the Court of Appeal did not say that the particular costs outside the action allowed by Bacon, V.C., were improperly incurred. They only said that under the order of Bacon, V.C., the mortgagee would be allowed those costs if properly incurred; they did not hold that the question whether those costs were or were not properly incurred was not appealable.] "Costs" as applied to trustees means something different to the word costs as applied to an ordinary plaintiff or litigant; as applied to a trustee it includes "charges and expenses."

LINDLEY, L.J.—This is an appeal from an order of Kekewich, J., allowing the plaintiff, a trustee, certain costs, charges, and expenses out of the trust estate. [The Lord Justice stated the facts above set out, and continued:—] The first question we have to deal with is whether an appeal lies from the order of Kekewich, J.? In my opinion an appeal does lie from that order. That question turns on the true effect of section 49 of the Judicature Act, 1873, and ord. 65, r. 1, of the Rules of 1883, for by section 19 of the Judicature Act, 1873, every order is appealable unless we find some provision in the Act or rules that it is not to be subject to appeal. Section 49 runs thus: "No order made by the High Court of Justice or any judge thereof . . . as to costs only, which by law are left to the discretion of the court, shall be subject to any appeal, except by leave of the court or judge making the order." We have, therefore, to see what are "costs only, which by law are left to the discretion of the court." That is shown by ord. 65, r. 1, which runs thus: "Subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge; provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted, carried on, or resisted any proceedings of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division." Neither the Act nor the rules say a word as to "charges and expenses" (as distinguished from costs) of either a mortgagee or a trustee. Both section 49 and ord. 65, r. 1, relate to "costs" only. The object and the history of the introduction into rule 1 of order 65 of the words "including the administratiion of estates and trusts" is really to emphasize the preceding words of the rule, "the costs of and incident to all proceedings in the Supreme Court," and to check the old chancery practice of giving the costs of administration out of the estate. Apart from the exception mentioned in the provisoes to ord. 65, r. 1 (and some other statutory exceptions which are not material), "the costs of and incident to all proceedings in the Supreme Court shall be in the discretion of the court or judge." But in the discretion of what court or what judge? In my opinion the meaning is that the costs of proceedings are to be in the discretion of the judge before whom the proceedings are taken, not that the costs of one proceeding are to be in the discretion of a judge before whom these costs may come in another proceeding. They could only then be asked for as charges and expenses, and the moment one asks to have them treated as charges and expenses they cease to be costs and become charges and expenses. In the present instance the costs of the common law action of *Savage* v. *Downes* were in the discretion of the commissioner who tried that case; but they are not costs of and incident to the proceedings before Kekewich, J., and are no more costs of proceedings in his discretion than any other charges and expenses. The view which I take as to the distinction between "costs" and "charges and expenses" has also been taken in *In re Chennell*, and I should have thought it plain, were it not for the case of *Charles* v. *Jones*, which at first sight appears to raise a difficulty. Under the proviso to ord. 65, r. 1, an executor or mortgagee or trustee who has not unreasonably instituted, carried on, or resisted any proceedings is not to be deprived of any right to costs out of a particular estate or fund to which he would have been entitled under the rules hitherto acted upon in chancery. The effect is that costs, charges, and expenses properly incurred are to be allowed to executors, mortgagees, and trustees. The case of *Charles* v. *Jones* is of the converse kind. In that case a mortgagee who had been guilty of some misconduct was allowed his costs as against the mortgagor by Bacon, V.C., and the Court of Appeal held that no appeal lay from the

order of the Vice-Chancellor because the costs in that case did not come within the proviso in rule 1 of order 65, and were in the discretion of the judge, from which there was no appeal. It is true there is a passage in the judgment of Cotton, L.J., which looks as if some question had been raised in that case as to "charges and expenses" as distinguished from "costs," but that question was not, I think, really before the Court of Appeal in *Charles* v. *Jones*, nor was it dealt with by the court. The doubt created by that case when first looked at has been removed from my mind, by examining the entry in the registrar's book of the actual orders made by Bacon, V.C., and the Court of Appeal; and that case is not an authority against allowing the appeal in the present case.

We have, therefore, now to consider whether the order made by the judge in the court below was right or wrong. The present appeal is against that part of the order of Kekewich, J., which allows the trustee out of the trust estate the costs of the common law action unsuccessfully defended by him. Notwithstanding the terms of the devise, Mrs. Savage was legal tenant for life, and was entitled to the deeds, and no doubt ought to be thrown by the court on this point. It is perfectly clear when the authorities are looked into. But no trustee could be reasonably expected to know this; and no solicitor can be blamed for not seeing at a glance what the rights of the parties were. Mr. Trow himself thought Cottam was right; but Trow did not act unreasonably in taking time to consider, nor in consulting counsel, nor in being guided by him rather than by his opponent Cottam. But a trustee who, without the sanction of the court, commences an action, or defends an action, unsuccessfully, does so at his own risk as regards the costs, even if he acts on counsel's opinion; and when the trustee seeks to obtain such costs out of his trust estate he ought not to be allowed to charge them against his *cestui que trusts* unless under very exceptional circumstances. If, indeed, the judge comes to the conclusion that he would have authorized the action or defence had he been applied to, he might, in the exercise of his discretion, allow the costs incurred by the trustee, out of the estate; but I cannot imagine any other circumstances under which the costs of an unauthorized and unsuccessful action brought or defended by a trustee could be properly thrown on the estate. Now, if in this case the trustee had applied by an originating summons for leave to defend the action at the expense of the estate, I cannot suppose that any judge would have authorized him to do so. Consequently, I should not myself have allowed these costs out of the estate.

I entirely agree that a trustee is entitled as of right to full indemnity out of his trust estate against all his costs, charges, and expenses properly incurred; such an indemnity is the price paid by *cestui que trusts* for the gratuitous and onerous services of trustees, and in all cases of doubt costs incurred by a trustee ought to be borne by the trust estate, and not by him personally. The words "properly incurred" in the ordinary form of order are equivalent to "not improperly incurred." This view of the right of a trustee to indemnity, is in conformity with the settled practice in chancery, and with *Turner* v. *Hancock*, 30 W. R. 480, 20 Ch. D. 303, the latest decision on the subject. But considering the ease and comparatively small expense with which trustees can obtain the opinion of a judge of the Chancery Division on the question whether an action should be brought or defended at the expense of the trust estate, I am of opinion that if a trustee brings or defends an action unsuccessfully and without leave, it is for him to show that the costs so incurred were properly incurred. The fact that the trustee acted on counsel's opinion is in all cases a circumstance which ought to weigh with the court in favour of the trustee, but counsel's opinion is no indemnity to him, even on a question of costs. This was decided in *Stott* v. *Milne*, 25 Ch. D., at p. 714. In the present case I am compelled to say that counsel made a mistake in advising that there was any doubt about Mrs. Savage's right to the deeds; and Mr. Trow made a mistake in acting on a doubtful opinion, and in not applying by an originating summons for leave to defend the action, as he was advised that he had a doubtful case.

In my opinion that part of the order of Kekewich, J., which allowed the trustee these costs out of the estate ought to be discharged, and an order made as follows:—Vary the order of Kekewich, J. As to the costs of *Savage* v. *Downes*, Downes to be allowed out of the estate only such of the costs in that action as would have been incurred if he had applied to the court for leave to defend, and no more. [To avoid further expense the Lord Justice fixed these costs at a specific sum. And as to the costs of Cottam in respect of the originating summons both in the court below and on the appeal, the Lord Justice also fixed them at a specific sum, and directed that that sum, and no more, was to be allowed to the appellant Cottam out of the trust estate.]

BOWEN, L.J.—I also am of opinion that an appeal lies. The costs of the collateral action in the Queen's Bench Division become, in my opinion, charges and expenses when the trustee seeks to recoup himself for them in the administration of the trust. They are costs in their origin, but cease to be costs which are fairly within the unappealable discretion of a court when an attempt is made to fix them on to the trust fund.

Ord. 65, r. 1, directs that, subject to the provisions of the Acts and the rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court. In order to understand the scope of this general rule, which deals with the general subject of costs, and in order to see whether there is or is not an appeal as regards the matter of the summons, we must look back to section 49 of the Act of 1873, which enacts that no order made by the High Court as "to costs only which by law are subject to the discretion of the court" is to be subject to an appeal except by leave. Unless an appeal in the present case is taken away by section 49 an appeal necessarily still lies. Are, then, these costs of the Queen's Bench action "costs only, within the discretion" of Kekewich, J.? They were costs as between the parties to the Queen's Bench action, and as between those parties were rightly dealt with by the Queen's Bench judge. But when one of the parties to the Queen's Bench action endeavours to recoup himself for them out of a trust fund, can they be said to be still "costs" within the meaning of section 49, and within the absolute discretion of the judge who hears the application? So to hold is to deprive *cestui que trusts* of an appeal upon the question whether the trustee was justified in defending a collateral action.

In *Chennell's case* the Master of the Rolls in the Court of Appeal pointed out that "charges and expenses" are not "costs" within section 49, and the present rule (ord. 65, r. 1), which is subsequent to *Chennell's case*, in still adhering, after that decision, to the former word "costs" cannot be taken to include "charges and expenses" under it. Is it reasonable to sweep within the scope of a section

dealing with general costs of actions the costs of an independent and collateral proceeding between third persons tried before a different judge? If this were a question between principal and agent, can it be said that under this rule the costs incurred by an agent in an action brought or defended by him were, as between himself and his principal, to be within the absolute discretion of some other judge who had not heard the case? The liability of the principal would depend on questions of pure fact. Why should the discretion of a judge of the High Court conclude the matter? And why should the law be otherwise in the case of a trust fund? All matters in connection with trust funds are not made the subject of pure discretion of a judge. They depend on questions of gravity involving controversies as to facts, and possibly legal questions of right. The fallacy of the respondents' argument lies in supposing that because a trustee has to pay costs in a collateral suit, it is as "costs" that he inflicts them on his own trust fund. It is only as "charges and expenses" that he can recover them, and charges and expenses are not matters as to which an appeal is taken away, either under section 49 of the Act of 1873 or under ord. 65, r. 1.

But it is said that the case of *Charles* v. *Jones* decides that although in such a case the trustee may appeal, the *cestui que trusts* may not. That case (rightly decided, no doubt, on the rules) nevertheless is one that inflicts some hardship on trust funds. If a trustee may appeal against an order finding that he has been guilty of misconduct, justice would seem to indicate that an appeal ought conversely to lie in the interests of infants and *cestui que trusts* when the decision is the other way. However under ord. 65, r. 1, it is not so. But we ought not to stretch the words of the rule in order to apply such a hard doctrine to "charges and expenses" when the clear words seem, in their ordinary sense, to exclude them. But in truth, in *Charles* v. *Jones*, the point raised in the present case as to the lawfulness of an appeal did not really arise. The appeal presented there was as to the misconduct of a trustee in the suit, and Cotton, L.J., while holding that no appeal lay on behalf of the trust fund interested, pointed out that the part of the order of Bacon, V.C., which directed that costs (in the sense of charges and expenses) properly incurred were to come out of the fund, was regular, but he does not say that, as to the propriety of incurring such charges and expenses, no appeal could lie. The case, therefore, is not in point. In my opinion, an appeal here lies, and I proceed to consider the present case on the merits.

If the present appeal fails, what, we are told, amounts to nearly a quarter of a tiny trust fund, will have been wasted with impunity in an unsuccessful litigation of no profit whatever to the trust fund—and the legal profession will have devoured, without any corresponding advantage to anybody, a considerable portion of a very small oyster.

The respondent was trustee of an estate such as I have described, and entitled in that capacity to a remainder in fee with trust for sale, subject always to the previous life interest of a tenant for life. The tenant for life, who was herself meditating a sale of the property under the Settled Land Act, 1882, demanded—as she was entitled to do—possession of the title deeds. On the true construction of the will, the trustee had no answer in law to the demand. But his solicitor entertained at the outset some doubt as to the law on the case: doubts which the result showed to be unfounded. He did not take out any summons for directions from the court, as he might have done, and thereby avoided litigation; but, on his own responsibility, he defended the action down to the assizes, and was there defeated in the end. The vanquished trustee now seeks to impose the costs of this idle and fruitless litigation on the estate under circumstances which I shall presently examine.

The principle of law to be applied appears unmistakably clear. A trustee can only be indemnified out of the pockets of his *cestui que trusts* against costs, charges, and expenses properly incurred for the benefit of the trust—a proposition in which the word "properly" means reasonably, as well as honestly, incurred. While I agree that trustees ought not to be visited with personal loss on account of mere errors in judgment, which fell short of negligence or unreasonableness, it is, on the other hand, essential to recollect that mere *bona fides* is not the test, and that it is no answer in the mouth of a trustee who has embarked in idle litigation to say that he honestly believed what his solicitor told him, if his solicitor has been wrongheaded and perverse. Costs, charges, and expenses which, in fact, have been unreasonably incurred do not assume in the eye of the law the character of reasonableness simply because the solicitor was the person who was in fault. No more disastrous or delusive doctrine could be invented in a court of equity than the dangerous idea that a trustee himself might recover over from his own *cestui que trusts* costs which his own solicitor has unreasonably and perversely incurred, merely because he had acted as his solicitor told him. If there be one consideration, again, more than another which ought to be present to the mind of a trustee—especially the trustee of a small and easily-dissipated fund—it is that all litigation should be avoided unless there is such a chance of success as to render it desirable, in the interests of the estate, that the necessary risk should be incurred. If a trustee is doubtful as to the wisdom of prosecuting or defending a lawsuit, he is provided by the law with an inexpensive method of solving his doubts in the interests of the trust. He has only to take out an originating summons, state the point under discussion, and ask the court whether the point is one which should be fought out or abandoned. To embark in a lawsuit at the risk of the fund without this salutary precaution might often be to speculate in law, with money that belongs to other people. With these preliminary observations I proceed to narrate succinctly the story of this wasteful litigation. [The Lord Justice then stated the facts, and observed that any solicitor must, after consulting the authorities, have known that it was a dangerous thing and calculated gravely to imperil the small trust fund, for the respondent to defend the threatened action for detinue of the title deeds; that on the issue of the writ the respondent's solicitor himself became alarmed, and on the 5th of March, 1889, wrote a letter to obtain counsel's opinion; that counsel's opinion in reply stated that "on the whole, though with much hesitation, he thought that Mrs. Savage was legal tenant for life, and, therefore, entitled to the custody of the deeds"; that counsel added that as regards costs he recommended an allegation to be added in the statement of defence in the action of detinue, that the defendant had been advised that the point was doubtful; that counsel, however, had not advised the action to be defended, nor stated that it could be defended with any prospect of success; his lordship then proceeded:—]

Pausing here to review the situation the following facts are clear. The respondent through his solicitor knew (on the 7th of March) that his counsel feared (as he himself did) that he was in the wrong. His counsel had not even advised him that the action might be defended with any reasonable prospect of success. What was the duty of any trustee of a tiny fund?

What was the only reasonable course that could thereupon be pursued for the benefit of a fund of this description? Obviously either to abandon the defence if he could not compromise, or to take out an originating summons asking for the directions of the court. The smallness of the estate out of which costs if ordered would have to come, the character of the question at issue, the adverse impression of counsel, the sense that the authorities on the point were unfavourable—all these things, to my mind, made it absolutely and utterly unreasonable without further advice to risk the money of the *cestui que trusts* in a common law action about the custody of these deeds. The litigation pursued its course. A futile attempt was made to stay the common law action on the terms of taking out an originating summons in chancery to have the question decided there, where counsel believed the trustee would get his costs out of the fund. A useless profession was made in the statement of defence of a willingness, as soon as the Queen's Bench Division should pronounce judgment, to submit to it—a pious expression of resignation to the will of the court, borrowed from chancery, but wholly thrown away upon a common law action of detinue—and on the 13th of August, at the assizes, the learned commissioner who sat as a judge decided the action against the respondent, not expressing any doubt upon it. There was no appeal against his decision. Reliance has been placed by respondent's counsel on the fact that in delivering judgment the learned commissioner stated that, if he had to deal with the question whether the trustee was entitled to retain or charge these costs against the trust estate, he saw, on the materials before him, nothing unreasonable in the respondent's conduct which ought to deprive him of the costs on the ground that he had acted in an unfair or improper manner, or done that which as trustee he was not warranted in doing; but that that matter must be disposed of, when it arose, by the proper tribunal. The learned commissioner had not before him the materials now before this court, and the matter is at large for us. The view of Kekewich, J., in the respondent's favour is a matter which has much impressed me. The note furnished us of his judgment is imperfect; but I think that Kekewich, J., has been influenced by the view that the solicitor of the respondent had acted either under, or not contrary to, the opinion of counsel. He also expresses the opinion that the point of law as to the custody of the deeds was one of some difficulty. As I have above stated, I myself do not agree that this point of law was difficult. As soon as the authorities are examined the difficulty vanishes. Even if the point of law was difficult, this does not, to my mind, justify, in a small trust, defending an action of detinue, in which the respondent's solicitor and his counsel were both unable to bring themselves to believe that the respondent would succeed, without making some effort to obtain directions from the court, or to make terms with their adversary. Any other view appears to me to be fraught with the utmost danger, both to trust estates and to the practice of this court. I think that up to the 9th of March the trustee was not acting unreasonably, although he was acting under a mistaken impression of his rights. From and after the 9th of March he was acting, in my opinion, most rashly and very unreasonably. He ought, I think, to be allowed out of the trust fund the costs indicated by Lindley, L.J., and no more. This will relieve the trust fund of the burthen placed on it by the order of the court below, and I agree that the varied order which Lindley, L.J., has stated is correct.

A. L. SMITH, L.J.—I have nothing to add to the judgments already delivered.

Order appealed from varied.

Solicitors, *Cottam; Tucker, Lake, & Lyon*, for *A. P. Trow*, Cleobury Mortimer.

From Q. B. Div. (Lord Esher, M.R., and Lopes, L.J.) — Dec. 1.

DAVEY v. BENTINCK. (*a*.)

Practice—Pleadings—Order for particulars—Non-compliance—Order to dismiss action if particulars not delivered within certain time—Ord. 19, *r.* 7—*Action shown by particulars to be frivolous or vexatious—"The pleadings"—Ord.* 25, *r.* 4.

An order made on a plaintiff to deliver particulars of his claim under ord. 19, *r.* 7, *may include the term that the action shall be dismissed unless the particulars are delivered within a certain time.*

Semble, *the words "the pleadings" in ord.* 25, *r.* 4, *include particulars.*

Appeal by the plaintiff from an order of a divisional court that the action be dismissed unless the plaintiff deliver proper particulars of his claim within fifteen days.

The plaintiff sued the defendant to recover a sum of money in respect of services alleged to have been performed by the plaintiff for the defendant at his request.

On the 30th of May, 1892, the defendant obtained an order, under ord. 19, r. 7, that the plaintiff should deliver particulars of his claim.

On the 15th of June a further order was made that the plaintiff should deliver particulars within ten days.

On the 4th of July a further order was made that the action should be dismissed unless the plaintiff delivered particulars within a week.

The plaintiff then delivered certain particulars to the defendant, but the defendant considered them insufficient, and on the 20th of July he obtained an order that unless the plaintiff delivered proper particulars within ten days certain paragraphs of the statement of claim should be struck out.

The plaintiff delivered further particulars, but again the defendant considered them insufficient, and on the 4th of August the defendant took out a summons asking (1) that the statement of claim be struck out under ord. 25, r. 4, as being frivolous and vexatious; and (2) that the action be dismissed unless the plaintiff delivered proper particulars within seven days. On the hearing of this summons the master made an order dismissing the action with costs. The plaintiff appealed to the judge at chambers, who affirmed the order of the master. The plaintiff again appealed to the Divisional Court (Mathew and Bruce, JJ.), who ordered the action to be dismissed unless the plaintiff should deliver proper particulars within fifteen days.

The plaintiff now appealed to the Court of Appeal.

Ord. 19, r. 7, is as follows: "A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice, or written proceeding requiring particulars, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just."

Ord. 25, r. 4, is as follows: "The court or a judge

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

J. E. Fox, for the plaintiff.

J. E. Bankes, for the defendant.

Lord ESHER, M.R.—In this case the master made an order that the action should be dismissed. The summons was applied for on two grounds—the first being that the action was frivolous and vexatious, and the second ground being that an order had been made for proper particulars, and proper particulars had not been given. Now there are two ways in which an action may be dismissed for being frivolous and vexatious; it may be done under ord. 25, r. 4, or it may be done under the inherent power of the court. The question whether the present action could be dismissed under ord. 25, r. 4, depends on whether particulars are to be treated as part of "the pleadings" within that rule. I am strongly of opinion that they are. I think that where there are particulars, and they show that the action is frivolous and vexatious, an order may be made under this rule dismissing the action. But it is not necessary to determine that point. The court has inherent authority to stop proceedings which are frivolous or vexatious, or an abuse of the process of the court. And this may be done at any stage of the proceedings. Here the plaintiff was ordered again and again to deliver particulars of the services in respect of which he sued the defendant; and he has failed to deliver any proper particulars. The court might well draw the inference that the reason why he failed to do so was because he had never rendered any services at all. If he had not rendered any services, then there was no cause of action. And under such circumstances the court has an inherent authority to order the action to be dismissed. The order of the Divisional Court, however, was that the action should be dismissed unless the plaintiff delivered particulars within fifteen days. The result of the order being made in that form is to raise this question—viz., whether ord. 19, r. 7, which says that particulars may be ordered "upon such terms, as to costs and otherwise, as may be just," authorizes the making of an order for particulars, including the term that the action shall be dismissed unless the particulars are delivered within a certain time. I am of opinion that the rule authorizes the making of such an order, and that the order now appealed from was rightly made under that rule. The appeal must be dismissed.

LOPES, L.J., concurred.

Solicitors for the plaintiff, *Fox & Joy*.

Solicitors for the defendant, *Lewis & Lewis*.

From Q. B. Div. (Lord Esher, M.R., and Bowen and Kay, L.JJ.) — Aug. 10, 1892.

GUARDIANS OF WEST HAM UNION (*Appellants*). CHURCHWARDENS, &c., OF ST. MATTHEW, BETHNAL GREEN (*Respondents*). (*a*.)

Poor law—Settlement—Irremovability—Residence apart from parent while under sixteen—11 & 12 *Vict. c.* 111 —*Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 34.

A pauper resided in domestic service from the age of fourteen to the age of eighteen in a parish in the appellant union. Her father was dead, and her mother never resided nor had a settlement in the appellant union.

Held, that the proviso in section 1 *of* 11 & 12 *Vict. c.* 111 *only applied to prevent the separation of families, and therefore did not apply where the pauper was residing apart from her parent; that the pauper acquired a status of irremovability by such residence while under sixteen; and that, accordingly, the period of residence under sixteen could be added to the period of residence over sixteen, so as to confer a settlement upon her under section* 34 *of the Divided Parishes Act*, 1876.

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Appeal from the judgment of the Queen's Bench Division upon a special case stated on appeal against an order of a metropolitan police magistrate, whereby he adjudged that the parish of Low Leyton, in the appellant union, was the place of the last legal settlement of the pauper, Caroline Batchelliar.

The pauper's father died when she was two years old, and her widowed mother resided and was settled in Shoreditch parish. The pauper, a few days before she attained the age of fourteen, went into domestic service in the parish of Low Leyton, and resided there without interruption until a few days before she became eighteen years of age, when she went to reside with her mother at places outside the appellant union until she became chargeable to the respondent parish. The court of quarter sessions dismissed the appeal from the magistrate, and this decision was affirmed by the Divisional Court (Pollock, B., and Vaughan Williams, J.) The appellant union appealed.

August 9.—*Jelf, Q.C.*, and *R. D. Muir*, for the appellants.—It must be shown that in each of the three years necessary to confer a settlement the pauper must have been irremovable. When the pauper was under sixteen she was part of her mother's family, and could have been removed with her to her place of settlement outside the appellant union. There were, therefore, not three years of irremovability while the pauper was in service in the appellant union. The proviso in section 1 of 11 & 12 Vict. c. 111 applied.

They referred to *Reg.* v. *St. Ebbe's*, 12 Q. B. 137; *Reg.* v. *Pott Shrigley*, 12 Q. B. 143; *Reg.* v. *St. Olave's Union*, 22 W. R. 75, L. R. 9 Q. B. 38; *Reg.* v. *Elvet*, 7 W. R. 586, 2 E. & E. 266; *Reg.* v. *Abingdon Union*, 18 W. R. 981, L. R. 5 Q. B. 406; *Reg.* v. *Leeds Union*, 27 W. R. 708, 4 Q. B. D. 323; *Dorchester Union* v. *Weymouth Union*, 16 Q. B. D. 31, 34 W. R. Dig. 135; *Swindon Union* v. *Westbury-on-Severn Union*, 38 W. R. 295, 14 App. Cas. 465.

Beven, for the respondents.—At the end of the first year's residence in the appellant union the pauper became irremovable, and during the next three years she remained irremovable, and came within the provisions of section 34 of the Divided Parishes Act, 1876. A child under sixteen can acquire a settlement by residence: *Holborn* v. *Chertsey*, 33 W. R. 344, 14 Q. B. D. 289; *Reg.* v. *St. George's-in-the-East*, 18 W. R. 787, L. R. 5 Q. B. 364; *Mitford Union* v. *Wayland Union*, 38 W. R. 632, 25 Q. B. D. 164.

Jelf, Q.C., replied.

Cur. adv. vult.

August 10.—Lord ESHER, M.R.—The Divisional Court has decided that the pauper obtained a settlement in the union in which she had in fact lived for more than three years in domestic service. The question is whether by so living she had obtained a

settlement. When she first went into service she was almost fourteen years of age, and she remained in service in the same parish for four years. Her mother did not live in that parish, and had no settlement there. Now the law of settlement was so obscure, and gave rise to so many lawsuits, that the efforts of the Legislature were directed towards simplifying the law. The first thing was to enact the law of irremovability, and to make that the important inquiry. The old law of settlement was not done away with. If a pauper was irremovable for a certain number of years, the pauper acquired a settlement. To ascertain whether a pauper has acquired a settlement in a certain parish, the inquiry must be directed to the question whether the pauper was irremovable in that parish for three years. The question of irremovability was simplified by enacting that residence for a year in a parish rendered the pauper irremovable. The result was that if a pauper resided for one year in a parish he would be irremovable; if he resided for three years he would acquire a settlement. Then comes a question which it is not necessary to determine, whether a pauper, who has resided for three years in a parish, and was irremovable in the last two years only, acquires a settlement? The case here stands thus: During the first year it is obvious that the pauper could have been removed from this parish. At the end of the first year the pauper, by her residence in the parish for one year, was irremovable, and therefore during each of the three years following she was irremovable. The pauper was therefore irremovable during each of those years, and acquired a settlement.

It is said that the proviso to section 1 of 11 & 12 Vict. c. 111 altered that. In my opinion the proviso was intended to be a humane enactment, whereby a family living together, which would otherwise be compelled to separate, would go to the place of settlement of the parent. That legislation was only wanted where that effect would be produced. That was the view taken by Cockburn, C.J., in *Reg.* v. *Leeds Union*, and he had there to consider whether the child was in contemplation of law living with its mother, though not in fact living with its mother. If a child were living with its parents, its residence would be its parents' residence. If the child were away on a visit, or at school, still in contemplation of law its residence would be with its parents, as the parents would have the power to take back the child at any moment. In the present case the pauper was in domestic service, and was living with her master or mistress. In *Reg.* v. *Leeds Union* Cockburn, C.J., was considering the case of a child who was abandoned by its parent, but he did not lay down that, apart from abandonment, a child must be considered as residing with its mother. Here I think that the pauper was residing in the parish where she was in service. It has been held that if there is a residence for one year under sixteen so as to cause irremovablity, and similar residence for the remaining two years after sixteen, the two periods may be added together so as to confer a settlement, subject of course to the proviso in section 1 of 11 & 12 Vict. c. 111 as to the separation of families. I think that the decision in *Reg.* v. *Leeds Union* is one that we cannot and ought not to overrule. It produces simplicity and carries out the object of the Legislature, and prevents the necessity of inquiring into the position of the parents. I agree with that decision, but even if I differed from it I do not think that we ought to overrule it. The judgment of the Divisional Court must be affirmed.

BOWEN, L.J.—I am of the same opinion. I do not think that this point was decided in the case of *Swindon Union* v. *Westbury-on-Severn Union*, and so far as the court below thought that it had, I must say I cannot follow them. This case turns upon another point—whether, at the end of the first year of the pauper's domestic service, she had not acquired a *status* of irremovability. If she had, that *status* of irremovability continued during the three following years, and she was irremovable in each of those years, and at the end of the three years acquired a settlement. We must first see whether the pauper resided in the parish, and, secondly, if so, whether the proviso to section 1 of 11 & 12 Vict. c. 111 prevented that residence from giving her a *status* of irremovability. As to whether she resided in the parish, I agree with what was said by the Master of the Rolls. The child, though unemancipated, had, with her parent's consent, gone into service and taken up her abode in the parish. That, in ordinary language, was residence there. The second question was whether that residence conferred a *status* of irremovability. That depends upon the proviso to the Act. A proviso must be taken as limiting the meaning of the section. That was the view taken by Cockburn, C.J., in *Reg.* v. *Leeds Union*. It is a proviso framed in the interests of humanity, and must be construed as thus limiting the section. In that case the child had been severed from the nurture and custody of the mother, and while so severed it had completed the statutory period of residence. The court came to the conclusion that the child, being so abandoned by the mother, must be taken to have acquired sufficient independence of life to obtain a residence away from its mother. The question then arose whether such residence away from its mother gave the child a *status* of irremovability, and upon that question the proviso had to be considered. The Lord Chief Justice considered the object of the legislation, and said that it was to prevent the dispersal of families, and only applied where the family were living together, and accordingly that the proviso did not apply to that case, where no question of separating a child from its parent arose. The irremovability of part of a family living together was not to take effect where the head of the family was not irremovable. That is how I understand the decision in that case, and that view was also taken in *Reg.* v. *St. Mary Arches, Exeter*, 10 W. R. 268, 31 L. J. M. C. 77, and, I think, accepted by this court in *Mitford Union* v. *Wayland Union*, where the Master of the Rolls and Fry, L.J., both point out that this limitation must be read into the proviso—namely, that it was enacted to prevent the dispersal of families. Whether that is the true meaning of the proviso I cannot say. But why should we disturb the law laid down for so many years? In my opinion we must follow it.

KAY, L.J., read the following judgment:—A young girl, the child of a widowed mother, was in domestic service in West Ham from July, 1879, to July, 1883. Her mother never resided in West Ham. In 1883 the girl went to live with her mother, and eventually became chargeable to the parish of St. Matthew, Bethnal Green. During only the last two years of her service in the parish of West Ham was the girl over sixteen, being just about fourteen when she first went there. It has been held that the girl acquired a settlement in West Ham. Against this decision the guardians of West Ham appeal.

It is contended that while the girl was under sixteen she could only have the settlement and the *status* of irremovability of her mother, who never had either in West Ham, and that consequently the girl did not acquire a settlement in West Ham. Such a settlement, it is argued, could only be acquired by three years of residence, each of which years must be

a year during, or at least at the end of which she would have been or become irremovable.

The question depends upon section 34 of the Divided Parishes and Poor Law Amendment Act, 1876. That section requires, for the purpose of a settlement being obtained, (1) three years' residence; (2) peculiar manner and circumstances of residence. The manner and circumstances are thus mentioned: "In such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render" her "irremovable." The statutes in that behalf are 9 & 10 Vict. c. 66, 11 & 12 Vict. c. 111, 24 & 25 Vict. c. 55, and 28 & 29 Vict. c. 79, s. 8.

By the first of those Acts five years' residence was necessary to give irremovability; by the third this was reduced to three years; and by the last to one year. But the first of these statutes contained a proviso which was made more explicit by the second, and as so altered provided, so far as applicable to the present case, that whenever a widow should have a child having no other settlement than her own, such child should be removable from any parish from which the mother would be removable. The mother would undoubtedly have been removable from the parish of West Ham, if she had gone there and become chargeable before the girl attained sixteen. Therefore it is said that the girl did not become irremovable before that age, because by section 35 of the Divided Parishes Act, passed in 1876, a child under sixteen must take the settlement of its widowed mother up to that age, and must retain that settlement until it acquires another. Having the mother's settlement up to sixteen, the proviso, it is argued, prevented the girl becoming irremovable in another parish by a year's residence under that age. Consequently there were not three years of residence in West Ham in each of which this girl was irremovable, but only two, and it must follow that by her residence there she did not acquire a settlement.

I confess I am considerably impressed by this reasoning, and it is necessary to see whether I am compelled by authority to arrive at some other conclusion. There are two cases which, it is said, have decided otherwise. The first is *Reg.* v. *Leeds Union.* In that case an illegitimate child a fortnight old was placed by its mother in the care of strangers who resided in a parish in which the mother did not reside, and the child lived with them for more than three years. Then they removed to another parish, and a few months afterwards the child became chargeable, and was removed to the parish where it had resided more than three years. Although the child for those three years was under the age of seven years, its residence was held sufficient to give it a settlement, and the proviso was held not to apply, Cockburn, C.J., saying that the proviso in 11 & 12 Vict. c. 111 was enacted "to prevent the dispersing of different members of a family," and that this mother had "entirely given up" the child. "It was not," he said, "a suspension, but a virtual abandonment of the maternal rights," without any intention to resume them, and that in such circumstances simple residence for the three years was sufficient. The other case is *Mitford Union* v. *Wayland Union.* There a child lived with her father till she attained sixteen, and shortly after attaining that age became chargeable. The father was then residing in, and had become irremovable from, a parish in which he had no settlement. It was held that the girl had the same settlement as her father, but that the proviso in 11 & 12 Vict. c. 111 applied, and that as he could not be removed from the parish in which he was residing neither could she.

In *Highworth Union* v. *Westbury-on-Severn Union* the House of Lords held that, where a girl had resided with her widowed mother in the parish in which that mother had a settlement, and from which she was irremovable, for three years partly before and partly after she attained sixteen, the period before she attained sixteen could be reckoned in making up the three years. The point we have to decide did not arise. The pauper was irremovable in each of the three years. The Lord Chancellor says:—"It is clear, therefore, that in this case there was for more than three years a *status* of irremovability in each of the three years." The decision, therefore, is of no authority in a case in which during one of those three years the pauper had not acquired that *status.* None of these cases decides the exact point raised before us. The question is a new one. It must be determined upon the meaning and intention of the proviso in 11 & 12 Vict. c. 111. If it was meant to prevent division of families where the members of the family were actually or virtually living together, no case comes within the mischief which was to be provided against where that circumstance does not exist. Does it exist where a girl of thirteen or fourteen has gone into domestic service in another parish different from that in which her parents are settled or are irremovable? The question seems to me doubtful. However, I am not prepared to differ from the view taken by the other members of the court, which I understand to be that such a case is not within the mischief aimed at by the proviso, and that such residence for a year will make the girl irremovable. If so, she was irremovable at the end of the first year of her service as well as in each of the succeeding years, and the appeal fails.

Appeal dismissed.

Solicitor for the appellants, *F. E. Hilleary.*

Solicitor for the respondents, *W. T. Howard.*

High Court of Justice.

Chan. Div. } Chitty, J. } Nov. 9.

In re DE TEISSIER'S SETTLED ESTATES. (*a.*)

Settled estate—Repairs and improvements—Application of "capital money"—Mansion-house—Alterations with a view to let—"Rebuilding"—"Annual rental of the settled land"—Settled Land Act, 1890 (53 & 54 *Vict. c.* 69), *ss.* 13 (*iv.*) (*ii.*), 15—*Settled Land Act,* 1882 (45 & 46 *Vict. c.* 38), *ss.* 22 (5) (6), 25.

By the Settled Land Act, 1890, *s.* 13, "*improvements authorized by the Act of* 1882" *include* "*making any additions to, or alterations in, buildings reasonably necessary or proper to enable the same to be let,*" *and* "*the rebuilding of the principal mansion-house on the settled land, provided that the sum to be applied*" *thereunder* "*shall not exceed one-half of the annual rental of the settled land.*"

In calculating the amount of such annual rental, the income of capital money arising under the Settled Land Act, 1882, *must be included.*

The expression "*rebuilding of the principal mansion-house*" *will be construed strictly, and improvements, to amount to a rebuilding within the above enactment, must be something more than structural alterations, however extensive.*

There must be a present intention of, if not an actual

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

contract for, letting, for additions or alterations to constitute improvements authorized by the Act of 1882 *under the above enactment.*

Summons.

This was a summons under the Settled Land Acts by the tenant for life in possession of the estate settled by the will of Baron de Teissier, deceased, asking that the trustees of the will, as the trustees for the purposes of the Acts of the settlement created by the will, might be authorized, out of the moneys representing the testator's residuary personal estate, to pay for the rebuilding and improvement of the mansion-house called Bourne House and cottages and outbuildings on the settled land.

It appeared that the testator, who at the date of his death in 1891 was himself residing in Bourne House, by words of legal limitation devised the house and cottages and land belonging to the house, being his only real estate, to his brother for life, with remainder to his brother's eldest son for life, with remainder to his eldest son for life, and with remainders over, and that such last tenant for life in remainder was an infant. The life tenancies were without impeachment of waste. The trustees had a power of sale, exercisable only upon the request in writing of an adult tenant for life entitled to possession or during the minority of anyone for the time being entitled as tenant for life or in tail. The testator bequeathed his residuary personal estate to trustees upon trusts corresponding to the devolutions declared with respect to his real estate. In May, 1892, a declaration was made by Chitty, J., that the testator's residuary personalty, amounting to some £50,000, was to be treated as held upon the same trusts as if it were capital money arising on a sale under the Settled Land Act.

The first tenant for life, having entered into possession of Bourne House, had, after conferring with the trustees, expended £930 on repairs and improvements, and it was also proposed to expend a further sum of £900 or thereabouts. There was evidence that the house was in a dilapidated condition, and the requisite repairs and improvements consisted of alterations of a structural nature necessitated by dry rot, by deficient and unsanitary drainage, and by the insecurity of the foundations. Repairs and improvements of a minor nature were also enumerated. There was no scheme submitted to the trustees, but they approved of what had been, and what was proposed to be, done.

By section 13 of the Act of 1890, "improvements authorized by the Act of 1882" include, *inter alia*, (ii.) "Making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let"; (iv.) "The rebuilding of the principal mansion-house on the settled land, provided that the sum to be applied under this sub-section shall not exceed one-half of the annual rental of the settled land," and by section 15 of the same Act, "The court may . . . make an order . . . authorizing capital money to be applied in or towards payment for any improvements" authorized by the Acts "notwithstanding that a scheme was not, before the execution of the improvement, submitted for approval, as required by the Act of 1882, to the trustees . . . or to the court."

By section 22 (5) of the Act of 1882 "capital money" arising under the Act "while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land . . . ," and by sub-section (6) "The income of those securities shall be paid or applied as the income of that land, if not disposed of, would have been payable or applicable under the settlement."

Upjohn, for the tenant for life, contended (1) that, though there was no scheme submitted for approval, this was a proper case for an order under section 15 of the Settled Land Act of 1890; (2) that the house could not be let until it was repaired, and the Settled Land Act, 1890, s. 13 (ii.), was, therefore, applicable to the case, whether there was an intention to let at the time the repairs were carried out or not; (3) that the structural repairs contemplated amounted to a "rebuilding" within sub-section (iv.) of the same section; and (4) that "annual rental" in the same sub-section included the income of capital money arising under the Act of 1882, as was shown by the terms of section 25 (5) of that Act.

Bramwell Davis, for the next tenants for life and the trustees, raised no objection to the proposed expenditure.

CHITTY, J.—[After stating that he was willing to authorize an expenditure strictly within the terms of the Settled Land Acts, his lordship proceeded:—] The first question which I have to decide is whether the income of a fund, representing residuary personal estate of the testator, which this court has already declared ought to be treated as capital money arising under the Settled Land Act, 1882, is or is not to be included in calculating the "annual rental of the settled land" within the meaning of section 13 (iv.) of the Settled Land Act, 1890. In my opinion this income ought to be included. I must read the Settled Land Acts of 1882 and 1890 as one enactment. Turning to the Act of 1882 I find section 22. [His lordship read section 22 (5) and (6) and proceeded:—] The result in the present case is that the present tenant for life is entitled to the income of this capital money. Now section 13 (iv.) of the Act of 1890 places a limit on the amount that may be spent on the rebuilding of the principal mansion-house on the settled land. Now it would be a strange result if the amount that might be so spent were to depend on the accident whether the "settled land" were at the moment land or money. That would, to my mind, be a narrow and erroneous construction of the statute. And, bearing in mind the scope and intention and general provisions of these Acts, I think that the reasonable construction is to treat "annual rental" in this section as intended to apply to the total income of the settled property, land as well as capital money invested, and I so hold.

Another point under section 13 (iv.) related to what had already been done or was proposed to be done by the tenant for life to the mansion-house. Improvements, to be within the meaning of this sub-section, must be something more than structural alterations, however extensive; they must, in my opinion, amount to actual rebuilding. It was not intended that improvements or alterations, much less repairs, should be paid for out of capital money. See section 13 (ii.). I think that the section means only what it says, and must be construed strictly, and therefore section 13 (iv.) has no application to this case, at any rate on the facts before me, which are not sufficient for me to say whether what is proposed to be done amounts to a "rebuilding" or not, and I leave that open for reconsideration in chambers on additional evidence, if there be any.

The third point is as to the construction of section 13 (ii.). On this I think it clear that if the tenant for life is residing in the mansion-house or is contemplating residence there, he cannot ask for capital-money to be spent in making alterations and repairs. The additions or alterations contemplated must be reasonably necessary to enable the mansion-house to be let. I think that there must be a present intention at least of, if not an actual contract for, letting, before any application under this sub-section can be made.

Otherwise a long-lived tenant for life, coming forward from time to time and making such applications, might in that way eat up all the capital-money with his continual repairs.

The point as to the cottages is whether they are within section 25 (x.) of the Act of 1882, but on this point I express no opinion.

You can go back to chambers with these directions for the guidance of my chief clerk, to have the details of these repairs more fully considered, if the matter is persisted in by the tenant for life.

Adjourned to chambers.

Solicitors for all parties, *Barnes & Bernard.*

Chan. Div. } Nov. 9, 10.
Chitty, J. }

In re DE TEISSIER'S TRUSTS.
DE TEISSIER *v.* DE TEISSIER. (*a.*)

Settled estate—Repairs—Expenditure of trust money—Tenant for life in possession—Infants—Jurisdiction.

T. by his will made a legal devise of real estate, including a mansion-house, to several tenants for life in succession, the last of whom was an infant, without impeachment for waste, with remainders over.

T. lived in the house till his death, when it was found to be in a very dilapidated condition. Divers repairs and improvements were considered necessary to make the house habitable, including the repair of damage caused by dry rot. On an application by the trustees of the will,

Held, that there was no jurisdiction to allow the necessary expenditure out of a fund representing capital moneys under the Settled Land Act; for, assuming that disposition of such moneys otherwise than as the Settled Land Acts provided was not excluded by the Acts, there was no settled doctrine of the court under which the expenditure could be sanctioned. The circumstances did not amount to a case of salvage or preservation of the inheritance, and the court had no inherent jurisdiction to charge or sell an infant's estate upon the notion that such a proceeding would be beneficial to the infant.

Hibbert *v.* Cooke, 1 *Sim. & St.* 552, *followed as to the repair of the damage from dry rot.*

In re Jackson, 21 *Ch. D.* 786, 31 *W. R. Dig.* 204, *and* Conway *v.* Fenton, 37 *W. R.* 156, 40 *Ch. D.* 512, *distinguished.*

Summons.

This was a summons by the trustees of the will of the late Baron de Teissier for liberty to them, as such trustees, to apply, out of the moneys in their hands representing the residuary personal estate of the said testator, a sum not exceeding £1,900 in payment for the rebuilding and improvement of a mansion-house called Bourne House, and cottages and outbuildings forming part of the settled estate of the testator. The facts and evidence were the same as in *In re De Tessier's Settled Estates* (*ante*, p. 184).

Upjohn, for the trustees of the will.—We ask the court to allow this expenditure in exercise of its general jurisdiction. [CHITTY, J., referred to *Dent* v. *Dent*, 10 W. R. 375, 30 Beav. 363.] The trustees have advanced part of the money, and are in effect asking the court for an indemnity: see the observations of Kekewich, J., in *Conway* v. *Fenton*, 37 W. R. 156, 40 Ch. D. 512. Where there is a fund vested in trustees on trusts corresponding to the uses declared of settled real estate the court has jurisdiction to authorize the expenditure out of the fund of so much as may be required to make the real estate saleable, and also to indemnify the trustees where they make such expenditure without the sanction of the court. [CHITTY, J., referred to *Drake* v. *Trefusis*, 23 W. R. 762, L. R. 10 Ch. App. 364.] See *In re Ormrod's Settled Estate*, 40 W. R. 490, [1892] 2 Ch. 318. The preservation and salvage of the property are what I ground my application on: see *Jesse* v. *Lloyd*, 48 L. T. N. S. 656, 31 W. R. Dig. 205. The Settled Land Acts do not exclude the jurisdiction to sanction an expenditure of capital money on salvage: *Conway* v. *Fenton*. [CHITTY, J.—There was a trust for sale there.] The powers of the Acts are cumulative, not exclusive, and the court will exercise its jurisdiction in a case of salvage. [CHITTY, J., referred to an unreported case before him, where a tenant for life would not repair certain houses in London which were so dilapidated that they were tumbling down, in which case his lordship had made an order under the jurisdiction which was now invoked, and the order was confirmed on appeal.] With regard to applicants' position in the matter, as trustees of this will, see *In re Hotchkys*, 34 W. R. 569, 32 Ch. D. 408, and *In re Houghton Estate*, 33 W. R. 869, 30 Ch. D. 102.

He also referred to *In re Leigh's Estate*, 19 W. R. 1105, L. R. 6 Ch. App. 887; and *In re Household*, 27 Ch. D. 553, 33 W. R. Dig. 105.

Bramwell Davis, for the next tenant for life and the infant.—I support the application on the ground that the expenditure is necessary for the preservation of the estate. [CHITTY, J.—You admit that you want something done which cannot be done under the Acts. Can you produce a case where, in similar circumstances, a court of equity has laid hold of a trust fund and repaired the property out of it?] Yes, *In re Hurst*, 29 L. R. Ir. Ch. 219. [CHITTY, J.—The court would not allow an expenditure of money or a charge on the real estate, which amounted to the same thing, to compensate the tenant for life for expenses occasioned by dry rot in the mansion-house: *Hibbert* v. *Cooke*, 1 Sim. & St. 552.] This house was absolutely uninhabitable. The court has jurisdiction to sanction an expenditure to preserve the property in tenantable condition, the testator having left it untenantable: *Conway* v. *Fenton*; *In re Hurst*. Moreover, it is for the benefit of all concerned that the expenditure should be authorized. [CHITTY, J., referred to *In re Swanston*, 31 SOLICITORS' JOURNAL, 427, and *Calvert* v. *Godfrey*, 6 Beav. 97.] *In re Jackson*, 21 Ch. D. 786, 31 W. R. Dig. 204, supports my contention. [CHITTY, J.—Do you say that the court has jurisdiction to charge the real estate, supposing that there was no fund here?] Yes, but, there being a fund, I need not go that length.

CHITTY, J.—The main object of the present summons is the same as that of the summons in *In re Teissier's Settled Estates*, which was before me yesterday. That was under the Settled Land Acts, and related to works done and proposed to be done to the mansion-house settled by a will, and to certain cottages on the estate settled by the same will. I referred the matter to chambers that the present tenant for life under the will might have the opportunity of producing further evidence, and get the most beneficial order to himself that could properly be made under the Settled Land Acts.

This is an application by the trustees, who hold a fund of personalty which, according to the testator's true meaning as ascertained by the court, is deemed to be capital money under the Settled Land Acts; and the trustees desire that I should now make some order giving them liberty to execute certain works on

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

the mansion-house and cottages which confessedly are not within the scope of the Settled Land Acts. The proposition is addressed to what is termed the general jurisdiction of the court, and, as counsel has stated it, the proposition is one of salvage, or preserving the inheritance. I quite agree with what has been said by other judges with regard to salvage. The propositions which are put forward at the bar under that head are often of a very loose character indeed, and the court has to examine with care to see whether the case is one of salvage. But the case starts here with this, that what is proposed to be done will not be done under the Settled Land Acts. Those Acts, as is well known, have provided by means of most beneficial provisions for the improvement of the real estate as a whole, and among the improvements authorized are many which the old courts of equity had no power to allow to be done at the expense of the inheritance. Under the Settled Land Acts many things can be done by the present possessor of the property, the tenant for life, at the expense of the inheritance, and for the benefit of the estate, and a liberal view has been taken of things which are done, which are often more beneficial for those who are in possession than for those who come after. But the broad principle has been established, and, if I may say so, it is one which has operated greatly to the advantage of landowners in general.

I will shortly state the facts of the case. The testator has devised his real estate in strict settlement, including a mansion-house known as Bourne House, which he declared should be deemed the principal mansion-house within the meaning of section 15 of the Settled Land Act, 1882, in words which, if not absolutely clear, are sufficient for their purpose. The limitations are—first to the present tenant for life; secondly, to a tenant for life in remainder in being, each of these two being of age and *sui juris;* and, thirdly, to another tenant for life in remainder, who is an infant. It has been suggested that the last may be tenant in tail, but as to that I express no opinion, only saying that, as far as I have heard anything about the will, the third person in succession now in being, is tenant for life. Now the mansion-house and cottages were left in bad repair by the testator. All the tenants for life are unimpeachable for waste, and there is no obligation to repair on any of them. They may exercise all legal rights over the mansion and property, subject to the doctrine of equitable waste. The testator lived in the house till his death. He has made no provision whatever by his will for putting the house into that state of repair which, according to modern notions—as I understand the evidence—would be suitable for such a house. The house is said to be uninhabitable. But the testator lived there till his death; therefore this means no more than not in a fit and proper condition for the habitation, according to their reasonable notions of what a house should be, of the present and next tenants for life. Now in accordance with the affidavits, which I must take as they stand, without accepting loose statements made at the bar with a view of supplementing the evidence, the plaintiff's counsel mentioned four points as to the mansion-house, viz., the state of the foundation of the outside wall, the state of the drainage, dry rot in the house, and some insignificant structural defects. [His lordship, in order to show the nature and extent of the reparation required, proceeded to read portions of the affidavit of Mr. Money, architect and surveyor, from which it appeared that owing to bad and imperfect drainage the soil under the house was sodden and dangerous to health, the foundations of the outside walls were thereby rendered insecure, the floors of certain rooms were completely decayed by dry rot, there being no ventilation and a waterlogged subsoil, and certain sanitary work was urgently necessary, the soil and other pipes being improperly laid and the soil pipes loose and leaking at the joints. His lordship then continued:—] That is the house which the testator has given in succession by way of legal estates to various tenants for life.

What has been done? I mention this, because some reliance seems to be placed upon the proceedings of the first tenant for life and the trustees, before the applications to the court. The tenant for life is one of the trustees. The trustees have no relation to or concern with the realty, with this exception, that they are the trustees for the purposes of the Settled Land Act, and have a power of sale which they do not propose at present to exercise. The trustees themselves are under no liability with regard to the house, and they have no concern with the devised estates, except that relation which I have stated, which depends solely on the Settled Land Acts, and this application severs those Acts altogether and puts them out of consideration. Now it is plain that the tenant for life has given some order for work to be done, and that a sum of £930 has already been spent, and a sum of about that amount, it is contemplated, will be required to do the work, of which, however, there is no specification and no schedule; but the work is proposed to be done on the house. Upon the evidence as it stands the first tenant for life is alone responsible for the £930 expended. I am told at the bar (and I give way to counsel to this extent, that I merely mention the fact) that the trustees without any authority have already applied £930 out of the moneys which they hold representing capital money under the Settled Land Acts. Now it is clear from his evidence that the tenant for life desired and had the intention to reside upon the property with his family. There is a tenant for life, then, in possession who is minded to do this work. I am told that the result of the evidence is that he intends to do it, but to get the money for it, if he can (for this is the proposition, as I understand it), out of the capital moneys belonging to the estate.

Now I go back rather to review the case as it stands after this statement of facts. Whatever may be done to the mansion-house under the Settled Land Acts at the expense of the capital moneys will be done. Is this a case where, assuming that disposition of the settled moneys otherwise than as the Acts provide is not excluded by the Acts, a court of equity can, under any settled doctrine, order such payments as are now asked for? Salvage is pressed upon me. Is this a case of salvage? I could understand that where the court finds that the property has been condemned, and there are trustees who hold it in trust for different persons in succession, they can come to the court and say, This has been condemned; the trust estate will be put to expense; the sanitary authority will enter and do the work and will charge us; allow us as trustees, for the benefit of all concerned, to anticipate them and do the work and save the property. The court in such a case would, in my opinion, protect the property in that way, because there would be a legal demand made by some external authority which amounts to a *vis major* acting on the property. But here I cannot see any case of salvage.

In *Hibbert* v. *Cooke*, where the tenant for life had expended money in repairing the mansion-house, which had been damaged by dry rot, Leach, V.C., refused an inquiry, considering that the expense occasioned by the dry rot was an expense to which a tenant for life choosing to occupy a mansion-house must submit. That is to say, the tenant for life, choosing to reside there, is at liberty, out of his own pocket and at his own expense, to put the house into

the condition that is required in order to remove that which was a fatal defect in the house. That principle, as far as I know, has never been questioned. Leach, V.C., evidently did not consider the case one of salving or preserving the inheritance, and his decision shows how any such argument, if it had been addressed to him, would have been dealt with. No authority has been produced for the proposition that is contended for on the part of the trustees under the general jurisdiction of the court.

I now come to the argument that it is for the benefit of all concerned that the expenditure should be authorized. The error on which it proceeds was well pointed out by the Master of the Rolls in Ireland in *In re Hurst*, where he said, "It is a common popular idea that the court, in dealing with the property of infants, is somehow possessed of plenary powers, enabling it to do whatever seems advisable. But this is, of course, an error. It is only for the protection, and not for the alienation, of the property of infants that any jurisdiction is vested in the court, apart from express statutory authority" (29 L. R. Ir. Ch. D. 219, at p. 228). It was once thought that the court could order a sale of an infant's realty upon the ground that it would be beneficial to the infant, but that idea was exploded so long since as 1843 by the case of *Calvert* v. *Godfrey*. Then the Court of Appeal has laid it down that in the case of an infant absolutely entitled to real estate in possession the court has no jurisdiction to charge the real estate for the purpose of advancing the infant. That was a decision in a case where it was eminently desirable that such an advance should be made, if it could be made. That was the case of *In re Swanston*. I mention that, not by way of exhausting the matter, but for the purpose of showing that the jurisdiction which the court exercises over the real estate of infants is not to dispose of it at its will and pleasure, but practically it is to administer the estate.

There is one other case which I ought to mention. The present Lord Justice Kay had before him in *In re Jackson* the case of an infant entitled to real estate in possession, and the property was very dilapidated, and he considered that that was a case where the benefit of the infant was concerned, and I think that he also treated it as a case of salvage; but he decreed a very limited inquiry, and did not consider that there was jurisdiction allowing him to go beyond the very limited order which he made. But that was a jurisdiction which was exercised in the interests of an infant entitled to the inheritance. I have here an infant tenant for life in remainder only, which seems to me to distinguish the case at once. How can it be for the benefit of an infant tenant for life in remainder, there being two previous life estates before him, to have the expenditure made at the expense of capital in which he is interested? It is said that it is better to do these repairs now than to allow the house to get into a worse state of repair, such as it may be in when that infant comes into possession. It appears to me that this is a proposition which goes beyond the considerations which I am entitled to entertain. There is no evidence that the present tenant for life is impecunious. I see that the annual income which he derives from these capital moneys is more than the sum proposed to be expended. *In re Hurst* would not justify an inquiry here. Counsel found a difficulty in saying what the proper terms would be. An inquiry what repairs would be necessary to put the property in tenantable and habitable condition was suggested, but there would be no precedent under the general jurisdiction of the court for ordering such an inquiry; and *In re Hurst* is no authority, because the three infants entitled under the will in succession were in that case entitled to reside in the house under the trusts of the will. *Conway* v. *Fenton* is distinguishable on the grounds that the legal estate—*i.e.*, the property—was there vested in the trustees for the husband and wife for their lives, and afterward for their children, who were infants and residing with them. The court there did direct an inquiry in a form which is stated at the end of the report. There was a trust for sale, and, therefore, though there was no immediate intention of selling, there were the combined elements of all the persons interested then being before the court, all persons interested living in the house or upon the estate, and a trust for sale, through the medium of which Kekewich, J., thought that he could apply the well-recognized doctrine of *Vyse* v. *Foster*, 21 W. R. 207, L. R. 8 Ch. App. 309.

I wish to add one practical observation. If I were to accede to this application I foresee similar applications in all cases of dilapidated mansion-houses similarly settled. The tenant for life would first apply, under the Settled Land Acts, to see what he could get under the Acts; and if he did not get all that he wanted, he would then try in this ingenious way and see what he could get under the general jurisdiction of the court. The Settled Land Acts, even if they are not exclusive of any of the doctrines of general jurisdiction which I have been considering, at any rate afford a guide to the court in the exercise of its jurisdiction in the matters to which they relate. And confessedly on this summons none of these things can be done under the Acts. Unless the court is firm in matters of this kind it will be flooded with applications.

In my opinion, although I am by no means adverse to the tenant for life and the trustees in such a case as this, this summons fails, and must be dismissed. I will allow the costs of all parties out of the testator's residuary personalty, though this is perhaps rather a strong thing to do.

Summons dismissed.

Solicitors for all parties, *Barnes & Bernard.*

Chan. Div. North, J. — Nov. 19.

In re BERNERS.
BERNERS *v.* CALVERT. (*a.*)

Power—Jointure and portions—Exercise of power—Devise of real estate and bequest of personal estate for purchase of land subject to same powers—Liability of devised estate to charges.

Real estate was settled with powers to the tenant for life to charge jointure and portions. On his marriage he in part exercised these powers and charged the settled estate, but not to the full extent authorized. At a subsequent period a testator devised real estate and bequeathed his residuary personal estate to be laid out in the purchase of land, to such of the uses and subject to such of the powers declared of the settled estate as should be subsisting at his death, but not so as to increase or multiply any charges or powers of charging. The tenant for life and the tenant in tail of the settled estate executed, after the testator's death, a disentailing assurance of all the properties subject to the settlement.

Held, that the devised estate and the residuary personal estate were not subject to the charges existing at the date of the testator's death; that a release of his still existing powers of charging ought to be executed by the tenant for life; and that the trustees of testator's will were thereupon

(*a.*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

bound to pay the residuary personalty to the tenant for life and the tenant in tail on their joint receipt.

Adjourned summons.

Under an indenture of settlement, dated the 23rd of April, 1864, certain real estate was settled to the use of John Berners for life, with remainder to his issue, remainder to the use of Hugh Berners for life, remainder to Charles Hugh Berners for life, remainder to his first and other sons in tail male, and various remainders over.

The settlement gave powers to Charles Hugh Berners to charge the settled estates by deed or will with a jointure for any woman he might marry, not exceeding £3,000 per annum, and with portions for his younger children, not exceeding £10,000 for each child.

In June, 1867, Charles Hugh Berners married, and by his marriage settlement, dated the 18th of June, charged the settled estates with a jointure of £1,000 per annum for his then intended wife if she should survive him, and with portions of £1,000 for each of the younger children of the intended marriage. There were issue of this marriage three sons and two daughters.

By his will, dated the 3rd of June, 1877, John Berners, who died without issue on the 31st of August, 1886, devised certain real estate to which he was entitled in fee simple to trustees, to such of the uses, and upon and for such of the trusts, and with, under, and subject to such of the powers and provisoes in and by the settlement of 1864 limited and declared, of or concerning the settled estates as at the time of his decease should be subsisting and undetermined or capable of taking effect or being performed, but not so as to increase or multiply any charges or powers of charging, to the intent that the devised estate might go and be held along with, and as part of, the settled estate, or as near thereto as circumstances would permit. And the testator bequeathed all his residuary personal estate to the same trustees, upon trust to pay off incumbrances on the settled estate or the devised estate existing at the time of the testator's death, or to lay out and invest the same in the purchase of real estate or in the purchase of the reversion to any leasehold premises, subject at the time to the uses of the settlement of 1864; and the hereditaments and premises so to be purchased were to be settled to the uses and upon the trusts, and with and subject to the powers and provisoes thereinbefore expressed and declared or referred to, of or concerning the hereditaments and premises thereinbefore devised, but not so as to increase or multiply any charges or powers of charging. Hugh Berners died on the 20th of September, 1886.

On the 27th of June, 1892, Charles Hugh Berners and his eldest son, John Anstruther Berners, who had attained twenty-one, executed a disentailing deed, whereby all the hereditaments which were subject at law or in equity to the subsisting uses of the settlement of 1864 were conveyed, and all the residuary personal estate of John Berners which was subject to be laid out in the purchase of land to be settled, was assigned, to a trustee to such uses and upon such trusts as Charles Hugh Berners and John Anstruther Berners should by deed jointly appoint.

This was an originating summons, taken out by Charles Hugh Berners and John Anstruther Berners, plaintiffs, to which the trustees of John Berners' will, the wife of Charles Hugh Berners, and the trustees of C. H. Berners' marriage settlement were made defendants, asking for a declaration that the trustees of the will might transfer or pay the residuary personal estate of the testator to the plaintiffs on their joint receipt or as they might jointly appoint.

The question at issue was whether the devised estate and the residuary personalty of the testator were subject to the charges for jointure and portions existing on the settled estate.

Cozens-Hardy, Q.C., and *L. S. Bristowe*, for the plaintiffs.

Sebastian, for the trustees of the will.

Vernon Smith, for the wife of Charles Hugh Berners.

The cases of *Smyth-Pigott* v. *Smyth-Pigott*, W. N., 1884, p. 149, and *Leigh* v. *Leigh*, 18 W. R. 991, were referred to.

NORTH, J.—I do not think there is much difficulty about this question of construction. On looking at the will I think I can give effect to Mr. Hardy's contention that the language is to be construed fairly, but strictly, and is not to be extended to anything beyond what is contemplated by the settlement itself. The devised estate and the land to be purchased with the residuary personalty must be subject to the uses, trusts, and powers created by the settlement so far as they actually were subsisting at the time of the testator's death, but not further. The powers of jointuring and charging had at the time to some extent been exercised, and to that extent could not be exercised again, and to that extent, therefore, nothing further remained to be done under the settlement. There might be further portions charged and further jointures charged, as the power of charging is expressly kept open, so as to apply to the newly-devised and bequeathed property as well as to that originally subject to the settlement. The greatest difficulty I felt was in the phrase to which I have called attention, "so as not to increase or multiply charges or powers of charging"; but Mr. Vernon Smith points out that there is something to which "charges" can refer other than charges created by the exercise of the power to jointure or portion; and, that being so, I am not driven to say that charges here refers to charges already made under those powers, which, so far as they have been exercised, are dead. I think, therefore, that the direction that the testator's estate is to be subject to the subsisting powers of the settlement do subject the estate to any new charge by way of jointure or portions that may be created, but not to the charges already made under the powers of the settlement and existing at the date of the testator's death. I think there ought to be a release by the plaintiff Charles Hugh Berners of his power of charging and jointuring before the order is drawn up, whereupon there must be a declaration that the executors may be ordered, or be at liberty, to transfer and pay the residuary personal estate to the plaintiffs on their joint receipt.

Solicitors, *Rhodes & Son.*

Chan. Div. } Stirling, J. } Oct. 28, 29; Nov. 2.

In re BIRMINGHAM AND DISTRICT LAND CO. AND ALLDAY. (*a.*)

Vendor and purchaser—Building scheme—Sale by auction in lots—Restrictive conditions—Subsequent sale of unsold lots—Retainer of adjoining land by vendor—Liability of vendor in respect of restrictive conditions.

A land company put up for sale by auction in lots property which was described as "a small freehold estate

(a.) Reported by W. A. G. WOODS, Esq., Barrister-at-Law.

divided into twenty-two convenient lots of sound building sites." The particulars specified the dimensions of the lots, and had a plan annexed which showed the position and boundaries of such lots, and also the existence of houses on adjoining land of the company. The conditions of sale provided that each purchaser was to covenant that no buildings other than dwelling-houses should be erected upon the land purchased by him; that every such dwelling-house should cost not less than £250, and that the building line as shown upon the said plan in respect of the other lands of the vendors should be observed. The property put up for sale in lots formed only a portion of the estate of the vendors, which was of considerable extent. At the auction some only of the lots were sold. A. purchased one lot and accepted the title. Before the completion of the purchase, however, the vendors claimed the right to sell the remainder of the lots free from the restrictive conditions, and A. then took out a summons under the Vendor and Purchaser Act, 1874, in substance to determine the question of right raised by the vendors, but in form to settle the terms of the covenants to be contained in the conveyance to him.

Held, that A. was entitled to the benefit of the contract by the vendors implied in the conditions of sale, that they would, as to lots unsold at the auction, observe stipulations similar to those which the purchasers of those lots, had they been sold, would have been bound to covenant to observe; and that the conveyance to him ought to contain an expression of such an obligation on the vendors.

Summons.

This was a summons under the Vendor and Purchaser Act, 1874, taken out by the purchaser of a plot of land (lot 15) at a sale by auction of several building sites, put up for sale in lots according to printed particulars and conditions of sale, asking for a declaration (1) that he was entitled to the benefit of a contract by the vendors, implied in the conditions of sale, that the vendors would, as to lots unsold at the auction, and including lots 8 to 14 both inclusive, and 16, 17, 20, 21, and 22, observe and abide by stipulations similar to those which the purchasers of those lots respectively, had they been sold at the auction, would have been bound to covenant that they would observe and abide by; (2) that the purchaser was entitled to have the obligations of the vendors in respect of the said unsold lots expressed in and made binding on them by the deed of conveyance of lot 15.

On the 5th of November, 1891, the company put up for sale a piece of freehold land at Moseley, near Birmingham, in lots according to certain particulars and conditions of sale. The particulars were stated to be "Particulars and plans of valuable freehold building sites in suitable lots for the erection of small villas situate in Cadbury-road, and a few plots in Stoney-lane and Anderton Park-road." The property for sale was described as "a small freehold estate divided into twenty-two convenient lots of sound building sites having frontages of 13 yards and upwards, and mean depths of about 40 yards, the lots varying in quantities from 289 square yards to 2,182 square yards, the building restriction being £250 per house." And there was this statement: "These eligible plots of land situated in a most desirable neighbourhood, for the greater part fronting on a newly-made road (which is properly curbed, channelled, and sewered in accordance with the requirements of the sanitary authority), and the whole are admirably adapted for the erection of a class of houses to be let at moderate rentals, for which there is considerable demand in this salubrious locality."

The plan showed that the property, which was marked out in lots, was a triangular piece of land, bounded on one side by Anderton Park-road, on another by Stoney-lane, and on the third by adjoining property, which apparently belonged to the vendors. Cadbury-road ran across the property separating some of the lots from the others. All the lots fronted on one or other of the three roads mentioned. The plan also showed that houses had been built on parts of the adjoining land and also on parts of the land on which the lots were marked, such last-mentioned houses having been built on pieces of land interpersed between the lots. There were names affixed to the houses so that any person looking at the plan would suppose that they were of the same character as the houses for the erection of which the lots to be sold were stated to be suitable.

The eleventh condition of sale was as follows:—"Each purchaser, in the assurance to him of the property purchased by him, shall covenant with the vendors, their successors and assigns, and also by way of separate covenant with the other conveying parties (if any), their heirs and assigns as follows: That no buildings other than dwelling-houses, with necessary outbuildings, shall be erected or built upon the land purchased by him. And that every such dwelling-house and outbuildings shall, in the erection and completion thereof, cost not less than the sum of £250, and that no house shall be used for any other purpose than as a private dwelling-house. That no building shall be erected upon any of the lots fronting to Anderton Park-road and Stoney-lane respectively within the building line as shown upon the plan annexed to the particulars, so that the line of buildings now standing upon the other land of the vendors, fronting Anderton Park-road and Stoney-lane respectively, shall be observed. And that no building shall be erected upon any of the lots fronting to Cadbury-road within the building line as shown upon the said plan, being a distance of three yards back from Cadbury-road."

At the auction some only of the lots were sold. Allday was the purchaser at the sale of lot 15. He accepted the vendor's title, and upon settling the draft conveyance contended that he was entitled to have an assignment of such benefit and right of enforcing any covenants entered into by any past or future purchasers of any of the other plots, restrictive of the right of building on or user of such plots, as the vendors might be able to convey. The vendors declined to give him the right which he asked for, and maintained their right to sell the remainder of the lots free from the restrictive conditions. Allday declined to complete, and took out this summons in substance to determine the question of right raised by the vendors, but in form to settle the terms of the covenants to be contained in the conveyance to him of lot 15.

T. C. Wright, for the purchaser.—The particulars and conditions of sale constituted a building scheme upon certain terms and subject to certain restrictive conditions, and the applicant is entitled to have those terms and conditions expressed in the conveyance to him: *Renals* v. *Cowlishaw*, 26 W. R. 754, 28 *Ibid.* 9, 9 Ch. D. 125, 11 *Ibid.* 866. The property was put up for sale as one estate. There is consequently an implied contract that the whole of the property should remain subject to restrictive conditions: *Martin* v. *Spicer*, 37 W. R. 689, 34 Ch. D. 1, 14 App. Cas. 12; *Mackenzie* v. *Childers*, 38 W. R. 243, 43 Ch. D. 265. The vendors, if they had desired to subsequently sell the lots remaining unsold at the auction free from the restrictive conditions, should have expressly reserved to themselves, by the conditions of sale, the right to do so: *Sidney* v. *Clarkson*, 14 W. R. 157, 35 Beav. 118.

Hastings, Q.C., and *H. Fellows*, for the vendors.—If all the lots had been sold, the purchaser could, no doubt, have enforced these restrictive conditions

against the purchasers of the other lots, but the case is different where, as here, the vendor retains part of the property in his own hands. The law as stated in *Martin* v. *Spicer* is not applicable, inasmuch as the plan annexed to the particulars and conditions of sale and the conditions themselves show that the vendors retained adjoining property, and it must therefore be assumed that they introduced these restrictions for the protection of the property retained by them. The judgment of Lord Esher, M.R., in the *Nottingham Patent Brick and Tile Co.* v. *Butler*, 33 W. R. Dig. 231, 34 W. R. 405, 15 Q. B. D. 261, 16 Q. B. D. 778, supports that view.

Wright replied.

Cur. adv. vult.

Nov. 2.—STIRLING, J., after stating the facts, continued:—The question is one of principle, not conveyancing, and I have to decide whether the purchaser has a right to the declaration which he claims. On behalf of the purchaser, reliance was placed on the judgment of Lord Macnaghten in advising the House of Lords in *Martin* v. *Spicer*, 37 W. R. 689, L. R. 14 App. Cas. 12, at pp. 24-25. The passage relied on is somewhat long, but I will quote two extracts from it.—"If the site of the houses now known as Cromwell-gardens had been put up for sale by auction in building lots, according to a plan corresponding with that on Mr. Martin's lease, and if the conditions of sale had prescribed that houses should be built such as those which have actually been erected, and that every purchaser should bind himself by a covenant in the terms of the restrictive covenant now in question, no one, I think, could have doubted that each purchaser would, as against the vendor, and as against every co-purchaser, have had a right to the benefit of the covenant, although there might have been no direct covenants by the purchasers *inter se*." And further on he says: "It seems to me that when Mr. Spicer put his houses in Cromwell-gardens on the market he invited the public to come in and take a portion of an estate which was bound by one general law—a law perfectly well understood, and one calculated and intended to add to the security of the lessees, and consequently to increase the price of the houses. The benefit of that increase, whatever it was, Mr. Spicer got. Can he or his representative be permitted to destroy the value of the thing he sold by authorizing the use of part of the estate for a purpose inconsistent with the law by which he professed to bind the whole?"

On behalf of the vendors it is said that the law as thus stated is inapplicable, on the ground that it appears from the plan which is annexed to the particulars and conditions of sale and from the conditions themselves, that the vendors retained in their own hands the adjoining property, and that these restrictive stipulations must therefore be taken to have been introduced for the protection of the property retained by them. In support of that view they rely on the judgment of Lord Esher, M.R., in *The Nottingham Patent Brick and Tile Co.* v. *Butler*. I will first of all refer to the judgment in that case given in the court below by Wills, J., 15 Q. B. D., at p. 268, which was approved of by Lindley, L.J., as being a correct statement of law: "The principle which appears to me to be deducible from the cases is that where the same vendor, selling to several persons plots of land, parts of a larger property, exacts from each of them covenants imposing restrictions on the use of the plots sold without putting himself under any corresponding obligation, it is a question of fact whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him, and understood by the buyers, to be for the common advantage of the several purchasers. If the restrictive covenants are simply for the benefit of the vendor, purchasers of other plots of land from the vendor cannot claim to take advantage of them. If they are meant for the common advantage of a set of purchasers, such purchasers and their assigns may enforce them *inter se* for their own benefit." Then he says: "It appears to me that where land is put up to auction in lots, and two or more persons purchase according to conditions of sale containing restrictions of the character of those under consideration in the present case, it is very difficult to resist the inference that they were intended for the common benefit of such purchasers, especially where the vendor purposes (as in the present case) to sell the whole of his property. Where he retains none, how can the covenants be for his benefit; and for what purpose can they be proposed except that each purchaser, expecting the benefit of them as against his neighbours, may be willing on that account to pay a higher price for his land than if he bought at the risk of whatever use his neighbour might choose to put his property to? Where, therefore, the vendor desires to sell at the auction the whole of his property, the inference is strong that such covenants are for the common benefit of the purchasers; and it seems to me that the strength of this evidence is not diminished by the fact that at the sale a considerable number of the lots may fail to find purchasers." When the case was heard on appeal, the Master of the Rolls says this (16 Q. B. D., at p. 784): "I think that Wills, J.'s view of the law on this subject is perfectly correct. In my view he is right in saying that, when an estate is put up for sale in lots, subject to a condition that restrictive covenants are to be entered into by each of the purchasers with the vendor, and the vendor is intending at that sale to sell the whole of the property, the question whether it is intended that each of the purchasers shall be liable in respect of those restrictive covenants to each of the other purchasers is a question of fact to be determined by the intention of the vendor and of the purchasers, and that question must be determined upon the same rules of evidence as every other question of intention. And if it is found that it was the intention that the purchasers should be bound by the covenants *inter se*, a court of equity will, in favour of any one of the purchasers, insist upon the performance of the covenants by any other of them, and will do so under such circumstances without introducing the vendor into the matter." Then he says: "There are two lines of cases to be found in the books. The first is where there has been a sale of part of a property, with no existing intention of selling the rest, and subsequently there is a sale of another part; then, as regards the later sale, you connot look at the conditions of the former sale, you must look only at the conditions relating to the later sale. The other line of cases is where the whole of a property is put up for sale (not necessarily under a building scheme), but is put up for sale in lots, subject to certain restrictive covenants; then it is a question of fact whether it was or was not the intention that the restrictive covenants should be entered into for the benefit of each of the purchasers as against all the others, and it is a most material circumstance whether the vendor reserves any part of the property for himself. If he does not reserve any part, that is almost, if not quite, conclusive (unless there is something contradictory) that the covenants which he takes from the purchasers are intended for the benefit of each purchaser as against the others."

The judgments of the other Lords Justices do not go any further, but Lindley, L.J., approves of the statement of the law as given by Wills, J.

That case is cited as an authority for the contention that the restrictive conditions are only enforceable against a vendor by a purchaser when the vendor has disposed of the whole of the property. I confess I cannot come to that conclusion. I take the same view as Wills, J., that "it is a question of fact whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him, and understood by the buyers to be, for the common advantage of the several purchasers," and that is a question of fact to be determined, not by looking at one circumstance, but at all the circumstances of the case; and, indeed, the language of the Master of the Rolls seems to me to point strongly to that conclusion, though in the judgment referred to he was speaking of a case in which the vendor was disposing of the whole estate. He says: "If the vendor does not reserve any part, that is almost, if not quite, conclusive (unless there is something contradictory)"; but that language appears to concede that the conclusion may be rebutted by something else. The retainer by the vendor of some part of the property is an element, and a very important element; but, after all, it is only one element to be taken into consideration along with other circumstances in ascertaining the intention. It appears to me that, although the vendor may not part with his whole estate, there may be circumstances which show that the intention was that each purchaser should be entitled to enforce the whole of the building restrictions against the vendor and every other purchaser.

That being so, let us turn to the particulars and conditions in the present case. [His lordship read the statements in the particulars above set out, and continued:—] What would a purchaser infer from reading the particulars and looking at the plan? Admitting that it appears (as it certainly does appear) from the plan and conditions that the vendors were owners of other property in the immediate neighbourhood, it is still to be borne in mind that the owners of building estates in the neighbourhood of large towns such as Birmingham do not throw the whole of their estates on the market at once; and, further, that they do not devote the whole estate to the erection of the same class of houses, but very often appropriate one portion to one class and another portion to another class, and that these various plots do not, in the language of the particulars, become "ripe for building operations" at the same time, and that considerations of this kind apply with not less force when the vendor is a land company presumably dealing with land for the purposes of sale, and not for the purpose of retention as a permanent investment. It would seem to me, then, that, looking at the particulars of sale, a purchaser would naturally infer that this property, described as "a small freehold estate," had been selected by the vendors from the larger property belonging to them as a portion of land to be devoted to the erection of houses of a particular value and to be occupied as residences. What do the conditions of sale say? The restrictive conditions prescribe this:—[His lordship read the 11th condition, and continued:—] These conditions provide in substance for three things—(1) for the erection of private dwelling-houses only; (2) for a minimum value as regards each house erected; and (3) for adherence to a building-line stated to be already existing as regards buildings on other land of the vendors. Now the plan annexed to the particulars shows each lot on the adjoining land of the vendors as having a house already erected on it, and in most cases as bearing a name such as indicates an ordinary villa residence of the class usually found in the neighbourhood of large towns, but there is no evidence before me of their value. It may fairly be assumed, as against the vendors, that those houses were not under the value fixed as a minimum. As regards the land thus retained by the vendors, the intending purchaser would see that the building conditions had already been complied with, and the inference which I have already suggested as that likely to occur to his mind would be confirmed.

It seems to me, therefore, that these particulars and conditions constituted (in the language of Lord Macnaghten in *Spicer* v. *Martin*) an invitation to the public to come in and purchase on the footing that the whole of the property offered for sale was to be bound by one general law affecting the character of the buildings to be erected thereon; and that the vendors ought not to be considered to be at liberty to destroy the value of that which was sold, by authorizing the use of a part of the property for a purpose inconsistent with the law by which they purported to bind the whole. It is said, and, indeed, the secretary of the company has sworn, that the company never intended to give the purchaser the benefit claimed by him. Upon that it is to be remarked that whereas a purchaser cannot dive into the recesses of a vendor's mind, a vendor offering property always has it in his power to make his intentions clear, and it is his duty so to do. It has long been the practice for vendors whose intentions are such as stated by the secretary of the company to reserve by express conditions power to make future sales discharged from restrictive conditions. An example is to be found in the case cited in argument of *Sidney* v. *Clarkson*, which was decided so far back as the year 1865. I do not, of course, mean that the vendor cannot indicate his intention in other ways; but this consideration appears to me to relieve such a case as the present from any element of hardship to which weight might otherwise attach. I may add that the remarks of Lord Langdale in *Peacock* v. *Penson*, 11 Beav. 355, see p. 359, and the case of *Collins* v. *Castle*, 36 W. R. 300, 36 Ch. D. 243, appear to me to support the view which I have taken. I think, therefore, that the purchaser is entitled to the declaration which he asks.

His lordship then made a declaration that the applicant Allday was entitled to the benefit of a contract by the vendors, implied by the conditions of sale, that the vendors would, as to lots unsold at the auction at which Allday bought, observe and abide by stipulations similar to those which the purchasers of those lots, had they been sold at the auctions, would have been bound to covenant that they would observe and abide by, and that the applicant was entitled to have such obligations of the vendors expressed in the conveyance to him of his lot.

Solicitors for the applicant, *Harvey & Capron*, for *E. C. Newey*, Birmingham.

Solicitors for the respondents, *Stibbard, Gibson, & Co.*, for *Rowlands & Co.*, Birmingham.

Court of Appeal.

From Q. B. Div. (Lindley, Bowen, and A. L. Smith, L.JJ.) — Dec. 10.

BARNARD v. FABER. (a.)

Insurance—Fire—Lloyd's policy—"To be on same rate, terms, and identical interest" as specified assurance companies, "and to follow their settlements"—Construction.

The plaintiff effected with the defendant, a Lloyd's underwriter, a policy of fire insurance, containing the following clause:—"Warranted to be on same rate, terms, and identical interest as the U. Assurance Co. £800, and the G. Assurance Co. £700, and to follow their settlements." The rate at which the plaintiff had insured with the U. Co. was not, in fact, the same as the rate specified in the Lloyd's policy.

Held (reversing Wright, J.) that the clause, on its true construction, constituted a stipulation by the plaintiff with the defendant that the plaintiff had insured in the two other companies on the same terms as to risk, the same rate, and identical interest, as was thereby undertaken by Lloyd's underwriters; that such stipulation was one going to the root of the transaction, and therefore a condition precedent to any liability under the Lloyds policy on the part of the defendant; and, as the condition had not been fulfilled, that the defendant was not liable.

Semble, *that the construction of the clause would have been the same, even if the word "warranted" had not been used.*

Appeal from the decision of Wright, J.

The action was in respect of a policy of fire insurance for £1,000 upon furniture and other things in a music hall and tavern belonging to the plaintiff, effected by the plaintiff with, and subscribed by, certain Lloyd's underwriters.

The policy was in the form known as a Lloyd's fire policy, and it stated that the plaintiff had paid 25s. per cent. premium or consideration to the underwriters, whose names were subscribed at foot, to insure from all loss or damage by fire the furniture, &c., specified; and the policy contained the following clause, upon which the question in the present case turned: "Warranted to be on same rate, terms, and identical interest as Union Assurance Co., £800, and Glasgow and London, £700, and to follow their settlements." Each of the underwriters thereby bound himself to pay to the plaintiff all such damage and loss by fire, not exceeding the sum of £1,000, within thirty days after such loss was proved, and in proportion to the several sums by each of the underwriters subscribed against their respective names, &c.

Whilst the said policy was running, the particular part of the property insured, was destroyed by fire. The defendant was one of the underwriters of the Lloyd's policy. The plaintiff had insured the property in the Union Assurance Co. for £800, and in the Glasgow and London Co. for £700, but it appeared from the evidence and admissions that the time of the policy differed in the Union Insurance Co. and the Glasgow and London Co., and that although the premium rate was the same in the Glasgow and London as in the Lloyd's policy—viz., 25s. per cent.—yet the premium rate in the Union Assurance policy was 31s. 6d. per cent. Certain fire assessors employed by the Union Assurance Co. and by the Glasgow and London Co. made a settlement of the plaintiff's loss in the following proportions: The Union Co., £202 18s.; the Glasgow and London Co., £534 2s.; Lloyd's underwriters, £763; total, £1,500.

The plaintiff by his claim asked to have it declared that the defendant was bound by this settlement and should pay his proportion of the loss upon the basis of such settlement; or, in the alternative, for a declaration of the principle upon which the defendant's proportion of the loss was to be ascertained, and payment of his proportion as so ascertained.

The defendant by his defence alleged that the Union Assurance Co. had not insured on the same rate and terms, or on the same identical interest, as was thereby insured by Lloyd's; that the warranty to that effect in the Lloyd's policy had not been fulfilled; that the policy was in consequence rendered void, and that the defendant was under no liability to the plaintiff.

Wright, J., held that, on the true construction of the clause in question of the policy, it merely amounted to a collateral stipulation by the plaintiff, the non-performance of which did not avoid the defendant's obligation altogether, but only added something, not necessarily involved in the contract itself, which might give rise to a right of action, counter-claim, set-off, or reduction, on the part of the defendant. He accordingly gave judgment for the plaintiff. The defendant appealed.

Finlay, Q.C., and *T. Willes Chitty*, for the appellant.—The clause "warranted to be on the same rate, terms, and identical interest," &c., was the basis of the contract entered into by Lloyd's underwriters. It was a condition precedent to any liability on the part of Lloyd's underwriters that the assured should have been insured in the other offices mentioned on the same terms, rate, and interest as Lloyd's underwriters undertook. This condition has not been fulfilled, and the policy is, therefore, ineffectual, and the defendant is under no liability to the plaintiff.

They referred to *Behn* v. *Burness*, 11 W. R. 496, 3 B. & S. 751, and a transcript of the shorthand notes of the judgment of Mathew, J., in *Harvey* v. *Uzielli* (unreported), a case which turned on the construction of a Lloyd's fire policy containing a similar clause, in which, however, the word "warranted" was not used. [They were stopped.]

Geo. Wood Hill (*Cohen, Q.C.*, with him), for the plaintiff.—The clause is not a condition on which the liability of the underwriters depends. It is a mere collateral representation of fact by the assured. All stipulations in a charter-party are not conditions. It is a matter of common knowledge as regards fire policies that no two fire insurance companies have exactly the same terms in their policies. There is a valid contract effected under this policy with the defendant, although the plaintiff may possibly be liable in damages for misrepresentation. The clause as it stands cannot be construed as a condition precedent to the existence of any obligation on the part of the defendant, because the words of the clause, "and to follow their settlements," necessarily imply and recognize the existence of the obligation itself, and merely point to the mode in which the performance of the obligation is to be carried out.

LINDLEY, L.J.—I cannot agree with the view taken by the learned judge below, of the true construction of this document. The document certainly is not as plain as it might be; and if clauses are put in by unskilful people, and fire policies are built up as marine policies have been, I suppose there will be as much litigation before we understand a fire policy, as there has been to enable us to understand a marine policy.

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

The real point in this case is to get at what is the object of the insertion of the clause which has been so much commented upon in argument, and which I will read. This is a fire policy effected by Barnard with Faber on certain property at 25s. per cent.; and the clause is as follows: "Warranted to be on the same rate, terms, and identical interest as Union Assurance Co. £800, and Glasgow and London £700, and to follow their settlements." Now what is the object of the insertion of that clause? It appears to me it can really have only one object — viz., that "We (the underwriters) will insure, provided we are satisfied that the Union Co. and the Glasgow and London Co. have insured at the same rate, the same terms, and the same interest." I do not profess to understand exactly what the word "terms" means. I can get at it approximately, as being "terms as to risk," and I suppose that is what is meant. It cannot mean terms which are immaterial for the purposes of the contract which the parties are making; it does not matter, for example, whether these companies pay thirty days after loss, or forty or fifty days after loss—at least I should think not. That is not what the parties were aiming at. They were aiming in this clause at the risk; that is what they wanted to get at. The clause is equivalent to this, "Satisfy us that these two offices have insured the same risk, the same interest at the same rate, and we will effect the policy." I cannot myself think that the term "warranted" is important in itself, for I should construe the policy in exactly the same way whether the word "warranted" was in or out. The word "warranted" was not in the policy in the case before Mathew, J. (*Harvey* v. *Uzielli*), and I do not think that the policy is made plainer by the introduction of that word. I look on the policy as being made on a condition—but not wholly as a condition precedent, for that would make nonsense of it—but I regard the words "to be on the same rate, terms, and interest as" (the two named offices) as a condition precedent to the incurring of any liability at all, and the other words as a condition subsequent.

Unless you read it in that way, what is the position in which you will find yourself landed? You would find then that the underwriters have come under an obligation with only a right of cross-action against the insured. Can that have been the meaning of anybody? Did Barnard mean that? Did they mean that? Was that the object of inserting such a clause? It is so entirely novel that it strikes one as being strange, to say the least of it. And when you find a clause which is consistent with the ordinary habits of men if you interpret it one way, and utterly inconsistent with their ordinary habits if you interpret it the other way, I prefer the first, supposing the language admits of a double interpretation.

The more one looks at the document the more plainly it appears that the bargain was, "We will not insure except upon the terms as to risk that these two offices have insured—upon the same rate, upon the same terms (whatever they may be), and upon the same interest."

I think, therefore, that the learned judge below has gone wrong, and that the defendant is in the right, and judgment must be entered for the defendant, with costs here and below.

BOWEN, L.J.—I am entirely of the same opinion, and I confess that I consider the matter to be quite clear. I do not mean to say that the words are happily chosen in this policy, but I think the true meaning of it is really transparent.

The object of the clause in question is to have other companies or underwriters in the same boat as regards the particular interest and the risk to be covered. The clause is unquestionably one intended for the protection of the underwriter. When you have arrived at that, it seems to me you have arrived at half the journey's end, because it can be no adequate protection of the underwriters to relegate them to a cross-action. It is intended to protect them against having to pay, not merely to give them a right to bring an action against the man insuring with them. But the way in which the clause is inserted seems to me to lead to precisely the same conclusion, and beyond all shadow of doubt to guide one to that same end. The policy is signed by the underwriters, it is not signed by the insurer, and it is expressed in this way: [The Lord Justice read the clause and proceeded:—] "Warranted to be" must mean "guaranteed to be or promised to be"; and as soon as you observe that this document is one which the underwriters sign, it must mean, "It is a term of our promise that there shall be a guarantee or promise of the other side," and that guarantee or promise of the other side is then expressed. There is to be the same rate, the same terms, the identical interest as in the case of the other two companies. It is therefore a term of this policy that there should be this promise, and if this promise is one which goes to the root of the whole engagement and transaction, then it becomes, according to the ordinary principles of law, a condition—either a condition precedent, or, if this particular matter is one which cannot be construed as a condition precedent, and must be a condition subsequent, then it becomes a condition subsequent. That depends upon the materiality of the promise which is assumed to be made, and the making of which is to be a term of the engagement into which the underwriter has entered. It arises from the materiality of that promise as regards the entire transaction. When you have got as far as that, it is clear that it is to be as regards the risk—that the terms (as to risk) *must* be material. The words "same rate and identical interest" obviously are words so material to the transaction that we can only construe the language which applies to it as creating a condition precedent. With regard to the word "terms," it is not necessary for us to decide or explain exactly what that word means. I do not myself doubt that there is a limitation which can be put on it, a limitation to be derived from the character of the document, and from the nature of the transaction and the nature of the stipulation itself, which reduces within defined and reasonable limits that which otherwise might be vague, illimitable, and impracticable. But when you regard the words which alone we have to look at for the purposes of this appeal, "the same rate and identical interest" as the other two insurance companies, I do not doubt for a moment that it is a condition without which the contract cannot arise. With regard to the words "to follow their settlement," that is a condition subsequent, as Lindley, L.J., has said.

That is the true construction of the document. The opposite view is one, to my mind, which never could be adopted in business, for this reason, that I do not believe there is an underwriter in the world of any position or eminence who would put his hand to a policy in which a term affecting the risk directly, was to be enforced only by a cross-action on the part of the underwriter brought against the man after the loss. The point has been put in a nutshell in the judgment of Mathew, J., in *Harvey* v. *Uzielli*. He says it turns on the materiality of this promise. So it does. It is because the promise is so material to the construction of the risk that it seems to me to become a condition precedent.

A. L. SMITH, L.J.—I am of the same opinion.

Wright, J., had considerable doubt and difficulty about the judgment he arrived at in the end, and I think he got down at last on the wrong side of the rail. Looking at this clause, the question which one has to ask oneself is this, Does this clause contain a promise which goes to the root of the transaction, or is it merely a collateral stipulation the non-performance of which did not avoid the defendant's obligation, but only gave him a right to a cause of action? We must look to the business of the matter in construing this clause, and I quite agree with Lindley, L.J., that it is immaterial whether the word "warranted" is in this clause or not. I strike that out. The question is, What is the promise? Is it a promise which goes to the root of the whole transaction? Now, to state it as shortly as I can, in my judgment there is a stipulation in this contract between the underwriter and the assured that the underwriter undertakes to insure, provided that he undertakes the same risks which the two other offices have undertaken, which offices he knows and which he is content to abide by. If the other two offices have not undertaken the same risk, then, in my opinion, it being a condition of this policy that those two offices should have undertaken the same risk, then the policy is ineffectual. On these grounds I am of opinion that the clause is a condition, and not a collateral agreement, and that the defence is a good one.

Appeal allowed.

Solicitors for the appellants, *Waltons, Johnson, Bubb, & Whatton.*

Solicitor for the respondent, *A. R. Chamberlayne*, for *Mathew Hyde*, Portsmouth.

From Q. B. Div. (Lindley, Bowen, and A. L. Smith, L.JJ.) — Dec. 13, 17.

PERKINS *v.* BELL. (*a*.)

Sale of goods—Sale by sample—Place for delivery—Place for inspection — Contract — When property in goods sold passed.

The plaintiff, a farmer, sold by sample to the defendant, a corn dealer, a quantity of barley. In accordance with the terms of the contract the plaintiff, at his own expense, delivered the barley in sacks at T., a small roadside railway station. The plaintiff, at the time of the sale to the defendant, was aware that the defendant would resell the barley to brewers or maltsters, but had no knowledge when or to whom such resale would take place, or to whom the defendant would consign the barley. The defendant, in fact, on the same day resold the barley to a firm of brewers carrying on business at S. The defendant, on hearing of the arrival of the barley at T. station, directed the stationmaster to take and forward him a sample, and this the stationmaster did. The defendant, after inspection of the sample, ordered the stationmaster to send on the barley to the defendant's sub-vendees, the brewers at S. The defendant subsequently rejected the barley as inferior to sample. There was evidence to show that the bulk of the barley could be inspected in the sacks in the trucks at T. station.

Held, on these facts, that there was nothing to displace the primâ facie presumption that T. station, the place of delivery by the plaintiff (vendor), was also the place for inspection, and that the property in the barley passed when the defendant took possession of the barley at T. station, and ordered it to be sent on to his sub-vendees at S.; and, consequently, that the defendant was not entitled afterwards to reject the barley.

(a) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

Appeal by the plaintiff from the judgment of Lawrance, J.

The action was for goods sold and delivered, and the point raised was whether, under the contract and the circumstances of the case, the defendant was entitled to reject the goods purchased and throw them upon the plaintiff's hands; or, in other words, whether the property in the goods had passed to the defendant before he sought to reject them.

Upon the 4th of October, 1890, the plaintiff, who was a farmer, sold to the defendant, who was a corn dealer, at his stand in Leicester market, by sample, thirty-one quarters of malting barley at 34s. a quarter, to be delivered in sacks at Theddingworth Station, about two and a half miles from the plaintiff's farm. At the time of the sale the plaintiff was aware that the defendant would resell the barley, and probably to brewers or maltsters; but the plaintiff had no knowledge when or to whom such resales would take place nor to where the defendant would consign the barley. As a matter of fact, as it turned out, the defendant on the same day resold the barley by the same sample to Messrs. Sharpe & Co., brewers and maltsters, at Silsby, at an advance of 2s. per quarter. On the 7th of October the plaintiff sold to the defendant in Market Harborough market three more quarters of barley of not such good quality as the first; and it was arranged that the plaintiff should send to the defendant a sample of this barley, the price to be thereafter agreed upon. This barley was also to be delivered by the plaintiff in sacks at Theddingworth Station. Upon the plaintiff's arriving home at his farm in the evening he found that his men, whilst winnowing the three quarters, had, against his orders, mixed them with the thirty-one quarters, and he at once wrote to the defendant informing him of what had been done, and adding that if the defendant complained that it made any difference to him in the sample he (the plaintiff) would make it good, but he hoped that it would not. Upon receipt of this letter the defendant, on the 8th of October, wrote to the stationmaster at Theddingworth Station to forward him a sample of the "about thirty-five quarters of barley *ex* A. K. Perkins." This the stationmaster did, taking the sample out of twenty of the thirty-four quarters which had then arrived at his station. The residue arrived there the next day. It was admitted that the stationmaster took a fair sample of the barley. Having inspected this sample the defendant, on the 9th of October, ordered the stationmaster to forward the thirty-four quarters (called forty) to the order of Messrs. Sharpe & Sons, maltsters, Silsby, at Silsby Station, stating that the cost of carriage was to be placed to his account. On the 10th of October the barley was sent off. On the 16th of October Messrs. Sharpe, by telegraph to the defendant, rejected the barley, which was then at Silsby, and the defendant thereupon wrote to Messrs. Sharpe as follows:—"October 16, 1890.—Your telegram to hand. I can only say we had a bulk sample from sending station before moving on, and considered it a fair delivery. However, will you bring large bulk sample on Saturday to Leicester market, and oblige? The barley left sending station on the 10th inst., according to my back rate.—Yours truly, WILLIAM BELL, jun." On the same day, before the receipt of the above-mentioned letter, Messrs. Sharpe wrote to the defendant stating, "It seems strange that you did not take a bulk sample of it yourself before ordering on to Silsby, and thus save carriage. We

feel sure if you had done so, as promised, you would not have sent it, as it is quite unfit for brewing of ale."

The barley was subsequently rejected by the defendant, and hence the present action.

Lawrance, J., held that the defendant was, under the circumstances, entitled to reject the barley; and he accordingly dismissed the action.

The plaintiff appealed.

Toller, for the appellant.—Once the property in the goods sold passed, the defendant's right of inspection is gone, and in this case the property in the goods passed on the 9th of October, when the defendant directed the stationmaster at Theddingworth Station, where the barley then was, to send on the barley to Silsby to Messrs. Sharpe. The judge in the court below relied on *Kibble* v. *Gough*, 38 L. T. N. S. 204, 26 W. R. Dig. 93, but that case is not applicable at all to the circumstances of the present case. The defendant, through his agent the stationmaster at Theddingworth, in fact took a bulk sample of the barley at Theddingworth, and was satisfied with it, for he ordered it to be sent on to Silsby. After that it was too late for the defendant to reject the barley.

He cited *Lorymer* v. *Smith*, 1 B. & C. 1; *Parker* v. *Palmer*, 4 B. & Ald. 387; *Heilbutt* v. *Hickson*, 20 W. R. 1005, L. R. 7 C. P. 438.

Loyd, Q.C., for the defendant, the respondent.—In the case of a sale by sample, the buyer is entitled to a fair opportunity of comparing the bulk with the sale sample after the goods have been delivered, and in such case the place of delivery is not necessarily the place where inspection must be had. The plaintiff knew that the defendant was not buying the barley for himself, but with a view to resell it to a brewer. Having regard to the nature of the transaction itself and to the general practice of the trade in like cases, it was an implied term of the contract that the place for inspection of the barley was not to be the roadside station at which the farmer was to deliver the grain, but such a place as might be named by the buyer, although such place might be unknown to the seller. Inspection of the barley in bulk at Theddingworth Station was impracticable, and was never contemplated by the parties. [BOWEN, L.J., referred to *Poulton* v. *Lattimore*, 9 B. & C. 259.] The plaintiff knew that the defendant, being only a corn dealer, had no premises at Theddingworth where the barley could be properly inspected.

He cited *Morton* v. *Tibbett*, 15 Q. B. 428; *Page* v. *Morgan*, 33 W. R. 793, 15 Q. B. D. 228; and *Grimoldby* v. *Wells*, 23 W. R. 524, L. R. 10 C. P. 391.

Toller, in reply.—In *Heilbutt* v. *Hickson* the case of *Poulton* v. *Lattimore* was treated by Bovill, C.J., as a case of total failure of consideration.

Dec. 17.—The written judgment of the COURT (LINDLEY, BOWEN, and A. L. SMITH, L.JJ.) was read by

A. L. SMITH, L.J.—[After stating the facts as above set out, his lordship proceeded:—] The sole point the parties raise is whether upon the contract between them, and the facts of this case, the defendant was in time in rejecting the barley as and when he did. My brother Lawrance held that he was; and hence the present appeal. It will be noticed that by the contract the plaintiff was to deliver the barley at Theddingworth Station. No other destination was known to him, and we cannot doubt that if this had been a sale of specific ascertained barley, the property therein would have passed to the defendant upon its delivery to the railway company at the station by the plaintiff. The railway company would thereupon have become the agents of the defendant to receive it and to carry it to any place or places the defendant might direct. But it was said by Mr. Loyd for the defendant, that inasmuch as this was a sale by sample, the defendant was entitled to a fair opportunity of comparing the bulk with the sale sample after delivery, before the property in the barley passed to him, and that the place for inspection need not necessarily be the place at which the delivery is to be made; and in this we agree. The question, however, is if there can be read into this contract an implied term that the inspection was to be had at any place fixed by the vendee without the knowledge of the vendor. This is not a case in which before a sale by sample it is agreed that the destination of the goods shall be the vendee's premises or some other named locality, and that the transit thereto shall be performed partly by the vendor and partly by the vendee. In such a case it would be right to imply that the destination agreed upon, was the place for inspection, and that the joint transit was only an agreed mode of getting the goods there: see *Grimoldby* v. *Wells*. This is a case in which at the time of sale the only known destination was Theddingworth Station, at which the vendor undertook to deliver the barley at his own risk and expense. Of all that should take place afterwards as regards the barley, the vendor knew nothing. It was entirely at the disposal of the vendee, who might send it where and to whom he pleased, and when he pleased, and over which disposition the seller could exercise no control.

We find no evidence in this case to dislodge the presumption which *primâ facie* arises, that the place of delivery is the place of inspection. To hold otherwise would be to expose the vendor to unknown risks, impossible of calculation, when the contract was entered into. The vendee might consign the barley not only to one, but to different sub-vendees, living in different places and at different distances from Theddingworth Station, and until arrival at these places the barley would be at the risk of the vendor. If the barley was rejected by these sub-vendees upon arrival, the vendor would have at his own risk and cost to take the barley back from whatever places it might happen to be in, no matter how far they might be from Theddingworth Station, or to arrange for its sale at the places where it then was. As to these risks the contract is wholly silent, and in our judgment it is impossible to read into it that the vendor undertook these risks, as we were invited by Mr. Loyd to do. It was argued that Theddingworth Station was a mere roadside station, and that there was no opportunity there of comparing the bulk with the sample, and that consequently the station was not the place for inspection and that some other place was, and that this was the warehouse of the maltsters or brewers to whom the defendant might have chanced to have sent the barley. The evidence given shows that the bulk could be inspected in the sacks in the trucks at the station. The suggestion that the barley had to be shot before inspection is untenable, and there is no evidence to support it. Moreover, the letters of the 16th of October show that neither the defendant nor Messrs. Sharpe considered that there was any difficulty whatever in taking a bulk sample at the station; the one saying that he had had one taken, and the other saying that he should have done so, as promised. It seems to us that even if the plaintiff's country solicitors did take a wrong view of their client's position under the contract, as suggested by Mr. Loyd, this cannot affect its construction; and as there is nothing in the contract itself, nor any evidence, to show that by usage of trade as applied to such a contract, or otherwise, the *primâ facie* place for inspection had been altered,

in our judgment, under the contract the place of delivery named was the place where the inspection was to be had, and consequently Theddingworth Station was the place where rejection should have taken place, and not the premises of the maltsters at Silsby. When the defendant took possession of the barley at the station and ordered it to his sub-vendees, the property in the barley passed to him, and his right of rejection was then gone. For these reasons we think the plaintiff is entitled to judgment. Lawrance, J., does not appear to have had his mind sufficiently directed to the real nature of the contract between the parties. The appeal must be allowed with costs here and below, and judgment entered for the plaintiff.

Appeal allowed.

Solicitors for the appellant, *Crowders & Vizard*, for *J. H. Douglas*, Market Harborough.

Solicitors for the respondent, *Warren, Gardner, & Murton*, for *G. & H. Lamb & Stringer*, Kettering.

From Q. B. Div. (Lord Esher, M.R., and Bowen and Kay, L.JJ.) — Aug. 10, 1892.

HEWLETT v. ALLEN & SONS. (a.)

Master and servant—Wages—Payment otherwise than in current coin—Deductions—Truck Act, 1831 (1 & 2 *Will.* 4, *c.* 37), *s.* 23.

The plaintiff, upon entering the employment of the defendants, signed an agreement to conform to all the rules of the defendants' works. One of the rules provided that the employés were to become members of the sick and accident club connected with the works, and were to contribute weekly to its funds according to the amount of wages received by each. The amount of the plaintiff's contribution was deducted weekly from her wages and paid over to the sick and accident fund. In an action by the plaintiff to recover as arrears of wages the deductions so made, except those in respect of medicine and medical attendance,

Held, that the agreement under which the deductions were made was illegal under the Truck Act, and therefore could not justify the deductions being made, nor could it be vouched as an authority by the plaintiff to the defendants to pay the contributions for her to the fund; but that the plaintiff, by her conduct and acquiescence, had precluded herself from recovering the amount so paid.

Appeal from the Queen's Bench Division reversing the judgment of the Bow County Court judge.

The action was brought by the plaintiff, who was employed by the defendants in their confectionery works, to recover £1 13s. 7d., being the amount of alleged illegal deductions from her wages. The plaintiff, upon entering the defendants' employment in 1886, signed a document by which she agreed to conform to all the rules and regulations of the defendants' works. Rule 28 provided that "all *employés* will have to become members of the Sick and Accident Club." By the rules of the sick and accident club the contributors were to consist of all employed in the works, who should contribute according to their wages, and the defendants deducted 2½d. weekly from the plaintiff's wages and paid it over to the fund. The plaintiff, upon leaving the defendants' employment, brought an action to recover the amount of the deductions as being illegal under the Truck Acts. It was admitted at the trial that part of this sum was properly deducted in respect of medicine and medical attendance, and the county court judge gave judgment for the plaintiff for the balance, £1 6s. 10d., upon the ground that these deductions were not authorized by section 23 of the Truck Act, 1831. The Divisional Court (Day and Charles, JJ.) reversed this judgment. The plaintiff by leave appealed.

Corrie Grant and *Compton Smith*, for the plaintiff.

Finlay, Q.C., and *Crispe*, for the defendants.

Cur. adv. vult.

Aug. 10.—The judgment of Lord ESHER, M.R., and BOWEN, L.J., was read by

BOWEN, L.J.—This cases raises a very important inquiry as to the meaning and construction of the Truck Acts, and more particularly of sections 2, 3, 4, and 23 of 1 and 2 Will. 4, c. 37. The plaintiff was, at different periods, ranging over some years, in the employ of the defendants, who are proprietors of large confectionery works, and her action was brought to recover arrears of unpaid wages amounting to £1 13s. 7d. The contention of the defendants is that the sums sued for are deductions which represent payments made with her consent during the period of her service to a sick and benefit society in connection with the works, and that such deductions either are excepted by section 23 from the general scope of the Act or else are payments made at her request to a fund under circumstances which would constitute a defence for the defendants by way of set-off or counter-claim or otherwise. The case was heard before the county court judge. At the hearing the plaintiff withdrew from her claim the sum of 6s. 9d., which represented contributions for medicine and medical attendance, and the judge directed judgment to be entered in her favour for the residue, £1 6s. 10d. on the ground that the defendants, by reason of the Truck Acts, could not justify the retention or deduction of the latter sum. The Divisional Court reversed his judgment, and the appeal has been brought by leave from their decision.

The clear intention of the Truck Acts was to insure to workmen the payment of the entire amount of their wages in actual current coin of the realm, unfettered by any promise or obligation that it should be spent in any particular manner or at any particular shop. The Legislature endeavoured to secure that the workman might have in his hand the very actual coin representing his wages, in order that he and his family might freely carry it home or expend it without impediment in the open market. Subject to certain exceptions to be considered hereafter, this was (speaking broadly) the object of this legislation. The Truck Act of 1831, with which alone we need concern ourselves for the practical purposes of this case, for the statute of 1887 does not substantially differ so far as this case is concerned, attempted to enforce this object by rendering illegal every payment, or contract for payment, of wages except in the mode provided by the Act. One head of sections imposed penalties upon all those who made such illegal contracts or payments. Another class of sections, the range of which was not altogether commensurate with the former, gave the right to the workman to recover the arrears of wages not actually paid over in coin, while it prevented the employer from setting up in answer to such action some rights of set-off, of which he might otherwise at law have availed himself, while, on the other hand, other rights of set-off were still left available to the employer. It is on the effect of this latter portion of the legislation, and the

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

similar provision in the later statute, that this appeal, in our view, turns, and the present case depends mainly on the exact extent to which an employer's ordinary defence to an action at law has, in circumstances like the present, been interfered with by the Acts. The portion of the Act which deals with penalties is, nevertheless, worthy of consideration, since it may throw some light on the entire scope of the Acts, as also on the construction of special parts of them.

After reciting that it is necessary to prohibit the payment (in certain trades) of wages in goods or otherwise than in the current coin of the realm, the statute (1 & 2 Will. 4, c. 37), by section 1, enacts that if in any contract the whole or only part of a workman's wages shall be made payable in any other manner than current coin of the realm, such contract shall be illegal, null, and void. The same fate is (under section 2) to befall any contract in which any provision, directly or indirectly, is made respecting the place where, or the manner in which, or the persons with whom, the whole or any part of the wages shall be laid out or expended. These two first sections of the Act prohibit contracts which infringe on the prescribed limitations. Section 3 deals, not with contracts but with payments. The entire amount of the wages earned, it provides, "shall be actually paid to such artificer in the current coin of this realm and not otherwise"; and every payment made to such artificer by his employer of or in respect of any such wages by the delivery to him of goods or otherwise than in the current coin aforesaid (except in certain excepted cases) is declared to be illegal, null, and void. Section 8 contains an exception in the case of bank-notes and drafts on neighbouring bankers; and section 23 a further exception in respect of specific deductions which are declared to be legitimate. Section 10 inflicts penalties on offenders against the Act.

Pausing here to consider what payments have been prohibited by the statute, we find that in order to be valid the payment to a workman must be of the entire amount of the wages due, and that it must be actually paid to the artificer in current coin of the realm, excepting in the excepted cases of bank-notes and cheques (section 8), and of specific deductions (under section 23). The statute insists (in all but the excepted cases) on actual payment in coin. Payment on account will not do. Payment in goods will not do. Nothing is to discharge the wages debt except actual payment in current coin. The first gloss, or interpretation, which we think principles of sound construction (in a highly penal Act) require us to adopt is that the payment will not be invalid simply because, instead of being made to the artificer himself, it is made to anybody lawfully and *bonâ fide* appointed to receive it as his agent. It cannot have been intended, where what is paid over is current coin of the realm, to make it a penal offence to pay such current coin to a man's wife or child instead of to the man himself. The principle of the common law is that what is paid to a man's agent lawfully authorized to receive it is paid, in the eyes of the law, to himself, and although the language of a statute may, of course, provide that none but an actual personal payment shall suffice, unless this intention is to be discovered in the statute, the ordinary rule of the law applies. The point at which the statute aims appears to us to be that the entire amount should be paid in coin, and the statute has not interfered with the ordinary doctrine that what is paid to a man's agent is to be treated as if it were paid to himself. It is hardly necessary to observe that since the Act prescribes payments in coin, deductions made by the employer, whether authorized by the workman or not, are not and cannot be payment to the workman in current coin of the realm. The employer cannot, for the purpose of compliance with the statute, be both payer and payee. To hold otherwise would be to make the statute idle. Secondly, it is to be observed that the legislation as to contracts for payments runs parallel to and is commensurate with the legislation as to payments. If the payment is in an illegal shape, the contract to make it in that shape is also declared not merely null and void, but also illegal. The result is that when such illegal contract has been made an offence against the Act has been committed; and the other doctrines of English law applicable to illegal, as distinct from merely voidable, contracts follow. Not merely cannot such a contract be enforced, but the contract cannot by itself give rise to any right or be vouched as an authority for any act done under it. So far we have dealt with the prohibitory portion of the Act.

We pass next to those provisions of the Act which affect directly civil litigation, and the defences open to an employer who is sued for all the arrears of wages which he has not actually paid in current coin. This part of the legislation begins with section 4, by which it is enacted that every artificer shall be entitled to recover from his employer so much of his wages earned as shall have not been actually paid to him by his employer in the current coin of the realm. The effect of this section by itself would be that in any action brought to recover the wages an employer could not plead as "payment" anything but an actual payment in current coin, save only in the cases excepted in other sections of the Act. But it is manifest that, if no further provision was to be made, an action by workmen for such arrears might be barred, and the objects of the statute defeated, by other defences which at law would be left open still to the offending employer. The employer might, for example, have supplied goods to the amount of the wages deducted, or the workman might, by virtue of an express or other agreement with his employer, have taken some consideration other than goods in place of the wages, or have authorized the employer to spend the money in some way which, though not payment in actual coin, might in an action to recover the arrears of wages, be set up by way of legal or equitable set-off, or used as a counter-claim to the action. Section 5 accordingly follows section 4, and is a section devoted to limiting a possible right of set-off. It will be seen that it extinguishes such right of set-off only in certain cases, leaving rights of legal and equitable set-off untouched in all other instances than those specifically mentioned. It is provided in the section that in such actions to recover wages due "the defendant shall not be allowed to make any set-off, nor to claim any reduction of the plaintiff's demand by reason or in respect of any goods, wares, or merchandise had or received by the plaintiff as or on account of his wages or in reward for his labour." The price of the goods in virtue of which the unpaid wages were deducted cannot accordingly be set-off. But the section goes further and debars the employer also from any set-off arising out of the sale to his workman of any other goods supplied at any other time, either by the employer's own shop or by any shop in the profits of which the employer has an interest. The statute draws its line of tutelary shelter here, and a similar, though not an absolutely identical, line is drawn in the Act of 1887. Beyond these lines all legal and equitable rights of set-off, and all legal and equitable defences other than payment, are still left open in any civil action to the employer.

The above analysis of the leading sections of

the earlier Act shows that the penal sections of the Act and the provisions which affect the civil rights of the parties do not cover precisely the same ground. The payment in current coin of a portion only instead of the entire wages may be an offence against the Act, and yet when the workman sues to recover the unpaid portion, the employer is not precluded in all cases and every case alike from enforcing every set-off or legal or equitable defence that he possesses, although in respect of certain specified dealings he is deprived of a particular set-off. The offence against the public may well be complete and the penalty have been incurred, but it does not follow that the employer is to pay the workman the full arrear left unpaid in current coin, where, though not paid in current coin, the claim of the workman has been released or satisfied in some other lawful way which falls short of being actual payment. Money payment at the request of the workman to a third person will be accordingly one amongst other conceivable defences left open to the employer by way of set-off, and facts which establish a right of equitable as well as legal set-off will also be available to the employer if they are outside the set-off forbidden by the Act.

It now becomes necessary to apply the above interpretation of the statute to the facts of the present action. On entering the service of the defendants the plaintiff signed an agreement by which she bound herself to conform to all the rules and regulations of Messrs. F. Allen & Sons' works, and to submit to the penalties for breaches of the same. One of these rules and regulations (No. 28) was in the following terms:—"All *employés* will have to become members of the sick and accident club." Its rules provide for a weekly subscription to the fund proportioned to the weekly wages of each contributor. By virtue of this contract a proportionate deduction was in fact made each week from the plaintiff's wages which was carried or paid over to the fund on her behalf. In what manner the deduction found its way into the fund is not clear, since the defendants called no witnesses before the county court judge, but it was stated to us, and did not appear to be disputed, that the deductions were taken each week to the secretary of the fund, who paid them into an account kept at a separate bank by one of the defendants' firm acting as treasurer to the fund. That the plaintiff herself knew of the deductions being made was evident, inasmuch as she had been for years in the defendants' service, during which period she had twice left and twice returned and re-engaged herself, signing on each occasion the agreement above referred to.

It is at this stage desirable to brush away one or two legal points which might otherwise obscure the exact point of law we have to decide. It was not argued before us that the deductions made from her wages were only another mode of calculating her wages which took the case outside the Truck Act altogether (as in *Chawner* v. *Cummings*, 8 Q. B. 311; *Archer* v. *James*, 2 B. & S. 61, 8 W. R. C. L. Dig. 74. The defendants' counsel, on the other hand, urged upon us the argument that the deductions made came within section 23 of the Act. This latter point seems to us untenable. The proportion of the arrears attributable to payments for medicine and medical attendance was struck out of the plaintiff's claim in the county court, and the other objects of the fund—viz., insurance against sickness, accident, and death—are not within section 23. The defendants' case therefore depends, not on the construction of section 23, but on the effect of the earlier clauses of the statute. It is clear, to begin with, that the contract between the defendants and the plaintiff that these deductions should be made was an illegal one. It may well fall within the language of section 2 of the Act of 1831 and section 6 of the Act of 1887. But if the contract in question be even not within section 2 of the former and section 6 of the later Act, it appears to us still to be illegal under section 1 as being a contract that the wages shall be paid otherwise than in current coin. No justification can therefore be found in the signed contract for anything done under it. That the plaintiff has not actually received her entire wages in current coin of the realm seems obvious. Has there been any actual payment in current coin of the realm to anyone at all? On the evidence this seems most doubtful, and a mere show of passing current coin from the firm to the secretary of the fund would not necessarily satisfy a court or a jury that current coin was actually paid by the defendants to an agent of the plaintiff's lawfully authorized to receive it. An offence against the Act has, therefore, to all appearance, been committed, for the burden lay on the defendants to show the actual coin payment, and they have not chosen to call witnesses.

But, although an offence against the Act may have been committed, it remains still to be ascertained whether in a civil proceeding the employer in this case may not have an answer to the plaintiff's claim by way of set-off, counter-claim, or otherwise. No notice of set-off or counter-claim was given. But we should not allow justice to be defeated upon a mere defect of pleading, and the matter in the Court of Appeal must be treated as if all facts had properly been pleaded which are undisputed in the case. The question therefore arises whether the defendants are entitled on the facts of this case to say that, although an offence against the Act may have been committed, nevertheless the deductions from the plaintiff's wages have been disposed of with her consent in a manner which she cannot now impugn after the lapse of years. The defendants having called no witnesses, we cannot properly assume in their favour that the deductions were lodged in the hands of any third person for the purposes of the fund. We think, however, that, having regard to the rules and the balance-sheet put in by the plaintiff, and the manner in which the case has been conducted, we must infer that a fund has been honestly and actually set aside in the defendants' hands for the benefit of the contributors to the fund, to be applied from time to time according to its rules. To this fund we think we also must assume that the money professedly paid on behalf of the plaintiff has honestly found its way; and nothing, in our judgment, is intended to reflect in the least on the good faith of the defendants, either in the institution of the fund or in its management. If the trust fund to which money has been so paid was an illegal trust, the defendants could not set up as a defence payment to its credit of any sums at all. But the trust is not an illegal trust merely because it is made up of moneys collected from persons who have made illegal agreements to subscribe to it, subscription to it in lawful ways being perfectly possible. *Fieri non debuit—factum valet.* The purposes for which this money is held are not illegitimate. All that can be said is that as an authority for carrying moneys to the fund the defendants cannot rely on the workmen's contracts, all such contracts being illegal. But if an authority or a ratification can be found outside the original contract, that will be sufficient as a defence in this action. It could not be right that a workman should sanction the handing over of his contributions to a fund created for his own benefit and the benefit of others, and years afterwards recall his contributions. In the first place, such a gift or contribution once

given would be irrevocable. In the second place, it would in all probability long since have been expended in the administration of the fund; and, indeed, we do not doubt but that the plaintiff's contributions have long since been appropriated to some of the ordinary expenditure of the society.

Did the plaintiff, then, authorize such contributions as professedly were made on her behalf to be so made and so expended? The original contract with the plaintiff cannot in law justify the deduction being made from her wages, nor, in our opinion, can it be vouched as of itself an authority by her to pay the contributions for her. The defendants cannot, therefore, fall back on the contract with the plaintiff to justify the payment over of her contributions to the fund. But the plaintiff has known for years of, and has acquiesced in, these deductions and their destination. She twice left the defendants' service and has twice returned to it. She must also have known, not, indeed, of the details of the expenditure, but that the current contributions were in fact expended on the objects of the society. We do not think that she can, years afterwards, complain of what has been done with her knowledge and with her tacit assent. The Truck Act has been broken. But she has precluded herself, by her own conduct and by her long acquiescence in the payment to the fund of her contributions, from now recalling them. She does not, indeed, assert that she either objected to it or that she did not know of it, and the fact that she did not assent was not even alleged before us, nor was it suggested before the county court judge. The defendants can, therefore, avail themselves as an answer to this action in the nature of a set-off or counter-claim of the fact that these sums have been paid over, professedly on the plaintiff's behalf, to a trust fund of which J. Allen is trustee, and have been used for the purposes of the fund, and that she subsequently ratified and assented to such payment and expenditure.

It remains for us to pronounce an opinion as to the relevancy and applicability of some of the authorities cited in argument before us. *Cutts* v. *Ward*, 15 W. R. 445, L. R. 2 Q. B. 357, is a decision on the construction of section 23, and has no bearing on the present inquiry. *Ex parte Cooper*, 26 Ch. D. 693, 33 W. R. Dig. 23, is a case the headnote and reported language in which require explanation, if not rectification. By an arrangement, not in writing, sums were, in that case, deducted from wages for a doctor's fund and for a reading-room, of which there was a treasurer. The fund was handed over by the employers to the doctor and treasurer from time to time. But at the time of the liquidation of the employers' firm £149 stood in the employers' books to the credit of the doctor's fund, arising from the deductions from the wages which had been made but not yet paid over, and £63 stood in like manner to the credit of the treasurer of the reading-room. No trust, it would appear, had been created by the direction of the men. "All that appears by the evidence," says Lord Selborne, "is that the workmen were desirous that what was in substance due from them to the doctor and for the reading-room should be paid through the machinery of a retainer out of their wages." The employers' defence to this application accordingly failed on every ground. Actual payment in current coin there had been none, so as to raise a valid plea of payment. No payment otherwise than in current coin had been made to the doctor or to the reading-room of which the employers could avail themselves by way of set-off. There had been no agreement with the doctor or the reading-room by which the workmen's debt had been discharged, or under which the doctor had accepted the liability of the employers. There was nothing accordingly which amounted to any other legal or equitable defence, to any release for valuable consideration, or to any legal or equitable set-off or counter-claim. The actual decision in *Ex parte Cooper* is, we think, entirely in conformity with our interpretation of the statute. The language of the judgments of the court is not as clearly worded in the report as might be desired. "The employers have retained the amount out of the wages," says Lord Selborne, "but they have never paid it over, and there is no evidence to satisfy me that anything equivalent to payment to the workmen has taken place." Strictly speaking, payment over to the doctor, if it even had taken place, would have been a bar to the action, not because it was equivalent to payment to the workmen, but because it would give rise to a defence on other grounds than that of payment. Cotton, L.J's suggestion, that, if such payment had taken place, "it might possibly amount to a payment in cash"—by which we incline to think he means current coin—"not to them"—that is the workmen—"but to their agent, or to a person on their behalf appointed to receive it," is an expression again not perfectly exact. For the purpose of the case it was not necessary to point out what we, nevertheless, now think it desirable to make plain, that, although such payment over would have taken the transaction out of the operation of the Truck Act, by amounting either to a set-off or other legal or equitable defence, it would not necessarily have been equivalent to or pleadable as payment, or, in other words, as an actual payment in current coin of the realm within section 4. The court below appears to have considered that the present appeal was governed by the authority of *Lamb* v. *Great Northern Railway Co.*, 39 W. R. 475, [1891] 2 Q. B. 281. It appears to us that the point on which our judgment in this case hinges either did not arise or was not at all considered in that case. The deductions there were made as contributions to a sick and funeral allowance fund. The fund was for the benefit of the defendants' servants, and was managed on their behalf by the defendants. The case was really decided by A. L. Smith and Grantham, JJ., on the ground that a larger sum had actually been paid out of the fund for medical attendance on the plaintiff and his wife than the total amount of his contributions which he sought in the action to recover. Inasmuch as such payments could be lawfully deducted under section 23, the action necessarily failed. The question what would have been the result if it had been otherwise, and the contribution had not in fact been actually expended for the plaintiff at his request under section 23, did not accordingly occur. It might have otherwise become necessary (as here) to consider whether the defendants in that case had constituted themselves trustees of any funds left in their hands for distribution under a binding trust, and had actually distributed the same as moneys appropriated to trust purposes under the plaintiff's own direction. We cannot, therefore, agree with the Divisional Court in their view, that the present case is covered by the decision in *Lamb's case*, although our conclusion is that their judgment must, for the reasons we have given, be affirmed. But as we are not satisfied that the action of the defendants in respect of this fund has been consistent with the provisions of the Truck Act, we think that, although the plaintiff's civil claim against the defendants fails, there ought to be no costs of this appeal, although we do not in the least doubt that the defendants' conduct in respect of the fund has been dictated by kindly and humane motives and characterized by good faith.

KAY, L.J:—I agree in the judgment which has

been read, but I desire to express a doubt which I feel upon one point. Upon the evidence before us I cannot make out that the defendants had any set-off at law or in equity such as is allowed by section 5 of 1 & 2 Will. 4, c. 37, because I do not gather from the evidence that the deductions have in fact been paid over to anyone with the plaintiff's authority. I agree, however, that the circumstances do raise a case of counter-claim, and the doubt I have is whether a cross-action, brought by way of counter-claim, would be an answer to a claim under the Truck Act. The other members of the court being of opinion that it would be an answer, I do not desire to dissent from that opinion, but I only wish to express the doubt I feel.

Appeal dismissed.

Solicitors for the plaintiff, *Shaen, Roscoe, Massey, & Co.*

Solicitor for the defendants, *Milner Jutsum.*

High Court of Justice.

Chan. Div. Chitty, J. } March 25, 29, 30; Oct. 26, 27; Nov. 2.

SCHAUER *v.* J. C. & J. FIELD (LIMITED). (*a.*)

Copyright—International Copyright Act, 1886 (49 & 50 *Vict. c.* 33), *s.* 6—*Saving of rights and interests previously acquired—Trade-mark—Interest in advertising—Subsisting and valuable interests—Artistic work first produced in foreign country.*

By the International Copyright Act, 1886, *s.* 6, *upon an Order in Council being made with respect to any foreign country, the author and publisher of any artistic work shall be entitled to copyright in the United Kingdom in respect of works first produced before such order comes into operation, "provided that, where any person has, before the date of the publication of an Order in Council, lawfully produced any work in the United Kingdom, nothing in this section shall diminish or prejudice any rights or interests arising from or in connection with such production which are subsisting and valuable at the said date."*

An Order in Council was made applying the Act to German subjects. Before the date of the publication of the order an artistic work, first produced in Germany, was lawfully produced in the United Kingdom and registered, and used as a trade-mark upon goods. The work was also reproduced by the proprietors of the trade-mark on showcards and trade lists for the purpose of advertising their goods. The trade-mark, as registered, had the words "trade-mark" printed on it, but these words were omitted in the showcards and trade lists. In an action to restrain infringement of copyright by the use of these showcards and trade lists.

Held, that the proprietors of the trade-mark had an interest, as such proprietors, in advertising it; that this was an interest arising from or in connection with the trade-mark itself, and subsisting and valuable at the date of the publication of the Order in Council; that the omission of the words "trade-mark" in the showcards and trade lists was immaterial; and, consequently, that the proprietors of the trade-mark were protected in their use of the showcards and trade lists by the proviso to section 6.

Moul *v.* Groenings, 39 *W. R.* 691, [1891] 2 *Q. B.* 443, *explained.*

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

Motion.

The plaintiff, a foreigner, claimed to be entitled to the copyright in an oil painting called "Lisette," so far as regarded the right of reproduction by photographic processes, and also to the copyright in a photograph by Carl Quiddi, of Berlin, of the same oil painting as a distinct work of art.

The oil painting was produced in Germany before December, 1885, and represented the half-length figure of a girl in a mob cap, laughing, with a lighted candle in her left hand, shielding with her right hand the light, which was reflected over her face and bust.

On the 29th of January, 1887, Messrs. Field, candle manufacturers, applied under the Trade-Marks Acts to register a trade-mark in class 47 for candles of all descriptions, and such trade-mark was registered in due course.

In November, 1887, the trade-mark was, together with the goodwill of their business, assigned by Messrs. Field to the defendants, a limited company, and the defendants were afterwards entered on the register as the proprietors of the mark.

The mark as registered consisted of a photograph of "Lisette" on a small scale, probably taken from the photograph by Carl Quiddi, of Berlin, or from a reproduction of it. Across the lower part of the girl's figure, as registered under the Trade-Marks Acts, the words "trade-mark" appeared. Over the girl's head, but at some distance above it, there also appeared in the "Trade-Marks Register" the words, "Field's candles." The defendants had used this trade-mark upon their goods, and in their use of the trade-mark reproduced it in various sizes and colours.

The defendants had also reproduced the picture in various sizes and colours without the words "trade-mark" on showcards and trade lists, and these they gratuitously distributed amongst their customers for the purpose of advertising their goods. They contained an enlarged reproduction of the figure of the girl as represented in the trade-mark photograph, but printed in colours, with the words, "Ozokerit candles," and the name of the company in conspicuous type displayed outside the figure, and were, as well as the trade-mark pictures, produced by chromo-lithography, and not by photography.

In January, 1892, the plaintiff registered himself as the owner of the aforesaid copyright in England, under the International Copyright Act, 1886, and an Order in Council made thereunder on the 28th of November, and published on the 2nd of December, 1887.

The plaintiff, by his writ in the action, claimed an injunction to restrain the defendants from printing, publishing, multiplying, selling, or distributing any copies or colourable imitations of the plaintiff's copyright work, "Lisette," and for the delivery up to the plaintiff of all blocks and copies of the copyright work which were in the defendants' possession, and he also claimed penalties under the Act of 1862.

By the International Copyright Act, 1886, s. 6, upon an Order in Council being made under the International Copyright Acts with respect to any foreign country, the author and publisher of any work first produced in that country before the date at whith such order comes into operation are to be entitled to the same rights and remedies as if such Acts and order had applied to that country at the date of the said production, "provided that where any person has, before the date of the publication of an Order in Council, lawfully produced any work in the United Kingdom, nothing in this section shall diminish or prejudice any rights or interests arising from or in connection with such production which are subsisting and valuable at the said date."

By the said Order in Council of the 28th of November, 1887, which was published on the 2nd of December, 1887, protection under the International Copyright Acts was extended to authors of literary and artistic works in divers foreign countries, including Germany.

During the greater part of the argument counsel contended that the plaintiff was entitled to an injunction which would restrain the defendants from using their trade-mark. But ultimately that contention was given up, and in the result of the argument counsel merely asked for an injunction, and the injunction sought was one so framed as, while leaving the defendants in the full enjoyment of their trade-mark, would preclude them from using their showcards and price lists. The hearing of the motion was by consent treated as the trial of the action.

Byrne, Q.C., and *Scrutton*, for the plaintiffs.

Farwell, Q.C., and *J. Cutler*, for the defendants.

CHITTY, J.—The plaintiff's case is founded on the claim of the plaintiff Schauer to copyright under the International Copyright Act, 1886, and the Order in Council made thereunder, which was published on the 2nd of December, 1887, and came into operation on the 6th of that month. During the argument, counsel, threading their way, as best they could, through the intricate mazes of the International and other Copyright Acts, raised numerous questions; but, in the view I take, the case falls to be decided on a comparatively simple point—viz., the meaning and effect of the proviso in the 6th section of the International Copyright Act, 1886, as applied to the material facts, a short statement of which will suffice.

The copyright claimed relates to an oil painting produced in Germany before the 20th of December, 1885, by an artist named George Horn, entitled "Lisette," representing the half-length figure of a girl in a mob cap, laughing, with a candle in her left hand, shielding with her right hand the light, which is reflected over her face and bust. The nature of the copyright claimed appears from the two separate entries which the plaintiff Schauer caused to be made in the register at Stationers' Hall on the 19th of January, 1892, a few weeks before the commencement of the action. The claims are two: first, for the copyright in the painting so far as regards the right to reproduce by photographic processes; and, secondly, for the copyright in a distinct work of art—viz., a photograph from the oil painting produced by one Carl Quiddi, of Berlin. The plaintiff Schauer is a foreigner residing in Berlin.

On the 29th of January, 1887, Messrs. Field, candle manufacturers, applied under the Trade-Marks Acts to register a trade-mark in class 47 for candles of all descriptions, and the trade-mark was subsequently duly registered, the registration taking effect as from the date of the application. This trade-mark was, in November, 1887, assigned to the defendants, the company, with the goodwill of Messrs. Field's business, and the company now appear on the register as the proprietors of the mark. The defendants' business is very extensive, and the trade-mark has been largely used by them in their business, and is very valuable. The mark, as registered, consists of a photograph on a small scale of "Lisette"; probably this photograph was taken from Quiddi's photograph, or a reproduction of it. Across the girl's figure, just below the waist, the words "trade-mark" occur in the photograph registered under the Trade-Marks Act, the original of which was produced in court from the controller's office. Outside the girl's head, and at some little distance from it, there appears in the "Trade-Marks Register" the words "Field's candles." The proprietor of a trade-mark is not restricted as to size, or colour, or the mode of production. In their user of their trade-mark the defendants have reproduced it in various sizes and colours, the means employed being chromo-lithography; as a matter of fact they have not had recourse to photography.

During the greater part of the argument the plaintiff's counsel contended that they were entitled to an injunction which would restrain the defendants from using their trade-mark. But ultimately this contention was given up. Obviously it could not be maintained in the face of the proviso contained in the 6th section of the International Copyright Act, 1886. Undoubtedly the defendants are within the protection of the proviso so far as regards their trade-mark and its user. They had, before the date of the publication of the Order in Council lawfully produced a work, viz., their trade-mark, and had rights arising from or in connection with such production which were subsisting and valuable at the date of the publication of the order. The trade-mark was lawfully produced, because at the date of its production, in January, 1887, the plaintiff and those from whom he claimed had no copyright in England.

In the result of the argument, the plaintiff's counsel asked merely for an injunction, and the injunction they sought was one so framed as, while leaving the defendants in the full enjoyment of their trade-mark would preclude them from using their showcards and price lists. The issuing of the showcards and price lists was the only ground of complaint which remained after the case as to the trade-mark had been abandoned. [His lordship here referred to an exhibit as a good example of the showcards used, and proposed to be used in future by the defendants. It consisted of a black disc containing in the centre an enlarged and coloured reproduction of the girl as represented in the trade-mark photograph. The reproduction was by chromo-lithography. There were printed on the disc, but outside the figure of the girl, the words "Ozokerit candles," and the name of the company in conspicuous type, the letters being white.] The showcards are being used, and are intended to be used, solely for the purpose of putting on the market the goods to which the trade-mark applies. They are not sold by the defendants, but are merely distributed gratuitously to their customers. Whether they have or have not any artistic merits, they are not put forward as works of art; they are used, and intended to be used, solely for the purpose of attracting attention to the goods with a view to their sale, and in connection with the trade-mark. The plaintiff has done for the defendants what the defendants have never done for themselves, or intended or contemplated should be done by their customers or others into whose hands the showcards may come. He has taken the showcard and framed it with a mount which cuts off the words "Ozokerit candles" and the defendants' names, leaving the representation of the girl alone visible in the oval of the mount; and he says: "See what can be done with the card; a work of art is produced which can be hung up as a picture." But the defendants cannot be made responsible for acts which they neither do nor intend or even contemplate should be done by others. So much for the facts. The point of law raised was on the words in the proviso, "rights or interests arising from or in connection with such production which are subsisting and valuable."

Now a showcard, used as the defendants use and intend to use theirs, is only one of the numerous modes of advertising adopted at the present day. The advertisement by showcards or otherwise of their trade-marks is a common and well-known practice on the part of the proprietors, from which they derive

benefit by the increased sale of their goods. It was urged for the plaintiff that the word "rights" in the proviso meant an exclusive right in a particular person, and not a right enjoyed by the public generally, and it was said that the proprietor of a trade-mark has not a right, in this sense, of advertising his trade-mark, and that any person is at liberty to advertise another's trade-mark.

It is not very easy to understand how a trade-mark can be honestly advertised by any person other than the proprietor of the mark, or persons selling or intending to sell the goods manufactured under the trade-mark. Persons not interested in the sale of the goods do not, as a matter of fact, when acting honestly, advertise the trade-mark with a view to push the sale of the goods. Traders, in matters of business, are not in the habit of acting upon motives of mere benevolence to other traders by advertising at their own expense trade-marks in which they have no concern for the benefit of the proprietors or others interested in the sale of the goods. But, passing by the word "rights," I come to the word "interests." The decision in *Moul & Mayeur* v. *Groenings*, 39 W. R. 691, [1891] 2 Q. B. 443, if authority be wanted, shows that "interests" in the proviso has a more extended meaning than "rights." Some attempt was made by one of the plaintiff's counsel to use the judgment delivered in that case for the purpose of cutting down the meaning of the word "interests" to "capital embarked," or in some other way. But the judgment did nothing of the kind. What was decided was that the bandmaster had an interest, and was protected. The defendants here, as the proprietors of the trade-mark, have, in my opinion, an interest in advertising it, and this interest is a special interest in them as distinct from the rest of the public. This interest I hold was an interest arising from or in connection with the trade-mark itself, and was subsisting and valuable at the date of the publication of the Order in Council. This interest in the defendants is wholly unconnected with any copyright in the defendants; they have none, and claim none; it arises from or in connection with their trade-mark alone. It becomes immaterial, then, to consider when any particular showcard or advertisement of the trade-mark was first produced by the defendants. The interest of the defendants to advertise the mark is general, and is not confined to any particular showcard or other form of advertisement adopted before the publication of the Order in Council. In effect, the plaintiff, while conceding to the defendants the right to use the trade-mark, is endeavouring, by the injunction they seek, to deprive the defendants of some of the ordinary and legitimate benefits enjoyed by proprietors in connection with their trade-marks. It is absurd to say that the owners of a trade-mark may use it, but not advertise it.

One point remains to be noticed in connection with the showcards. The trade-mark, as registered, contained, as already mentioned, the words "trade-mark" printed on the girl's figure, and these words are omitted in the showcards. Thereupon it was suggested towards the close of the reply that the defendants were advertising on their showcards, not the trade-mark, but something else. If they were really doing this their act would not be protected by their interest in the mark. But this omission appears to me to be too trifling to frame anything upon it. The defendants are not, under guise or pretence of advertising their mark, really putting forth an independent picture or work of art; they are honestly advertising the substance of their trade-mark. If any other trader put the representation of the girl as she appears in the showcard on goods not of the defendants' manufacture, he would clearly be taking the substance of the defendants' mark, and would infringe the defendants' rights in the mark.

It is not necessary to consider the trade lists separately, what I have said as to the showcards applies, with at least equal force, to the trade lists.

For these reasons, and expressing no opinion on the other points raised, I think the action fails, and must be dismissed.

Action dismissed.

Solicitor for the plaintiff, *Herbert Bentwitch.*

Solicitor for the defendants, *E. Chester.*

(1893, 1 Ch. 429)

Chan. Div. } North, J. } Nov. 8.

In re GARDNER.
LONG *v.* GARDNER. (*a.*)

Will—Legacy—Interest on legacy—Infant executor.

Testatrix by her will appointed an infant one of her executors, and gave to him, as such executor, a legacy of £1,000.

Held, that the legacy would not carry interest until the infant should attain twenty-one years and agree to act as executor.

Further consideration.

By her will, dated the 8th of December, 1887, Mrs. Richardson Gardner appointed her friend George H. Long, her nephew William Compton Smith, Lionel James Richardson, and the Honourable Stanley Goulbourn Giffard executors thereof, and gave to each of her executors a legacy of £1,000. In another clause of her will testatrix declared: "I hereby declare my will to be that no gift, legacy, bequest, or benefit by this my will or any codicil hereto given, bequeathed, or intended for any person who, at the date of my decease, shall be an infant shall become vested in such legatee unless, being male, he shall attain the age of twenty-one years, or, being female, shall have been married, or shall marry under it."

Testatrix gave the income of her estate to her husband for life, and after his death, subject to certain legacies, gave the ultimate residue thereof to the said Honourable Stanley Goulbourn Giffard.

The testatrix died on the 2nd of April, 1889, and her will was proved by her first three named executors on the 23rd of May, 1889, S. G. Giffard being at that time an infant. An action for the administration of the estate was commenced on the 16th of December, 1889, and on the 3rd of March, 1890, the usual order for accounts and inquiries were made. In his certificate, dated the 18th of July, 1892, the chief clerk raised, *inter alia*, the question whether the legacy to S. G. Giffard, who was still an infant, carried interest. The action came on for further consideration on the 8th of November, 1892.

Cozens-Hardy, Q.C., and *F. A. Jones*, for the plaintiffs, the three executors.

Everitt, Q.C., and *P. V. Smith*, for the husband of the testatrix.

Sir Arthur Watson, Q.C., and *Methold*, for the infant.—We say that this legacy is given to the infant as executor. He cannot, we admit, take it unless he accepts the office. It is almost certain that there will then be duties for the executors to perform when the infant attains the age of twenty-one years, and if

(*a.*) Reported by G. B. M. COORE, Esq., Barrister-at-Law.

he then accepts the office the legacy might then be paid to him with interest. There is no direct authority on the point, but in *Reed* v. *Devaynes*, 2 Cox. 285, the Master of the Rolls expressed an opinion that such a legacy to an infant would carry interest. He there distinguishes between an executor who has neglected to prove and an executor who has been prevented from proving. In *Angermann* v. *Ford*, 9 W. R. 512, 29 Beav. 349, interest was refused to an executor on the ground that he had wilfully neglected to prove. The infant executor's interest in the legacy is vested, and subject to be divested only on his dying before attaining twenty-one years. The clause as to legacies not vesting until the legatees attain the age of twenty-one is not sufficient to divest it. A legacy of this kind must carry interest.

NORTH, J.—In this case a legacy of £1,000 has been bequeathed to an infant, who will not receive it until he attains twenty-one years, and the question arises whether he is entitled to the interest upon that amount.

This is a case in which an infant is, with others, appointed executor, and a legacy of £1,000 is given to him as executor. It is my opinion that he is not entitled to that unless he acts as executor, and he is only entitled to interest upon it from the time at which the legacy is payable to him.

One or two cases were referred to in which the proving of the will was spoken of as essential. I do not think the proving of the will is in the least essential, the real point is whether he accepts the trusts and fulfils the duty of executor, and he may do that without proving the will if somebody else has proved it, for, as Lord St. Leonards pointed out in *Cummins* v. *Cummins*, 8 Ir. Eq. Rep. 723, 1 Jon. & Lat., p. 64, L. R. 7 H. L., p. 723, probate by one executor is quite enough for all—it is unnecessary for others to prove. If the will has been proved their acting is sufficient without further probate. In the present case the will has been proved by three of the other executors. Therefoe no further probate for the infant is necessary. If when he attains twenty-one he elects to act as executor the existing probate is ample for the purpose, but unless he elects at that time to act as executor he will not be entitled to the legacy. Therefore it is a legacy contingent on his accepting the office of executor and acting as such. I think that is settled by authority. The case that Sir Arthur Watson referred to, *Angermann* v. *Ford*, goes to prove that. There was a legacy to William Augustus Ford of £1,000 for his own use and benefit, and then he was appointed one of the executors. He first of all renounced probate, but afterwards, in 1859, he did what the law then allowed—he retracted this renunciation and a further probate was granted to him. Then the question was as to his right to the legacy, and the Master of the Rolls pointed out that he was only entitled to the legacy if he clothed himself with the character of the executor. "It is well settled that he must clothe himself with the character of executor before he can claim his legacy. Mr. Jessel argued, and I am disposed to concur with him, that his right to the legacy depends upon whether he has *bonâ fide* taken upon himself the duty of executor." Then, after dealing with the facts in that particular case, he says, "I think that I cannot in this state of circumstances take into account the greater or lesser period of time during which he has renounced, and that if an executor proves and acts as such any time before the real business of administrating the estate is concluded, he is entitled to be paid the legacy given to him by the testator. In this case, therefore, I am of opinion that Mr. Ford has fulfilled the conditions essential to entitle him to his legacy, and that the payment or retention of it must be allowed in the account taken. Interest is payable from the time the legacy becomes due, and therefore it must not commence until he proved the will." By "proving the will" I take him to mean "proved or accepted the duty of executor under the will," because I think it clear from *Cummins* v. *Cummins* that a further actual probate by him is entirely unnecessary.

Then in *In re Hawkins' Trusts*, 12 W. R. 945, 33 Beav. 570 (where the question was as to a legacy to an executor for his trouble), it was held not payable, as he had been prevented by severe illness from proving the will and from ever acting. In that case he had never acted—the mere probate was immaterial if he had acted—and inasmuch as he had never acted as executor it was held he was not entitled to the legacy.

Again, in *Lewis* v. *Mathews*, 17 W. R. 841, L. R. 8 Eq. 277, there was a legacy to an executor for his trouble. He was in Australia; he sent home power of attorney under which another person administered, and under which the rents of the real estate were received. He died without proving the will, but still it was held that he had shown his intention to act under the trusts of the will sufficiently to entitle his representative to the legacy. There they received it although he had not actually proved.

That being so, it seems to me that this is a legacy payable to the legatee when he determines to act—when he takes upon himself the duty of executor—which can only be when he attains twenty-one. In my opinion, therefore, it does not carry interest in the interim. It is unnecessary to consider the further clause, as to the vesting of the legacy to infants. I have, however, formed a strong impression on it. I consider the clause which says that the legacy to the infant legatee is not to vest until he is twenty-one means what it says. It does not say the legacy given to him is to be vested before that time, but divested if he does not attain twenty-one. It means what it says; it is to vest at twenty-one, and I think that would prevent his having interest in the meantime, if it were necessary to decide that point.

In my opinion, therefore, the practical result of it is, that it is not necessary to make any provision for the payment of the legacy at present, though it may have to be raised out of the estate if the event arises upon which it is to be paid.

Solicitors, *Western & Son; Gedge, Kirby, & Millett; Humphrey, Son, & Kershaw.*

Chan. Div. } Dec. 2.
Stirling, J. }

BADCOCK *v.* CUMBERLAND GAP PARK CO. (*a.*)

Practice — Writ — Service of — Foreign corporation— Shareholders resident in England—Service on agent in England—Setting aside—R. S. C., 1883, *ord.* 9, *r.* 8.

A foreign corporation, though having the majority of its shareholders resident in England, and having a London agent with a London office, but carrying on no principal or material part of its business in this country, is not liable to be sued in an English court.

Service of a writ of summons on the agent in London set aside on the ground of want of jurisdiction.

Motion.

This was a motion to set aside the service of a writ on a foreign corporation under the following circumstances: The defendant company was established to

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

carry on the business of hotel proprietors in the State of Tennessee, America, and was incorporated according to the law of Tennessee. All the directors were resident in America, and the offices of the company were at New York and at Cumberland Gap, in Tennessee. About three-fourths of the shareholders were resident in England. The company had an agent in London, who kept a register of all the English shareholders, and who was authorized to register transfers of shares duly signed by the president of the company in America. He was also authorized to receive calls on shares from the English shareholders, and to remit the money to America. His office in London had the name of the company painted up on the door, as also the names of several other companies. He also issued circulars and notices from his office stating that it was the London office of the company. Some of the office furniture belonged to the company, and on one occasion the agent had used money belonging to the company in a transaction on the Stock Exchange.

The action was brought by a shareholder in the company asking for an injunction to restrain the company from carrying into effect a resolution for the reconstruction of the company and for other purposes. The writ was served on the London agent of the company at his office in London.

Buckley, Q.C., and *Carson*, for the motion, contended that the company carried on no part of its business here, and, therefore, could not be sued in this country.

They cited *Newby* v. *Von Oppen and Colt's Patent Firearms Manufacturing Co.*, 20 W. R. 383, L. R. 7 Q. B. 293; *Mackereth* v. *Glasgow and South-Western Railway Co.*, 21 W. R. 339, L. R. 8 Ex. 149; *Nutter* v. *Messageries Maritimes de France*, 54 L. J. Q. B. 527, 34 W. R. Dig. 150; *Haggin* v. *Comptoir d'Escompte de Paris*, 37 W. R. 703, 23 Q. B. D. 519.

Hastings, Q.C., and *Swinfen Eady, contrà*, said that the company did carry on business in London, as it was proved in evidence that rooms could be engaged at the hotel in Tennessee on application being made at the London office of the company. They submitted that the writ was duly served on the company, and ought not to be set aside.

They referred to *Newby* v. *Von Oppen* and *Russell* v. *Cambefort*, 37 W. R. 701, 23 Q. B. D. 526.

STIRLING, J., said there was no statutory provision affecting service on such a company. [He stated the nature of the action, and continued:—] The question here arises whether the rules of court with respect to service have been complied with. Do the rules apply to such a company as this? They do extend to foreign corporations, and the latest case on the subject is *Haggin* v. *Comptoir d'Escompte de Paris*. [His lordship referred to the judgment of Cotton, L.J., and the rule as laid down by him, and continued:—] The result of that passage is that if a foreign corporation sets up here, and is resident here, and carrying on business, it is within the jurisdiction of this court. Is it established in this case that the company carries on a principal part of its business in London? What is its business? It is mainly to carry on the business of a hotel in Tennessee. It undoubtedly has an agent here, a Mr. Charles Holland. His office is used as an agency, and the name of the company is up. Some of the office furniture belongs to the company, but that is not enough; it must carry on business here. It has lent money on the Stock Exchange, but that is not part of the principal business of the company. It is sworn by Holland that it was only one transaction carried on from fortnight to fortnight. It only proves that the company did at one time possess property in this country. It is said you could obtain rooms in Tennessee by applying in London, but this allegation breaks down. This is a case of a company having its capital divided in shares—a number of the shareholders are resident in England, and there are kept in London certain books under the control of Holland, containing a list of the shareholders, &c. Holland's powers are limited, as I have stated. That is not carrying on a business within the meaning of the rule as laid down by Cotton, L.J. Therefore the motion must succeed, and the service of the writ must be discharged.

Solicitors for the motion, *Paine, Son, & Pollock.*

Solicitor for the plaintiff, *Arthur Harris.*

Prob. Div. and Adm. Div. Admiralty. } July 12, 26, 1892.

"THE WILHELM TELL." (*a.*)

Shipping—Salvage—Apportionment—Agreement to participate in salvage remuneration in proportions previously determined—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 182—*Merchant Shipping Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 18.

In a case of apportionment of salvage it appeared that it had been stipulated by the articles that the salvors, the owners, master, and crew of a steam trawler, should participate in all sums awarded for salvage in proportion to a percentage set forth therein, and that, according to this proportion, the master of the trawler would be entitled to ten per cent. of all salvage awards, her mate to seven per cent., and her boatswain to three per cent. of the same.

Held, that the stipulation so embodied in the articles was not inequitable, and that the court would apportion shares of the salvage to the applicants, the master, mate, and boatswain of the trawler, in accordance with such stipulation.

Motion.

This was a motion by the master, mate, and boatswain of the steam trawler *Irrawaddy*, for the apportionment to such master, mate, and boatswain of their respective shares of a salvage award of £1,000 theretofore awarded by the court to the owners, master, and crew of *The Irrawaddy* for salvage services rendered to the barque *Wilhelm Tell* in the North Sea from the 12th to the 16th of December last.

J. P. Aspinall, for the master, mate, and boatswain.

Butler Aspinall, for the owners of *The Irrawaddy*.

The facts and arguments are sufficiently stated in the judgment.

Cur. adv. vult.

BARNES, J.—In this case the master, mate, and boatswain of *The Irrawaddy* ask to have the sum of £1,000, less unrecovered costs, apportioned between them and the other parties interested, and for an order that the applicants are not bound by the articles of *The Irrawaddy* to receive only the proportions of salvage set out therein against their respective names.

This sum of £1,000 has been awarded to the owners, master, and crew of the steam trawler *Irrawaddy* in a suit brought by them against the sailing vessel *Wilhelm Tell* for salvage services rendered in the North Sea to the latter vessel in

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

December, 1891, whereby *The Wilhelm Tell* was, with other assistance, taken into the Humber.

In rendering these services the master and boatswain of *The Irrawaddy* were both injured while on board their own vessel. The master received an injury to one of his fingers, in consequence of which he was ill for a month, and during that time he received no pay, but incurred no medical expenses. The boatswain had his left leg broken, and in consequence was laid up for thirteen weeks. During this time he received no wages, but, as he was treated in the Hull Infirmary, he also incurred no medical expenses. When he recovered he was taken on by the owners of *The Irrawaddy* as a deck hand. These particulars were furnished to me after the hearing of the case.

The Irrawaddy was for some time under repair owing to the damage received by her in rendering the said services. Admissions were put in before me from which it appeared that at the time aforesaid the master, mate, and boatswain were respectively serving under articles of agreement, of which the following is an extract: "And it is also agreed that every member of the crew, including apprentices, shall be regarded as entitled to participate in any sum or sums of money received for any salvage services performed for any ship in distress or otherwise in the proportion set forth opposite to their respective names in this agreement." Then follows a memorandum, from which it appears that the captain (Minns) was engaged on the 7th of December, 1891, at a rate of wages which was based on a share of the fishing profits of one and three-eighths per cent., and a share of salvage of ten per cent. The mate, engaged at the same time, was to have one per cent. of the profits and seven per cent. of salvage. The boatswain, engaged on the 4th of November, 1891, was to have 22s. a week and three per cent. of salvage.

It was contended by Mr. Aspinall, for the applicants, that this agreement was not binding on them, and that they were entitled to have such an apportionment as the court might deem just under the circumstances, without regard to the agreement. He relied on section 182 of the Merchant Shipping Act of 1854 and the following cases—namely, *The Enchantress*, Lush. 93, 8 W. R. Adm. Dig. 23; *The Pride of Canada*, Br. & L. 208, 12 W. R. Adm. Dig. 31; *The Louisa*, 2 Wm. Rob. 22; *The Ganges*, L. R. 2 A. & E. 370, 18 W. R. Adm. Dig. 22; and *The Rosario*, 2 P. D. 41, 25 W. R. Dig. 270.

Mr. Butler Aspinall, for the owners, contended, on the other hand, that the agreement was binding upon the parties, on the grounds, first, that the 18th section of the Merchant Shipping Act Amendment Act of 1862 applied to this case; and, secondly, that the 182nd section of the Act of 1854 did not prevent the parties from entering into an equitable agreement for the apportionment of salvage, and that the agreement in the present case was equitable.

Section 182 of the Act of 1854 provides, *inter alia*, that "every stipulation by which any seaman consents to abandon . . . any right which he may have or obtain in the nature of salvage shall be wholly inoperative," and the 18th section of the Act of 1862 declares that the said 182nd section is "not to apply to the case of any stipulation made by the seamen belonging to any ship which, according to the terms of the said agreement, is to be employed on salvage services, with respect to the remuneration to be paid to them for salvage services to be rendered by such ship to any other ship or ships."

I do not think the point was referred to in argument; but it is to be noticed that those sections apply only to seamen, and not to masters, for the term "seamen" does not include masters; see the interpretation clauses (section 2) of the Act of 1854. They do not, therefore, appear to affect the master in the present case. As to the point raised on the 18th section, I am of opinion that *The Irrawaddy* was not a ship which, according to the terms of the agreement, was to be employed on salvage service within the meaning of that section. She was, in fact, to be employed, according to the terms of the agreement, in trawling in the North Sea, and the clause as to salvage was only inserted in order to deal with the case of an apportionment of any salvage which she might have the good fortune to earn.

The contentions on the part of the applicants give rise to more difficulty; but in my opinion the result of the cases above referred to, and also the cases of *The Afrika*, 5 P. D. 192, 28 W. R. Dig. 212, and of *The Beulah*, 2 Notes of Cases, 61, is to show that the 182nd section of the Act of 1854 does not prevent seamen from entering into an equitable agreement for the apportionment of salvage, though it prohibits stipulations by which they abandon their rights to salvage, and that the court will uphold an agreement with seamen for the apportionment of salvage if it is not inequitable.

In *The Louisa* Dr. Lushington readjusted the agreed apportionment apparently on the ground that it gave the owners more than the court ever, at that time, decreed to them, and it would seem as if he must have considered that the scale of apportionment agreed to was inequitable.

In *The Enchantress*, the same learned judge stated that he would decree an equitable apportionment unless barred by an equitable agreement or an equitable tender; and he said that "local and customary agreements, if equitable, such as that, where there is a lifeboat company, those who stay shall be rewarded as those who go, the court will favourably consider."

The Pride of Canada, Br. & Lush. 208, more fully reported 1 Mar. L. C. 406, was only a case in which the owners failed to bring the case within the 18th section of the Act of 1862; but Dr. Lushington, according to the report in the Maritime Law Cases, stated that, even before the Act of 1854, no seamen could enter into a stipulation of an equitable nature.

In *The Ganges* Sir Robert Phillimore held that an agreement in that case to pay certain wages, and a fixed rate of poundage on the towage and salvage money earned by a tug, was not inequitable, although the sum allowed to the plaintiff, a temporary master, would be very inadequate remuneration according to the general principles upon which salvage is distributed.

In *The Afrika* Sir Robert Phillimore adopts the language in *The Enchantress* which I have quoted above. He says, 5 P. D., at p. 194, "On this point I think it necessary to refer to the law laid down in *The Enchantress*, and I take the law as laid down in that case to be perfectly clear. In that case Dr. Lushington said, 'I conceive a duty is hereby imposed upon me to decree, upon application made, what, in my judgment, is an equitable apportionment of salvage, unless I am barred by one or two circumstances, either an equitable agreement between the parties, or an equitable tender.'"

In *The Beulah* Dr. Lushington said that he would make an exception to any arrangement made with seamen where there had been any extraordinary personal risk and labour to the seamen. If, however, an equitable agreement had been entered into I do not myself understand on what principle such an exception should be allowed, unless, perhaps, it might be considered in exceptional cases that the services of the men were beyond the scope of what was contemplated by the agreement at the time it was entered into.

The policy of the law is to protect seamen from improvident arrangements, and to encourage their exertions to save life and property. An agreement which secures these objects appears to me to be unobjectionable. They are secured in the fishing trade in the way I am about to point out. I should observe that no distinction is drawn in the cases between masters and seamen, though, as I have pointed out, sections 182 and 18 do not apply to masters. In all these cases there was no special legislation affecting the parties besides the Merchant Shipping Acts; but at the time of the argument of this case the form of articles used for *The Irrawaddy* was produced, and it then appeared that it was in the form issued by the Board of Trade in pursuance of the Merchant Shipping (Fishing Boats) Act, 1883 (46 & 47 Vict. c. 41). Section 13 of that Act provides that "the skipper of every fishing boat shall enter into an agreement with every seaman (not being a boy, under such agreement as is by this Act required) whom he carries to sea from any port in the United Kingdom as one of his crew. . . . And every such agreement shall be so framed as to admit of stipulations, to be adopted at the will of the skipper and seaman in each case, as to advance and allotment of wages, and may contain any other stipulations which are not contrary to law."

The Irrawaddy was a steam trawler, to which the Act applied, and her owners were compelled to use this form of articles, which had been sanctioned by the Board of Trade. The articles were for trawling in the North Sea, and contained as part of the printed form the clause above mentioned as to the apportionment of salvage, and a column for the insertion of the share of salvage. For such a vessel engaged in such a trade under such articles it seems very reasonable to have a provision for apportioning salvage on a fair basis, taking the rough with the smooth. This form must now be in use amongst a very large number of vessels, and if a fair percentage of the salvage is allotted to each man on the articles, the men have the advantage in easy towing cases, which are not infrequent, though their duties may be more arduous in rendering more difficult services.

I am informed that the present agreement gives the owners about two-thirds, and the master and crew one-third, of any salvage award.

In my opinion the agreement as to the apportionment of the salvage contained in these articles ought to be supported, on the ground that it is entered into in the form and manner which I have described, and is equitable, and that the stipulation as to apportionment is not contrary to law. Moreover, in the present case I do not think the applicants ran any greater risk than any of the rest of the crew, though they were more unfortunate in the accidents they met with. The court would hardly in such a case as this, apart from the agreement, give the owners of a steamer rendering useful towing services upon salvage terms less than two-thirds of the sum awarded.

A further point was raised by the owners, that, in arriving at the net sum to be apportioned, they were entitled to deduct certain sums, set out in the admissions, for repairs, and, as against the boatswain, certain further sums for loss of profits, time, &c., but in my opinion the owners are not entitled to make those deductions. The agreement is for a certain share of the salvage, and in my judgment that means the sum awarded less, as is agreed, the unrecovered costs in obtaining the award.

The agreement is binding, and the owners in a particular case may have to bear some disadvantages, just as some members of the crew do.

I therefore apportion the sum of £1,000, less unrecovered costs, in the porportions mentioned in the articles of agreement, and as neither party has succeeded entirely in their contentions, I leave each party to pay their own costs.

Solicitors for the applicants, *Stokes, Saunders, & Stokes.*

Solicitors for the owners of *The Irrawaddy, Rowcliffes, Rawle, & Co.*

House of Lords.

From C. A. (England). May 31, 1892.

TABERNACLE PERMANENT BUILDING SOCIETY (*Appellants*) AND KNIGHT'S ARBITRATION, *Re* (*No.* 2). (*a.*)

Arbitration—Building society—Power to direct arbitrators to state a case—Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *s.* 36—*Arbitration Act,* 1889 (52 & 53 *Vict. c.* 49), *ss.* 19, 24.

Section 19 *of the Arbitration Act,* 1889, *which provides that any arbitrator may, at any stage of the proceedings in the reference, and shall, if so directed by the court, state, in the form of a special case for the opinion of the court, any question of law arising in the course of reference, applies to arbitrations under the Building Societies Act,* 1874.

Where an order nisi *has been obtained by a party who has no notice of an award having been made, it lies upon those who contest it to show that the award was in fact executed prior to the order being made.*

Decision of the Court of Appeal (39 *W. R.* 507, [1891] 2 *Q. B.* 63) *affirmed.*

This was an appeal from an order of the Court of Appeal (Lord Esher, M.R., and Fry and Bowen, L.JJ.) reported 39 W. R. 507, [1891] 2 Q. B. 63.

A dispute having arisen between Knight and the appellants, a building society of which he was a member, reference was made to arbitration under section 34 of the Building Societies Act, 1874, as directed by the rules of the society.

During the progress of the arbitration a request was made to the arbitrators on behalf of Knight to state a special case for the opinion of the court upon a question of law arising in the course of the reference. They declined, and on the 16th of January, 1891, an order *nisi* was made at chambers directing them to do so, unless cause was shown to the contrary. It appeared that the arbitrators made and signed their award before either of them had notice of the order *nisi;* but there was no evidence that this had been done before the making of the order *nisi.*

The order *nisi* was made absolute. The Court of Appeal held that there was power under section 19 of the Arbitration Act, 1889, to order abitrators appointed under the Building Societies Act, 1874, to state a special case as directed by the order.

The building society appealed.

The sections of the Act and the arguments used sufficiently appear in the judgments.

Cock, Q.C. (*Maconn* with him), for the appellants.

Fillan (*A. L. Reed* with him), for the respondent.

The House took time for consideration.

Lord HALSBURY, L.C.—The first question in this case is whether the 37 & 38 Vict. c. 42 is inconsistent with the provisions of the general Arbitration Act,

(*a.*) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

52 & 53 Vict. c. 49. The policy of section 19 of the later Act is very manifest. During the progress of an arbitration it may be seen that the arbitrator has mistaken the law and is about to act upon his error, and the power of putting him right used to consist in the right of either party to revoke the submission to arbitration. That power has been greatly controlled by legislation, and now it may be extremely difficult for a party to obtain an order giving leave to revoke unless a case is stated.

Such a case actually occurred in your lordships' House (*East and West India Dock Co.* v. *Kirk*, 12 App. Cas. 738, 36 W. R. Dig. 7), and unless the parties had consented to terms (which happily they did), though leave would have been given by this House to revoke the submission, it is obvious that this is a clumsy and incomplete remedy. The court ought to have in its own hands power to compel in a fit case a reference to a court of competent jurisdiction, so as to prevent a failure of justice. This is a power independent of and altogether different from the right of the parties under section 36 of the Building Societies Act of 1874, which enacts that the determination of the arbitrators or the court shall be conclusive. It provides, also, that the arbitrators or registrar, as the case may be, may, at the request of either party, state a case for the opinion of the Supreme Court of Judicature on any question of law.

The later statute makes the provision which I have first referred to, apply to every arbitration under any Act passed before or after the commencement of the Act itself (1889), and only excepts from its operation any Act inconsistent with the Act regulating the arbitration, or with any rules or procedure authorized or recognized by that Act.

If the two provisions may stand together, I am unable to follow the argument that the one Act is inconsistent with the other; and the whole argument depends upon the word "inconsistent" in the later statute. It is obvious to inquire, where is the inconsistency if both may stand together and both operate without either interfering with the other?

The policy, object, and application of the two sections are entirely different. I think in the Building Societies Act the object was to enable the arbitrators, on the solicitation of the parties, to state a question of law which might enable them to decide the case in its final result. I think the object of section 19 of the Arbitration Act, 1889, though in one sense it may be said to have for its object the same result, was rather to hold a control over the arbitration while it was proceeding, by the courts, and not to allow the parties to be concluded by the award when, as it is said, parties may be precluded by the arbitrator's bad law if once the award is made, although they might have had a right to repudiate the arbitration if they had done so before the completion of the award.

I am therefore of opinion that the first objection here fails, and that the Acts, not being inconsistent with each other, may be read together, and the court or a judge would have jurisdiction to interfere.

The second objection turns upon a question of fact; and I should agree that if a complete award had been made a statute which gives the power to a court or judge at any stage of the proceedings under a reference would not be applicable where the proceedings had come to an end by a completed award. Now I will assume that in this case the award was very nearly completed, but I am equally satisfied that it was not completed and published as the award, but was in process of being completed. I will assume that the arbitrators had no notice of the rule *nisi*. But the affidavit which stated the fact that they had no notice of the rule *nisi* is studiously reticent about when, in fact, what is relied on as the completion of the award was effected; and I infer as a fact that the rule *nisi* was obtained, whether the arbitrators had notice of it or not, before the award was signed, even if that would be completion.

I think, therefore, that this appeal should be dismissed, with costs.

Lord WATSON.—Section 19 of the Arbitration Act, 1889, enacts that any arbitrator may, at any stage of the proceedings in the reference, and shall, if so directed by the court, state in the form of a special case for the opinion of the court any question of law arising in the course of the reference. The provisions of the Act are, by section 24, made applicable to every arbitration under any previous or subsequent statute, "except in so far as this Act is inconsistent with the Act regulating the reference, or with any rules or procedure authorized or recognized by that Act."

The appellants concede that, had it not been for the exception in section 24, the provisions of section 19 would have applied to arbitrations under the Building Societies Act of 1874. They maintain that these provisions are inapplicable, in respect of their being inconsistent with a proviso in section 36 of the Building Societies Act, 1874, to the effect that the statutory arbitrators "may, at the request of either party, state a case for the opinion of the Supreme Court of Judicature upon any question of law," and that the court had, therefore, no jurisdiction to make the order appealed from.

If the provisions of section 19 had been inserted verbatim in section 36 of the Building Societies Act they would not have repealed the discretion of the arbiters to state, or refuse to state, a case on the request of a party to the reference. They would simply have conferred upon the arbitrators the additional privilege to state a case *proprio motu*, and upon the parties the additional right to obtain an order from the court. The appellants were accordingly constrained to argue that, whenever the provisions of the Arbitration Act are found to add to the enactments of any other statute regulating arbitrations, they are, in the sense of the exception, inconsistent with it. To hold that the Legislature intended to attach that meaning to the word "inconsistent" would be to defeat the object of the leading enactment in section 24. In my opinion the object of the Legislature was to add to the remedies open to the parties under a statutory arbitration; and the sole purpose of the exception was to prevent the application of the powers conferred upon the court by the Act of 1889 to arbitrations under any statute whose provisions, either expressly or by reasonable implication, excluded the exercise of such powers.

A second point was raised by the appellants which is not noticed by any of the learned judges of the Appeal Court. Section 19 only authorizes the intervention of the court during the dependence of the reference, and does not warrant an order being made upon an arbitrator to state a case after his award has been duly completed; and it was argued that in this case there was a defect of jurisdiction, inasmuch as the award of the arbitrators had been adjusted and signed by them before an order *nisi* was obtained.

If there had been any evidence to show, or if there had been a suggestion in the pleadings, that an award was published on the same day as the order, but before the latter was applied for, I should not, as at present advised, have been prepared to hold that this case was governed by the decision of the Court of Exchequer in *Wright* v. *Mills*, 7 W. R. 498, 4 H. & N. 488. There the court had undoubted jurisdiction, and was, moreover, seised of the case at the time when, *fictione juris*, its order was held to have been made. Here the court had no process before it until the initial

order was applied for; and it had no jurisdiction to grant the order if, at the time of the application there was a completed award.

I am satisfied, however, that no foundation has been laid in fact for the argument which was addressed to us; and that circumstance probably accounts for the absence of any comment upon it by the Court of Appeal. There is an affidavit to the effect that the arbitrators' award was drawn up and signed by them before they had notice of the order of court. That statement, which was the sole basis of the argument, plainly implies that the award was not completed before the order was made, and that fact was sufficient to give the court jurisdiction. The completion of the award, between the issuing of the order and its intimation to the arbitrators, cannot deprive the parties of their statutory remedy, or oust the jurisdiction of the court.

I am, therefore, of opinion that the judgment appealed from ought to be affirmed, with costs.

Lord HERSCHELL.—The question involved in this appeal is whether the 19th section of the Arbitration Act, 1889, applies to arbitrations under the Building Societies Act, 1874. That section provides that "any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall if so directed by the court or a judge, state in the form of a special case for the opinion of the court any question of law arising in the course of the reference." Section 24 of the same Act provides as follows: "This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration or with any rules or procedure authorized or recognized by that Act."

It is said on behalf of the appellants that section 19 of the Arbitration Act is inconsistent with the Building Societies Act, 1874, and therefore does not apply to arbitrations under it. The material section of the latter Act is the 36th, which provides that "every determination by arbitration . . . under the Act of a dispute shall be binding and conclusive on all parties, and shall be final, to all intents and purposes, and shall not be subject to appeal and shall not be removed or removable into any court of law, or restrained or restrainable by the injunction of any court of equity, provided always that the arbitrators . . . may, at the request of either party, state a case for the opinion of the Supreme Court of Judicature on any question of law."

The argument of the appellants is, that this section vests in the arbitrators the discretion whether a case shall be stated or not, and that the later Act, which empowers the court to order the arbitrators to state a case, is therefore inconsistent with it. I cannot accede to this view. No doubt the Building Societies Act empowers the arbitrators to state a case, and leaves it to them to determine whether they will exercise this power or not; the parties cannot compel them to do so. The Arbitration Act, which confers upon the court the power to order a case to be stated, if it applies, adds, no doubt, to the provisions which are to govern an arbitration under the Building Societies Act, but it is clear that the fact that the provision is an additional one does not of itself show that there is any inconsistency in the two Acts, for, if so, the 24th section would never have any operation. I think the test is, whether you can read the provisions of the later Act into the earlier without any conflict between the two. This you can clearly do as regards the enactment under consideration. For these reasons I concur in the judgment of the court below.

A further point was argued at the bar which is not noticed in the judgments delivered in the Court of Appeal. It was said that, even if the Arbitration Act applied, the respondent had come to the court too late, inasmuch as the arbitrators made their award on the 16th of January, 1891, and it was only on that day that the order *nisi* was made, calling upon the arbitrators to show cause why they should not be required to state a case for the opinion of the court. The learned counsel for the appellants contended that it was for the respondent to show, in order to support the order, that it was obtained before the arbitrators had made their award, and were thus *functi officio*. It is unnecessary to determine whether the rule that a judicial act must be regarded as dating from the first moment of the day on which it is done would apply to such an order as that under consideration, or whether it would be sufficient cause for not making the order absolute if it were shown that the award, though bearing the same date, was in fact signed before the order *nisi* was made. I can entertain no doubt that, where an order *nisi* has been obtained by a party who has no notice of an award having been made, it is for those who contest it to show that the award was executed prior to the order being made. This is not shown in the present case. The affidavit of the arbitrators states only that their award was made and signed before either of them "had notice of the order *nisi*."

For these reasons I think the judgment appealed from should be affirmed.

Lord MORRIS.—I concur in the judgment which has been moved.

Lord FIELD.—I also am of opinion that this appeal should be dismissed. There are two questions to be considered. The first one is of general importance, namely, whether or not section 19 of the Arbitration Act of 1889, by which the court can order an arbitrator to state a case raising any question of law, is inconsistent with the arbitration provisions of the Building Societies Act of 1874 (37 & 38 Vict. c. 42). The second question is whether in the present case the order to state a case was made whilst the proceedings under the reference were pending.

With regard to the first point I can see no reason whatever why the enactments should not very properly stand together. The Building Societies Act contemplates, no doubt, as the learned judges of the Divisional Court thought, a speedy and comparatively inexpensive remedy. It gives that remedy by arbitration, the judges being selected by the litigating parties themselves. Those arbitrators might be laymen, as in the present case they were, or they might be qualified and trained lawyers. But then the statute only gives the arbitrators power to state a case in their discretion at the request of either party.

Now, in the present instance the arbitrators seem to have come to the conclusion, I will not say very rapidly, but very decidedly, that the view which they took was the only possible view that could be taken; and certainly this case, as it seems to me, is an illustration, and a very convenient one, of the benefit which will arise from consolidating and construing the two Acts together. Under the Building Societies Act the matter was, in the discretion of the arbitrators, at the request of either party; but then there came this Act, a general Act, which adds an element to it enabling either of the parties who wishes to have the point authoritatively determined to compel the arbitrators, whether they will or no, to state a case.

Now, it was thought by the learned judges in the Divisional Court that by implication that provision was excluded, because it was said that the Building

Societies Act, being an Act eminently for the discussion of questions without delay and without expense, it was entirely contrary to the sense and principles of that Act to import the power to state a case when that Act itself had laid down the only limits within which a case was to be stated. But it must be recollected that it may be far better and must be generally far better, in a case where the rights of the parties depend upon a question of pure law, the construction of statutes or authorities, to have a right decision than to have merely an inexpensive one; and when it is seen that the Legislature here has interposed the discretion of the judge before whom the case must come before any case can be stated for decision, it seems to me that there is no sufficient ground in the supposed policy of the Acts in question for excluding the operation of the last Act. The provisions may very well stand together. By the first either party may request; by the second, if either party request and the arbitrators refuse to state a case, then upon the party going before a judge and showing that the case is one involving some question of law (of course that is a matter which the judge will take into consideration—not a mere question of fact, but some question of law, and not only that, but some question of law upon which two opinions may possibly exist) the judge has power to compel the arbitrators to state a case.

With regard to the second point, I should not be prepared to carry further the doctrine with respect to part of a day and to hold that it cannot be considered in certain cases. In this case I am clearly of opinion, and the evidence satisfies me, that the order was really and truly made before the award.

Order appealed from affirmed, and appeal dismissed, with costs.

Solicitor for the appellants, *J. R. Pakeman.*

Solicitors for the respondent, *Hatchett-Jones & Co.*

Court of Appeal.

Original motion.
(Lord Esher, M.R., and Bowen and A. L. Smith, L.JJ.) — Jan. 11.

Ex parte GOLDBERG. (*a.*)

Practice — Appeal — Application to appeal in formâ pauperis—*Court to which application should be made.*

Where a party who has not sued or defended as a pauper in the court below desires to appeal in formâ pauperis, *the application for leave should be made* ex parte *to the Court of Appeal, and the court will require the provisions of ord.* 16, *rr.* 22-24, *to be followed upon such application.*

Application *ex parte* for leave to appeal *in formâ pauperis* from an order of Mr. Registrar Hope in bankruptcy. The applicant did not appear *in formâ pauperis* in the proceedings in the court below.

The applicant appeared in person.

Lord ESHER, M.R. — We must now decide definitely whether this application ought to be made in this court. The question would be the same in the case of an appeal from any court to this court. The applicant did not appear *in formâ pauperis* when before the registrar, but he now desires to appeal *in formâ pauperis.* I had at first some doubt whether this was the proper court to apply to, but it seems to me that, as this is a proceeding in an appeal, this court must have inherent jurisdiction in a matter relating exclusively to proceedings in this court. This court, and no other court, has inherent jurisdiction to deal with that matter. The case of *Kiff* v. *Roberts*, 35 W. R. 176, 33 Ch. D. 265, is an authority in support of this view, because the minutes of the order in that case show that this court gave the plaintiff liberty to appeal *in formâ pauperis.* We have, therefore, jurisdiction to entertain the application, and the provisions of ord. 16, rr. 22-24, must be followed. The provisions of those rules have been complied with in the present case, and the application is properly made *ex parte.* The application will therefore be granted. Whether the order may be challenged subsequently, upon the ground that the materials are irregular, or upon some other ground, is a different matter, which does not now arise.

BOWEN and A. L. SMITH, L.JJ., concurred.

Application granted.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

From Q. B. Div.
(Lindley, Bowen, and A. L. Smith, L.JJ.) — Dec. 6, 7.

CARLILL v. CARBOLIC SMOKE BALL CO. (*a.*)

Contract — Advertisement — Reward — Consideration — Acceptance—Notification of acceptance—Wagering—Insurance against disease—8 & 9 *Vict. c.* 109—14 *Geo.* 3, *c.* 48, *s.* 2.

The defendants, who were the proprietors and vendors of a medical preparation called "The Carbolic Smoke Ball," in November, 1891, *published the following advertisement:—"£100 reward will be paid by" the defendants "to any person who contracts the increasing epidemic, influenza, after having used the ball three times daily for two weeks" in a certain specified manner; "£1,000 is deposited with the A. Bank, showing our" (the defendants') "sincerity in the matter." The plaintiff, on the faith of this advertisement, purchased from a chemist one of the defendants' smoke balls, and used it three times a day from the 20th of November,* 1891, *to the 17th of January,* 1892, *when she contracted influenza.*

Held, that the advertisement was not a mere puff, but an offer to contract intended to be acted upon; that, by the performance of the conditions therein contained, the offer had been accepted by the plaintiff, and a contract thereby constituted between the plaintiff and the defendants; that, having regard to the character of the transaction, no notification of acceptance of the offer was necessary; that there was consideration moving from the plaintiff; and, consequently, that a binding contract by the defendants to pay the plaintiff £100 in the event which happened, had been constituted.

Held, also, that such contract was neither a contract by way of wagering within 8 & 9 *Vict. c.* 109, *nor a policy of insurance within* 14 *Geo.* 3, *c.* 48, *s.* 2, *and that the plaintiff was entitled to recover.*

Decision of Hawkins, J. ([1892] 2 *Q. B.* 484), *affirmed.*

Appeal from the decision of Hawkins, J., reported [1892] 2 Q. B. 484.

The defendants, the Carbolic Smoke Ball Co., in November, 1891, published in a newspaper the following advertisement:—"£100 reward will be paid by the Carbolic Smoke Ball Co. to any

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

person who contracts the increasing epidemic, influenza, colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. £1,000 is deposited with the Alliance Bank, Regent-street, showing our sincerity in the matter. During the last epidemic of influenza many thousand carbolic smoke balls were sold as preventatives against this disease, and in no ascertained case was the disease contracted by those using the carbolic smoke ball. One carbolic smoke ball will last a family several months, making it the cheapest remedy in the world at the price of 10s. post free. The ball can be refilled at a cost of 5s. Address, Carbolic Smoke Ball Co., 27, Princes-street, Hanover-square."

The defendants were the proprietors and vendors of the carbolic smoke ball. The plaintiff, Mrs. Carlill, having read this advertisement, on the faith of it purchased at a chemist's one of the defendants' smoke balls, and used it as directed, three times a day, from November 20 till January 17, 1892, when she was attacked by the influenza. She thereupon brought this action against the defendants to recover £100.

The defendants pleaded that there was no contract between them and the plaintiff that they should pay the plaintiff £100; and that if there were such a contract it was void, either under 14 Geo. 3, c. 48, s. 2, as being a policy of insurance not made in accordance with the provisions of that section, or as being contrary to public policy, or under 8 & 9 Vict. c. 109, as being a contract by way of wagering.

The facts not being disputed, Hawkins, J., held on the points of law raised by the defence (1) that there was a contract by the defendants to pay the plaintiff £100 in the events which happened; (2) that such contract was not a policy of insurance within section 2 of 14 Geo. 3, c. 48, nor a contract by way of wagering within 8 & 9 Vict. c. 109, and that the plaintiff was entitled to judgment for the £100.

The defendants appealed.

Finlay, Q.C., and *T. Terrell*, for the appellants.—First, no contract was constituted so as to enable the plaintiff to sue, because (*a*) it was not made either with the plaintiff or any other ascertained person, but with the whole world: *Week* v. *Tibold*, Rolle's Abr., (M) 1, p. 6 [LINDLEY, L.J.—It looks as if there were no promise at all in that case]; *Harris* v. *Nickerson*, 21 W. R. 635, L. R. 8 Q. B. 286; and (*b*) it was too vague and indefinite generally, no time being limited for the performance of the condition: *Guthing* v. *Lynn*, 2 B. & Ad. 232. Secondly, there was no consideration for the promise to pay £100, which on the face of it would apply to a case where a person who stole a ball, used it, and got influenza. No benefit accrues to the defendants by the mere user of the balls. In *Gerhard* v. *Bates*, 1 W. R 383, 2 Ell. & B. 476, the second reason given (at p. 487) in the judgment of Campbell, C.J., is in our favour. The advertisement was a mere puff, or at most a promise binding in honour only, not in law; it was *nudum pactum*. The case of *Denton* v. *Great Northern Railway Co.*, 4 W. R. 240, 5 Ell. & B. 860, which seems against us, can only be supported on the ground that the advertisement there amounted to a misrepresentation of fact. Thirdly, no notification of the acceptance by the plaintiff of the defendants' offer was given by the plaintiff, and some notification was necessary to constitute a contract: *Ex parte Harris*, 20 W. R. 690, L. R. 7 Ch. App. 587. The circumstances of this case show that it would be unreasonable to suppose that notification of acceptance was not necessary, as here the terms of the advertisement itself supply no means to the defendants of ascertaining the person with whom, by his performance of the condition, a contract is said to have been entered into. The defendants had no means of checking, so as to see whether the plaintiff had used the smoke ball as indicated. Fourthly, if there is a contract it was a contract by way of insurance, and therefore void under 4 Geo. 3, c. 48, s. 2, because the names of the persons interested therein were not inserted in it. Fifthly, if a contract at all, it was a contract to indemnify persons using the smoke ball against influenza, and therefore a wagering contract: *Good* v. *Elliott*, 3 Term Rep. 693, at p. 706; and therefore void under 8 & 9 Vict. c. 109: *Brogden* v. *Marriott*, 3 Bing. N. C. 88.

Dickens, Q.C., and *W. B. Allen*, for the plaintiff, were not called on to argue the points as to the contract (if any) being either a policy of insurance or a wagering contract.—This advertisement was not, nor intended to be, a mere puff; the statement as to the deposit of £1,000 in a bank negatives that. It was, in fact, an offer to contract, which offer was accepted and converted into a contract by any person performing the conditions of the advertisement: *Denton* v. *Great Northern Railway Co.* The moment the plaintiff performed the conditions of the advertisement she became ascertained as the acceptor of the offer, and the offer became a contract with the plaintiff All the reward cases are in point and in the plaintiff's favour: *Williams* v. *Carwardine*, 4 B. & Ad. 621; *Denton* v. *Great Northern Railway Co.* As to notification of the acceptance, that is not necessary where, as here, the character of the offer clearly shows that notification was not intended or required, and where the contract was complete when the conditions of the offer had been fulfilled by the plaintiff: *Brogden* v. *Metropolitan Railway Co.*, 2 App. Cas. 666, *per* Lord Blackburn, at p. 691; *Spencer* v. *Harding*, 19 W. R. 48, L. R. 5 C. P. 561, *per* Willes, J., at p. 563; *Denton* v. *Great Northern Railway Co.*; the doctrine as to notice of acceptance is not applicable to an executed, as distinguished from an executory, contract. As to consideration, in the case of a purchaser of the smoke ball there would clearly be consideration; and even apart from purchase the mere user of it by the plaintiff done at the defendants' request and for the defendants' benefit is a sufficient consideration; the passage in *Gerhard* v. *Bates* relied on by the defendants is explainable, on the ground that it turned on the form of the declaration alleging the promise in that case, the promise as there alleged being only applicable to the original holders of shares, and there being no allegation that the plaintiff there was an original holder. As to the limit of time for the performance of the condition, three constructions are possible—viz., during the existence of the then increasing epidemic, or while the user of the ball was going on, or within a reasonable time after the expiration of the continuance of such user; and either construction will suit the plaintiff.

Finlay, Q.C., in reply.—What the plaintiff calls the consideration—*i.e.*, the using the ball—is no consideration at all, but a mere condition, just as much as the catching of the influenza, on which the reward was to be payable. The object of the advertisement was to induce people to buy the balls, not necessarily to use them. Once a ball had been purchased the defendants were indifferent as to its user subsequently. The advertisement, from its terms, is not confined to persons who bought and used the ball after the advertisement appeared; it would apply equally to persons who had done so before it appeared. The mere user of the ball—apart from the purchase of it—was not a service done to the defendants, and therefore no request by the defendants to use the ball can be implied. In *Williams* v. *Carwardine* the nature of the

act done on which the reward was to be paid was a service to the defendant; a request is as necessary in the case of an executed consideration as an executory consideration: *Lampleigh* v. *Brathwait*, 1 Sm. L. C., 9th ed., p. 153. [BOWEN, L.J., referred to *Victors* v. *Davies*, 12 M. & W. 758, and *Fisher* v. *Pyne*, 1 Man. & Gr. 265 n.] As to notification of the acceptance, it would be unreasonable to attribute to this advertisement that it meant that the mere acceptance of the promise by anyone in the world, although unknown to the defendants, completed the contract: see *per* Lord Blackburn in *Brogden* v. *Metropolitan Railway Co.*, 2 App. Cas., at p. 692. As to the limit of time, there is nothing at all in the advertisement to limit it to the then existing influenza epidemic.

LINDLEY, L.J.—The defendants are interested in selling as largely as possible a thing they call the carbolic smoke ball. The defendants have great faith in it as an effectual preventive against influenza, colds, and other diseases caused by taking cold, and also as useful in a great variety of other things. They state that "the carbolic smoke ball never fails to cure all the diseases herein mentioned when used strictly according to these directions." The defendants, like other tradespeople, want to induce the public to have sufficient confidence in this thing to buy it largely. They are the vendors, and the more they can sell the better for them; and the more the thing is used, *primâ facie* the more they will sell, so that in that way the more it is used the better for the defendants.

That being the position of affairs, they publish this advertisement in various papers in a form to attract attention, for the purposes to which I have already alluded. [The Lord Justice read the advertisement, and proceeded:—] The plaintiff is a lady who, upon the strength of this advertisement, bought one of these smoke balls—not at the defendants' place of business, but at a chemist's shop in Oxford-street—and used it three times daily for two weeks, according to the printed directions supplied; and before she had in fact done using it she was unfortunate enough to contract influenza, so that in her particular case the smoke ball did not produce the desired effect. Thereupon she claimed the £100 from defendants, who refused to pay it; hence this action. Hawkins, J., decided in the plaintiff's favour, and the defendants now appeal.

Mr. Finlay, on their behalf, has argued the case with great ingenuity; his argument, in substance, however, comes only to this, that there is no binding promise at all.

Some of the contentions raised in the court below on behalf of the defendants I need only mention for the purpose of dismissing them. First it was said that no action would lie upon this, because it is a policy. You have only got to look at the document to dismiss that argument. Then it was said that it was a bet; Hawkins, J., examined that argument with his usual skill, and came to the conclusion that a bet was never intended by anyone, and that there was nothing whatever in common with a bet in the transaction. I so entirely agree with him that I propose to pass that over as not worth serious attention.

We have not got in this case to deal with any inferences of fact. What we have to deal with is an express promise to pay £100 in certain events. Read it how you will, there is here, in my opinion, a distinct promise expressed in language perfectly unmistakable—"£100 reward will be paid by the Carbolic Smoke Ball Co. to any person who contracts the influenza after having used the ball three times daily," &c. I have come to that conclusion after looking fully into the whole statement in order to see whether this was intended to be a promise at all, or whether it was a mere puff—a sort of thing that meant nothing. Is it a mere puff? I answer No, and I base my answer upon the following passage: "£1,000 is deposited with the Alliance Bank showing our sincerity in the matter." Now what is that deposited for? What is that statement put in for, except to negative the suggestion that this is a mere puff and means nothing at all? The deposit is called in aid by the advertiser as proof of his sincerity in the matter. What does that mean? Of his intention to pay the £100 in the events which he has specified. Whoever drew this advertisement has distinctly in words made that promise. I make these remarks for the purpose of giving point to the observation that we are not inferring the promise from the language used. Here the promise is as plain as words can make it.

Then it is said, on behalf of the defendants, that the promise is not binding, because, in the first place, it is not made with anybody in particular. That is a point which is common not only to the words of this advertisement, but to the words of all other advertisements offering rewards. They are offers to anybody who performs the conditions named in the advertisement, and anybody who does perform the conditions accepts the offer. This advertisement is, I take it, in point of law an offer to pay £100 to anybody who will perform the condition, and the performance of the condition is the acceptance of the offer. This view rests upon a line of authorities, the earliest of which is the celebrated advertisement case of *Williams* v. *Carwardine*, which has been followed by numerous other cases as to advertisements of rewards. That is the legal analysis of it so far.

The next point urged is this: granting that the performance of the condition is an acceptance of the offer, that acceptance must be notified. Unquestionably, as a general proposition, when an offer is made there must not only be acceptance, but notification of the acceptance, to constitute a contract. But is that so in cases of this kind? I apprehend that a case of this kind is rather an exception to the rule, or if not an exception, it is open to the observation that the notification of the acceptance need not precede the performance. This offer is a continuing one; it was never revoked, and if notice of acceptance be required—which I very much doubt—the person who makes the offer gets the notice of acceptance contemporaneously with the notice of the performance of the condition. Anyhow, if notice be required, he has got it before his offer is revoked, and that is all that is required by the general proposition itself. But I rather think that the true view in a case of this kind is that which was expressed by Lord Blackburn in *Brogden* v. *Metropolitan Railway Co.*, that the person who makes an offer of this kind shows by his language, and from the nature of the transaction, that he does not expect, and does not require, notice of the acceptance apart from the performance of the condition itself.

We have, therefore, all the elements necessary to form a binding contract, enforceable in point of law, subject to two observations. First, it is argued that the language used here is so vague that it cannot really be construed as a promise—that the vagueness of the language shows that a legal promise was never intended or contemplated. The language is vague and uncertain in some respects, and particularly in this, that the £100 is to be paid to any person who contracts the increasing epidemic after having used the balls three times daily and so on—and it was asked, how long after using the balls? According to the language of the advertisement no time is fixed as to that, and construing the

offer most strongly against the person making it, one might infer that *any* time after was meant. I am inclined to think, however, that such a construction would be pushing too far the doctrine of taking the language of the offer most strongly against the person making the offer. I doubt if business men, or reasonable men, would understand the offer to mean that if you took a smoke ball and used it three times daily for the time specified (two weeks), you were to be guaranteed against influenza for the rest of your life. I do not think that was what was meant. But, if it does not mean that, what does it mean? It is for the defendants to show what it does mean. It seems to me that there are two reasonable constructions which may be put on the advertisement as to this matter, either of which will answer the purpose of the plaintiff. Possibly there may be three constructions; it may possibly mean that it is limited to persons catching the increasing epidemic—that is, the then present influenza epidemic—or any colds, or diseases caused by taking cold, during the prevalence of the then increasing epidemic. That is one suggestion; it does not fascinate me, I confess. I prefer the other two suggestions, one of which is, that you are warranted free from catching this epidemic, or colds, or other diseases caused by taking cold, whilst you are using these smoke balls. If that be the meaning, the plaintiff was using the ball, and whilst using it got the epidemic. The other construction—and the one which I myself prefer—is that the warranty is against taking the influenza, &c., within a reasonable time after having used the smoke ball. Then it is asked, what is a reasonable time? One of the Lords Justices suggested that that depended upon the reasonable view of a germ in developing. I do not feel much pressed by that difficulty. It seems to me that what is a reasonable time may be got at, in a business sense and in a sense to the satisfaction of a lawyer, in this way: Find out what the smoke ball is composed of —a chemist will tell that; find out from a skilled physician how long such composition could be reasonably expected to endure so as to protect a person from an epidemic or cold; and in that way you will get a standard to be laid before a jury—or a judge without a jury—by which they might exercise their judgment as to what a reasonable time would be. In my opinion the true construction of this is, that £100 will be paid to anybody who uses this smoke ball three times daily for two weeks according to the printed directions, and who gets influenza, or cold, or other diseases caused by taking cold, within a reasonable time after so using it. That is, I think, the fair and proper business construction of this offer. If that be the true construction of it, it is enough for the plaintiff. I will, therefore, say no more as to the vagueness of the document.

I come now to the last point which I think requires attention, that is, the point as to consideration. Mr. Finlay has argued with great skill that this is *nudum pactum*. We must apply to that argument the usual legal tests. Let us see whether there is no advantage to the defendants. Mr. Finlay says it is no advantage to them how much the smoke ball is used; what is an advantage and benefit to them is the sale; and he has put the ingenious case that there might be a lot of these balls stolen, and that the user of the stolen balls by the thief or other persons would be no advantage to the defendants. The answer to that is, that it is quite obvious that, in the view of the advertisers, a use by the public (if they can only get the public to have confidence enough to use the smoke balls) will react, and produce a sale, which is decidedly beneficial to the defendants. It appears to me, therefore, that you get out of this an advantage to the defendants quite enough to constitute a consideration. Then, again, the matter has to be viewed from the other side. What about the person who acts upon this, and accepts the offer? Does not such person put himself to some inconvenience at the request of the defendants? Is the user of this smoke ball three times daily for two weeks, at the request of the defendants, to go for nothing? It appears to me that there is a distinct inconvenience, if not a detriment, to any person who uses this smoke ball. When, therefore, this argument of want of consideration is analyzed, it appears to me that there is ample consideration for the promise. We were pressed upon this point with the case of *Gerhard* v. *Bates* which was a case where some promoter of a company had promised the bearers of share warrants that they should have dividends for so many years, and the promise, as alleged, was held not to show any consideration. Lord Campbell's judgment upon that is intelligible; for when one comes to examine it, it is, I think, open to the explanation given by Mr. Dickens—viz., that the real point there was that the promise, if any, was made to the original bearers, and not to the plaintiff in that case; and that as the plaintiff was not suing in the name of the original bearer there was no contract with him. Then Lord Campbell goes on to enforce that view by showing that there was no consideration shown by the promise to him. I cannot help thinking that Lord Campbell's observations upon consideration would have been very different indeed if the plaintiff in that action had been an original bearer, or if the court had got to consider what a *société anonyme* was, and that the promise was, and had been alleged to be, a promise not only to the first bearer, but to anybody who should become the bearer. There was no such allegation, and the court said, in the absence of such allegation, that they did not know what a *société anonyme* was—meaning of course judicially—and, therefore, that there was no consideration. But in the present case, for the reasons I have given, I cannot see the slightest difficulty in coming to the conclusion that there is consideration.

It appears to me, therefore, that the defendants must perform their promise; and if they have been so unguarded and so unwary as to expose themselves to a great many actions, so much the worse for them. For once in a way the advertiser has reckoned too much on the gullibility of the public. It appears to me it would be very little short of a scandal if we held that no action would lie on such a promise as this, acted upon as it has been.

BOWEN, L.J.—I am of the same opinion.

We were asked by counsel for the defendants to say that this document was a contract too vague to be enforced. The first observation that arises is, that the document itself is not a contract at all. It is an offer made to the public; an offer the terms of which, Mr. Finlay says, are too vague to be treated as a definite offer the acceptance of which would constitute a binding contract. He relies on his construction of the document, in accordance with which he says there is no limit of time fixed for the catching of the influenza, and that it cannot seriously be meant as a promise to pay money to a person who catches the influenza at any time after the inhaling of the smoke ball. He says also, that when this document is looked at, you will find great vagueness in the limitation of the persons with whom the contract was intended to be made. That, in the first place, it does not follow that the persons do not include persons who may have used the smoke ball before the advertisement was issued: at all events, that it is a contract with the world in general; and also that it is an unreason-

able thing to suppose it to be a contract, because nobody in their senses would contract themselves out of the opportunity of checking the experiment which was going to be made at their own expense, and there is no such provision here made for the checking. All these things, he says, show that this is rather in the nature of a puff or a proclamation than a promise—an offer intended to mature unto a contract when accepted.

Mr. Finlay relies upon his right to say that the terms are too uncertain to be consolidated into a contract; but he seems to think that the strength of the position which he desires to take up is rather this, that the vagueness of the document shows that no contract at all was intended. It seems to me that, in order to arrive at the true construction of this document, we must read it in its plain meaning, as the public would understand it. It was intended to be issued to the public and to be read by the public. How would an ordinary person, reading this document, construe it, upon the points which Mr. Finlay has brought to our attention? It was intended, unquestionably, to have some effect, and I think that the effect it was intended to have was, that by means of the use of the carbolic smoke ball the sale of the carbolic smoke ball should be increased. This advertisement was designed to make people buy the smoke ball, no doubt; but it was also designed to make them use it, because the suggestions and allegations which it contains are directed immediately to the use of the smoke ball as distinct from the purchase of it. It did not follow that the smoke ball was to be purchased from the defendants directly, or even from agents of theirs directly. The intention was that the circulation of the smoke ball should be promoted, and that the usage of it should be increased. The advertisement begins by stating that a reward will be paid by the Carbolic Smoke Ball Co. to any person who contracts the increasing epidemic; Mr. Finlay suggests that the word "contracts" is applicable, not only to persons who contract the epidemic after the publication of the advertisement, but that it might also include persons who had contracted the influenza before. I cannot so read it. It is written in colloquial and popular language, and I think the expression is equivalent to this: "£100 will be paid to any person who shall contract the increasing epidemic after having used the carbolic smoke ball three times daily for two weeks," and it seems to me that that is the way in which the public would read it. A plain person who read this advertisement would read it in this plain way, that if anybody, after the advertisement was published, used three times daily for two weeks the carbolic smoke ball, and then caught the influenza or cold, he would be entitled to the reward.

Then Mr. Finlay asked, "Within what time is this protection to endure? Is it to go on for ever; or what is the limit of time?" As to that, I confess that I myself think that there are two constructions of this document, each of which is good sense and each of which seems to me to satisfy the exigencies of the present action. It may mean that the protection is warranted to last during the epidemic. If so, it was during the epidemic that the plaintiff contracted the disease. It may mean—and I think it more probable that it does mean—that it is to be a protection while the smoke ball is in use. That seems to me the way in which an ordinary person would understand an ordinary advertisement about medicine and about, especially, a specific against influenza. It could not be supposed that after you have left off using this smoke ball you are still to be protected for ever—as if there was to be a stamp set upon your forehead that you were never to catch the influenza because you had used the carbolic smoke ball. I think it means during use; that is the way I should read the advertisement, and I think the language of the advertisement lends itself to that conclusion. [The Lord Justice read the advertisement, and remarked that it concluded with saying that one smoke ball would last a family for several months; and continued:—] That means that it is to be going on being used; and there is also a statement that the ball can be refilled at a cost of five shillings. I therefore have no hesitation myself in saying that I think the plain construction of this protection was that it was to endure during the time that the carbolic smoke ball was being used. Lindley, L.J., thinks that the contract would be sufficiently definite if you were to read it in the sense that the protection was to be warranted during a reasonable period after use. I have some difficulty myself on that point; but it is not necessary for me to develop it, because, as I read the contract, it covered the exact moment during which the disease was contracted in this case.

Then, was the reward intended to be paid? The advertisement says £1,000 is lodged at the bank for the purpose. It not only says it will be paid, but it says, "We have lodged £1,000 to meet it." Therefore, it cannot be said that this advertisement was intended to be a mere puff. I think it was intended to be understood by the public as an offer which was to be acted upon.

Then it was urged that there was no check for the benefit of the persons who made the offer, and that it would be an insensate thing to promise £100 to a person who used the smoke ball unless you could check his using it. The answer is, that if a person chooses to make these extravagant promises he probably does so because it pays him to make them; and if he has made it, the extravagance of the promise is no reason in law why he should not be bound by it.

But it is said that it is made to all the world—that is, to anybody. It is not a contract made with all the world — there is the fallacy of Mr. Terrell's argument. It is an offer made to all the world, and why on earth should not an offer be made to all the world, which is to ripen into a contract with anybody who comes forward and performs the condition? It is an offer to become liable to anyone who, before it is retracted, performs the conditions, and, although the offer is made to the world, the contract is made with that limited portion of the public who come forward and perform the condition on the faith of the advertisement. It is not like cases in which you offer to negotiate, or in which you issue an advertisement that you have got a stock of boots to sell or houses to let—in which cases there is no offer to be bound by any contract. Such advertisements are offers to negotiate—offers to receive offers—offers to chaffer—as I think some learned judge has said in one of the cases cited. If this is an offer to be bound, then it is a contract the moment the person fulfils the condition. That seems to me to be sense, and it is also the ground on which all the advertisement cases have been decided during the century. It cannot be put better than it is put in Willes, J.'s judgment in *Spencer* v. *Harding*: "In the advertisement cases," he says, "there never was any doubt that the advertisement amounted to a promise to pay the money to the person who first gave information. The difficulty suggested was that it was a contract with all the world"—that is also the difficulty suggested here by Mr. Terrell—"but that, of course, was soon overruled. It was an offer to become liable to any person who, before the offer should be retracted, should happen to be the person to fulfil the contract of which the advertisement was an offer or tender.

That is not the sort of difficulty which presents itself here. If the circular had gone on to say, 'We undertake to sell to the highest bidder,' the reward cases would have applied, and there would have been a good contract in respect of the persons." As soon as the highest bidder presented himself in such case (says Willes, J.), the person who was to hold the *vinculum juris* on the other side of the contract was ascertained, and it became settled.

Then there was a very ingenious point taken by Mr. Finlay and Mr. Terrell, viz., that there was no notification of the acceptance of the contract.

It cannot be doubted that, as an ordinary rule of law, an acceptance of an offer ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless that be done the two minds may be apart, and there is no *consensus* which is necessary, according to English law, to make the contract. But there is this clear gloss to be made upon that doctrine, that as the mode of notifying acceptance is a part of the contract which is for the benefit of the person who makes the offer, as well as for the opposite party, the person who makes the offer may dispense with notice to himself, if he thinks it desirable to do so; and I suppose there can be no doubt that where a person, in an offer made to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person, to whom such offer is made, to follow the indicated method of acceptance; and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating an acceptance of it back again to himself, the offer is one which in its character dispenses with notification of the acceptance. Then, according to the very intimation of the person proposing the contract, performance of the condition is a sufficient acceptance without notification. That seems to me to be the principle which lies at the bottom of the acceptance cases, of which an instance is the well-known judgment of Mellish, L.J., in *Harris's case*, and another in the judgment of Lord Blackburn in *Brogden* v. *Metropolitan Railway Co.* The passage I refer to in the latter judgment will be found in the report in 2 App. Cas., at p. 691, and it seems to me that that is exactly the line which it takes.

If that is the law, how are you to find out whether the person who makes the offer does intimate that notification of acceptance will not be necessary in order to conclude a binding bargain? In many cases you look to the offer itself. In many cases you extract it from the character of the business that is being done; and in the advertisement cases it seems to me to follow as an inference to be drawn from the transaction itself, that a person is not expected to notify his acceptance of the offer before he performs the condition, but that if he performs the condition, at once notification is dispensed with; and it seems to me no other view could be taken from the point of view of common sense. If I advertise to the world that my dog is lost, and that anybody who brings the dog to a particular place will be paid some money, are all the police, or other persons whose business it is to find lost dogs, to be expected to sit down and write me a note saying that they have accepted my proposal? Why, of course they look after the dog, and as soon as they find the dog they have performed the condition. The very essence of the transaction is that the dog should be found, and it is not necessary under such circumstances, in order to make the contract binding, that there should be any notification of acceptance at all. It follows from the nature of the thing that the performance of the condition is sufficient acceptance without the notification of it; and a person who makes an offer in an advertisement of that kind makes an offer which must be read by the light of that common sense reflection. He does, therefore, in his offer impliedly indicate that he does not require notification of the acceptance of the offer.

Then we were very ably pressed by Mr. Finlay that this was a *nudum pactum*, that there was no consideration for the promise. He said that the taking the influenza was a condition, and that the using the smoke ball was a condition, and that there was no consideration at all; in fact, he said, that there was no request to use the smoke ball, express or implied.

I will not elaborate the discussion upon the exact law as to requests in this kind of contract; I will simply refer to *Victors* v. *Davies*, 12 M. & W. 758, and to the note by Serjeant Manning in the report of *Fisher* v. *Pyne* in 1 Man. & Gr., at p. 265. The short answer to this argument is that there is in the present case a request to use, involved in the very offer and acceptance. What is consideration? The definition of consideration as given in Selwyn's *Nisi Prius*, 13th ed., vol. 1, p. 55, is: "Any act of the plaintiff from which the defendant derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, provided such act is performed, or such inconvenience suffered by the plaintiff, at the request or with the consent, either express or implied, of the defendant." Can it be said here that if the person who reads this advertisement applies to his nostrils thrice daily for such time as may seem to him tolerable, for a whole fortnight, the carbolic smoke ball, he is doing nothing at all, that it is a mere act, which is not to count towards consideration to support a promise. The law does not require us to measure the adequacy of the consideration sufficient; if there is an inconvenience sustained by the one party with the consent of the other, that is enough to import a consideration. It is enough that here the plaintiff used the smoke ball. That is consideration enough. But, further, as has been shown by the plaintiff, she not only used it, but her using it was intended and contemplated by the promisor as being indirectly a benefit to the promisor himself, because the use of the smoke ball would promote the sale of the smoke ball.

Then we were pressed with *Gerhard* v. *Bates*. As to that I can only repeat what Lindley, L.J., has already said. In *Gerhard* v. *Bates*—which arose upon demurrer—the point upon which the action failed was that the plaintiff did not allege—and he did not allege it probably because he could not prove it—that the promise was made to the class of persons of whom alone the plaintiff was; and therefore there was no privity between the plaintiff and the defendant. But Lord Campbell went on to give a second reason. If his first reason was not enough, and if the plaintiff and the defendant there, had come together as contracting parties, and if the only question was consideration, it seems to me that Lord Campbell's reasoning would not have been sound. It is only if you read it as pointing out the want of consideration flowing from one person to the other in the particular case—assuming them not to have come into the relation of contracting parties—that it can be supported; but if so the language was superfluous. The truth is, that if in that case you could once have found the parties to be contracting parties, there would have been no difficulty about consideration; but in *Gerhard* v. *Bates* you could not find the parties to be contracting parties. So in this case, if once you determine that there was a promise made to the plaintiff here as one of the public that if she used the smoke ball three times daily for a fortnight and

got the influenza she should have the money, it seems to me that her using the smoke ball was sufficient consideration. If I say to a person, "If you use such and such a medicine for a week I will give you £5," and he uses it, there is ample consideration for the promise. It seems to me in the present case there was ample consideration.

A. L. SMITH, L.J.—The first point in this case is whether the defendants' advertisement was an offer which, when accepted and its conditions performed, constituted a promise to pay, assuming that there was good consideration to uphold that promise; or whether it was only a puff from which no promise could be implied; or, in other words—as it has been put to us—a mere statement by the defendants of the confidence they entertained in the efficiency of their remedy; or, to put it in the words used by Lord Campbell in *Denton* v. *Great Northern Railway Co.*, whether this advertisement was to be mere waste paper. That is how that learned judge summarized the arguments put forward as to the advertisement in that case.

I read this advertisement in this way, as if the paragraph in the middle of it were taken out and placed at the end of it, for it seems to me it then runs much more easily and is much more intelligible. In my view the true reading of this advertisement is this:—"£100 reward will be paid by the Carbolic Smoke Ball Co. to any person who, after having used the ball three times daily for two weeks according to the printed directions supplied with such ball, contracts the increasing epidemic, influenza, colds, or any diseases caused by taking colds." If I may paraphrase that, I think it means this:—If you—that is, one of the public as yet not ascertained, but who will be ascertained by the performing the condition—will hereafter use my smoke ball three times daily for two weeks according to my printed directions, I will pay you £100 if you contract the influenza within the period mentioned in the advertisement. Now why is there not a request there? In consideration of your using my smoke balls at my request, and paying for them—though that is not in, yet it is a necessary part of the use—then if you catch the influenza within a certain time I will pay you £100. It must not be lost sight of, that this advertisement also states that, as security for what is being offered, and as proof of its sincerity, £1,000 is actually lodged at the bank, wherewith to satisfy a possible demand which might be made in the event of the conditions contained therein being fulfilled, entitling a recipient to the £100 offered. How can it be said that such a statement as that embodied a mere expression of confidence in the wares the defendants had to sell? I cannot read the advertisement in any such way. In my judgment the advertisement was an offer intended to be acted upon if the conditions were performed, and when accepted constituted a binding promise on which an action would lie, assuming that there was consideration for that promise.

Mr. Finlay said that it was a promise in honour, or an agreement in honour, or a contract in honour; I asked him what he meant by that, and he said that it was a mere *nudum pactum*. That, I understand; I understand that if there be no consideration for a promise, it may be called a promise in honour, or, as a lawyer would call it, a promise without consideration and *nudum pactum*; but if he means anything else I do not understand it. I do not understand what a promise or an agreement in honour is, unless it is one on which an action cannot be brought because it is *nudum pactum*; and about *nudum pactum* I will say a word presently.

In my judgment this first points fails, and I think that this was an offer intended to be acted upon, and, when acted upon and the conditions performed, gave a right of action to a person performing those conditions.

Then it was argued that the promise was too wide, because there is, it was said, no limit of time within which the person is to catch the influenza. I am not going to pause there. As has been pointed out by Lindley, L.J., there are as to this three possible constructions to this contract. I like the last two, if I may call them so, the best—viz., either "catching the influenza during the time you are using the balls," or "catching the influenza within a reasonable time after the expiration of the two weeks during which you have used it three times daily." It is not necessary to say which is the correct construction. The third possible construction is "during the epidemic"; but whichever be the true construction, there is sufficient limit of time to prevent the contract being too vague in that particular.

Then it was argued that if the advertisement constituted an offer which might culminate in a contract if it were accepted, it was not accepted by the plaintiff in the manner contemplated; and it was said that the manner contemplated was such that notice of the acceptance had to be given by the party using the smoke ball to the defendants before user, so that the defendants might be at liberty to superintend the experiment. All I can say is that there is no such provision in the advertisement at all; and that in my judgment no such provision can be read into it. I entirely agree with what has fallen from the other Lords Justices—viz., that this is one of those cases in which a performance of the condition—the condition being the user of this smoke ball three times daily for two weeks—is an acceptance of the offer.

Then it was said that there was no person named in the advertisement with whom any contract was made. That, I suppose, has taken place in every case in which actions on advertisements have been maintained for the time of *Williams* v. *Carwardine*—and before that—down to the present day. I have nothing to add to what has been said on that subject—that a person becomes a *persona designata* and able to sue when he performs the conditions mentioned in the advertisement, which gives him a right to the money therein offered.

Then it was said that there was no consideration, and that it was *nudum pactum*. There are two considerations here. One is the consideration of the inconvenience of having to use this ball three times daily for two weeks. That is a consideration moving from the plaintiff to the defendants; and the other consideration is the money gain likely to accrue to the defendants by the enhanced sale of the smoke balls by reason of the plaintiff's user of them—ample considerations to support the promise.

I have only now to add that, as regards the points raised as to this being a policy or a wager, in my judgment there is nothing in either of them.

Appeal dismissed.

Solicitor for the appellants, *J. Bankes Pitman.*

Solicitors for the respondent, *Field, Roscoe, & Co.*

From Chan. Div. (Lindley, Bowen, and A. L. Smith, L.JJ.) Nov. 21.

SKINNER & CO. v. SHEW & CO. (a.)

Patent—Action to restrain threats by "Circulars, advertisements, or otherwise"—Threats contained in letters—Answer to inquiries—Privileged communications—Patentee unable to bring action for infringement—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 32.

A "threat" within the meaning of section 32 *of the Patents Act,* 1883, *may be contained in letters written* bonâ fide *in answer to inquiries made about a patent. Such a letter cannot be considered as a privileged communication.*

The words "or otherwise" in the section are not to be classed as ejusdem generis *with "circulars or advertisements": they are extended by the words which precede them, and not confined by them.*

Driffield and East Riding Pure Linseed Cake Co. *v.* Waterloo Mills Cake and Warehousing Co., 34 *W. R.* 360, 31 *Ch. D.* 638; Combined Weighing and Advertising Co. *v.* Automatic Weighing Machine Co., 37 *W. R.* 636, 42 *Ch. D.* 665; *and* Barrett *v.* Day, 38 *W. R.* 362, 43 *Ch. D.* 435, *approved.*

This was an appeal by the defendants from a decision of North, J., who had held that certain letters of the defendants contained "threats" within the meaning of section 32 of the Patents, Designs, and Trade-Marks Act, 1883, and had granted an injunction to restrain such threats, with an inquiry as to damages. The correspondence which constituted the alleged "threats" is set out in the judgment of Lindley, L.J. Ultimately, on the 16th of May, 1892, the plaintiffs issued the writ in this action against the defendants, claiming an injunction to restrain the defendants from making or continuing threats of legal proceedings or liability by letters, circulars, advertisements, or otherwise in respect of the alleged infringement of patent No. 4,102 of 1885, of which the defendants claimed to be the assignees, damages, and costs.

Section 32 of the Act provides as follows:—"Where any person claiming to be the patentee of an invention, by circular, advertisement, or otherwise, threatens any other person with any legal proceedings or liability in respect of any alleged manufacture, use, sale, or purchase of the invention; any person or persons aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as may have been sustained thereby, if the alleged manufacture, use, sale, or purchase to which the threats related was not in fact an infringement of any legal rights of the person making such threats; provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent."

Bousfield, Q.C., and *T. Terrell,* for the appellants, contended that their letters did not contain a threat within the meaning of section 32 of the Act.—The letters were written merely in answer to questions which they were bound in common fairness and honesty to answer and to give an opinion upon. The purview of the section had been extended by the decisions beyond what was intended. Under the old law, as in a case of libel, this would have been a privileged communication. The section was passed with reference to a well-known class of cases: *Wren* v. *Weild,* L. R. 4 Q. B. 731, 17 W. R. Dig. 91; *Halsey* v. *Brotherhood,* 29 W. R. 9, 15 Ch. D. 514. In such cases no action would lie against the threats unless *mala fides* was proved, and the section was directed against threats without *mala fides.* The word "otherwise" must be restricted to words *ejusdem generis* with circulars and advertisements: *Barrett* v. *Day,* 38 W. R. 362, 43 Ch. D. 435; Dwarris on Statutes, pp. 621, 657. If *mala fides* were shown here the remedy would be outside the section. The doctrine of privilege must be read into the section.

Moulton, Q.C., and *Micklem,* for the respondents, were not called upon.

LINDLEY, L.J.—This is an action brought on the 32nd section of the Patents Act, 1883. North, J., has held, under circumstances to which I will shortly allude, that the defendants have threatened by "circulars, advertisements, or otherwise," not certainly by circulars or advertisements, but "otherwise," some person with legal proceedings or liability in respect of an alleged manufacture and so on; and he has granted an injunction. The short outline of the case is this. It seems that the defendants have a patent camera, and it appears that they were customers of the London Stereoscopic Co. It appears that the plaintiff has got a camera, whether he has got a patent for it I do not at this moment recollect—I think it is said he had—but he wanted to introduce his camera to the public, and he sent it to the London Stereoscopic Co. The London Stereoscopic Co., thinking that it looked something like the defendants' patent camera, with which they were acquainted, wrote to the defendants and asked them their opinion about it, whereupon the defendants wrote this letter of the 18th of February, 1892, to the London Stereoscopic Co.: "In reply to yours of the 13th inst., we beg to confirm our opinion previously expressed, that the camera in question is an infringement not only of our patent No. 4,102/85 but also of our No. 15,657/91. We have taken further advice in the matter, and we are prepared to stop the sale of the camera if placed on the market. If you are willing to do so it would save time and trouble if you would give us the name of the manufacturer, and we will communicate direct with him." In consequence of that the Stereoscopic Co. declined to buy any of the plaintiff's cameras, and they said, through their solicitors, in their letter that which is only natural: "Under these circumstances it is absolutely impossible for our clients to continue any negotiations for an agreement. However useful your invention may be, they cannot submit themselves to the risk of a lawsuit." Then on the 20th the plaintiffs themselves wrote to the defendants this letter: "We are informed from a letter which you sent to the London Stereoscopic Co. that you intend to dispute our right to make our patent hand camera, of which they showed you a sample. We may say we have taken competent advice from more than one eminent authority, and we are fully prepared to defend any action that you may bring. The only probable result will be the quashing of your own patent through defective specification. In any case we are advised that our camera is clear. We are sorry to have to come to litigation with you, but we are so sure of our own ground that we cannot for a moment entertain the idea of withdrawing our camera from the market." Then in answer to that the defendants write to the plaintiffs: "In reply to yours of the 20th we can only confirm ours of the 18th to the London Stereoscopic Co., that we considered the camera in question an infringement of our patents Nos. 4,102/85 and 15,657/91,

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

and are prepared to take action to stop the sale. In order that we may go further into the matter before loss of time is incurred, if you would send us a camera and give us the number of the patent it would be an aid to our further investigation of the matter," and so on.

Now, North, J., has held that those threats are within the meaning of the expression in the 32nd section. And before I say any more about that, we must look a little further into this section. Supposing they are threats, then the person threatened—that is, the present plaintiff or any person aggrieved—may bring an action against the person making the threat, and may obtain an injunction against the continuance of such threats, and may recover such damages as may have been sustained thereby. But that is subject to these two qualifications: "if the alleged manufacture, use, sale, or purchase to which the threats related was not in fact an infringement of any legal rights of the person making such threats." Well, now, it is admitted here by Mr. Bousfield that the plaintiffs' camera cannot be regarded by him as in fact an infringement of the defendants' legal rights. That is explained by the state of the patent, and the necessity for amendment. Therefore, that condition is complied with. Then there is this further proviso, "that this section shall not apply"—that is to say, an action shall not lie under this section "if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent." For the same reason—viz., that the defendants' specification is not in a fit and proper state, and that an amendment is desirable — Mr. Bousfield also admits that it is a fact that the defendants are not in a position to commence and prosecute an action for the infringement of their patent; therefore, both these conditions may be regarded as complied with, and we need not trouble ourselves further about them, except that that last proviso contains, I think, the key to the legislation. I make that observation because we all know, as a matter of history, that this section in the Patents Act was introduced partly in consequence of the decision of this court in *Halsey* v. *Brotherhood*. Now, the object of this Act was to cure two blots—first of all, to give an action for damages where there was not one before; and, secondly, to enable an action to be brought against a man who uses these threats unless he will or does follow up his threat by commencing an action himself. That is the keynote.

Now, bearing in mind the state of the law which preceded this enactment, let us look to see what it is. The observations which I have made throw a good deal of light on the word "otherwise," to which I will presently refer more at length. The object of this section is, I think, apparent when once you bear in mind what I have already pointed out, and it is this—you are not to threaten; you are not to do it even in a general kind of way which might not be regarded as a threat to any particular person; you are not to do it even by a circular or advertisement; but if you do threaten, no action is to lie against you if you will prosecute the person who is aimed at by your threats. That is the substance of it. Now I will read the section: [His lordship read the section, and continued:] Now, Mr. Bousfield has urged upon us, that, although the letters to which I have referred may be regarded as threats, they are not threats by circulars, advertisements, or otherwise, if you read "otherwise," as he says you ought, *ejusdem generis* with circulars or advertisements—that is to say, by some published notice or in some public way more or less like a circular or an advertisement. If you so read it, it strikes me you miss the substance of the section: that is to say, you allow a man to make all sorts of threats, provided he does not do it by circular or advertisement, or by some method like a circular or advertisement. The object of the section is to prevent threats, even, as I say, in a general way by circular or advertisement, which might, or might not, be construed or regarded as a threat. You are not to do it; but the proviso shows that if you do it, you are not liable if you bring an action. Is this the construction which has been put on this section before? It appears to me it is, and has been for some few years past. It was the construction put upon it in *Driffield &c. Co.* v. *Waterloo Mills &c. Co.*, 34 W. R. 360, 31 Ch. D. 638, it was the construction put upon it in the *Combined Weighing and Advertising Co.* v. *The Automatic Weighing Machine Co.*, 37 W. R. 636, 42 Ch. D. 665, and it was the construction put upon it in *Barrett* v. *Day*, 38 W. R. 362, 43 Ch. D. 435—all before three different judges; the first being the decision of Bacon, V.C., the second being the decision of Kekewich, J., and the third the decision of North, J.; and they have all adopted the view that a threat by a letter is sufficient, although you cannot call a mere letter something like an advertisement or a circular. My own opinion is that that construction is the correct one.

Then we are urged to say that a letter which is in answer to a question is privileged. It appears to me that the question of privilege is far away from the subject of this inquiry. There is nothing about privilege in it either at common law or under the statute as I understand, but certainly not under the statute. There is nothing in the language of section 32 which invites or allows the consideration of such a question as privilege. I think, therefore, the decision of North, J., in this case was right. As to those letters being threats, there is no doubt about it. The only doubt is whether they are threats within the true meaning of the word "otherwise." I have come to that conclusion, and therefore the appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion. The inquiry perhaps is not too far to embark upon as to what was the state of the law before the statute, and then we shall see what the statute meant. At common law there was a cause of action whenever one person did damage to another wilfully and intentionally, and without just cause or excuse. Under the head of that class of action came the actions of slander of title, whether the subject of the slander was real or personal property If a man falsely and maliciously—because the malice would show there was no just cause—made a statement about the property of another, which was calculated to do, and which did do, damage to the other in the management of that property, an action would lie at common law and the damages would be recoverable; and at chancery I suppose that even if you could not prove actual damage incurred, the court might, if actual damage was likely to occur, prevent the wrongful act by injunction. The cases on the chancery side and on the common law side which occurred before the Act, and which make it clear what the state of the law was, are *Halsey* v. *Brotherhood* on the chancery side and *Wren* v. *Wield* on the common law side. Although in each of those cases an action was held not to lie, the law is laid down in an unmistakable manner. Nor does it require elaboration to show that if I make a misstatement falsely and maliciously about the property of another, which does him damage, the common law would take cognizance of such an action. Then comes the statute. It is to be observed that in order to make good such a cause of action at common law, or in order to make good such an application to the

court for an interference by the court on the equity side, you must show the statement was false and malicious—a wilful act done without just cause or excuse; and if a person, in the maintenance of what he conceived to be his rights, put forward a statement without knowing it to be false, but believing it to be true, even if the statement did damage to another person, an action would not lie, and the court of equity would not interfere. Why? Not because this is a right which belongs to the law of libel, but because it belongs to the general class which I have described; and the effect is the same, that if there was an occasion upon which a person was acting upon his rights in putting forward his own case the law would not interfere; and that the result of that would be, as is obvious, that a threat about an infringement, or an alleged infringement, could not be made the subject of an action or a suit unless you were prepared to show it was *malâ fide;* that there was no reasonable excuse for it. But it is to be observed that that threw the *onus* on those who instituted such an action, and made the remedy in a case of assertion of patent right, the effect of which was to paralyze the trade of others, almost nugatory; because it would be extremely difficult to prove that the persons put forward these assertions maliciously, or without just cause or excuse, to interfere with the proceedings of another; and apparently the Legislature was of opinion that there was a mischief which was not touched by the common law, and which it could cure, and we must see by the section itself what the mischief was and how far the section has cured it.

In the first place it seems to me that the whole argument of Mr. Bousfield and Mr. Terrell depends upon their convincing us that this particular threat is not a threat within the meaning of section 32, "by circulars, advertisements, or otherwise." They say first of all that this is not a threat, because it is addressed in answer to a letter with regard to one threat; and, secondly, the other threat is a threat addressed to the particular person who is supposed to infringe the patent. But using the language in its ordinary sense it is difficult to see that this intimation ceases to be a threat, because it is addressed to a third person in answer to an inquiry, or because it is addressed to the person himself. We are not dealing with libel or with any question of publication. We are dealing with threats. If I threaten a man that I will bring an action against him, I threaten *him* more or less, because I address that intimation to himself; and I threaten him none the less because I address the intimation to a third person. Mr. Bousfield's argument, as it seems to me with his usual quickness and perception to be understood, depends on his being able to convince us that this is not a threat by circular, advertisement, or otherwise. The word "otherwise," he says, ought to be cut down and considered according to the rule which is shortly described as the rule of *ejusdem generis*, that it follows upon "circular or advertisement," and that you must construe "otherwise" in such a sense as to confine it to the class, or at least to the *genus*, of the circulars or advertisements. There is no doubt of the existence of the rule *ejusdem generis;* it cannot be denied that the general words ought to be construed with reference to the words which immediately are around them. But there is an exception to that rule, if it be a rule, and not a maxim of common sense, which is, that although the words immediately around and before the general words are words which are *primâ facie* confined to a class, if you can see, from a wider inspection of the scope of the Legislature, that the general words, notwithstanding that they follow particular words, are nevertheless to be construed generally, you must give effect to the intention of the Legislature as gathered from the entire section. And here the question is whether the entire section, when you have regard to the special subject-matter as it is applied, does not lead you to the view that the larger meaning must be put upon the words "or otherwise," and that they are rather extended by the words which precede them than they are themselves confined by them. What is the subject-matter, in the first place, of this section? It is a threat about a patent action. Now every person of common sense knows what is involved in patent actions, and what the expense of them is; and everybody knows that to be threatened with a patent action is about as disagreeable a thing as can happen to a man of business; and the thing most calculated to paralyze a man in his business, even if he be innocent of any infringement of patent law.

To say that the threat, which the Legislature intends to stop, is only such a threat as is directed generally to the public by circulars and advertisements, would be to make the protection incommensurate with the evil, because a man might be addressing a threat at a particular moment to a purchaser, and might do as an irretrievable damage to the manufacturer, whose manufacture was about to be purchased, as if he had put his threat in the *Times* newspaper. Take the language of the section, and see if the scope of the section does not run in the same direction. First of all, an injunction may be obtained against a continuance of such threats—language which seems to indicate that it is a hanging over the head, of the threat, which the Legislature intends to put an end to. When we come to the last paragraph, which says, "Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent," the whole meaning, it seems to me, of the section leaps into light. The Legislature desires that threats on patent actions shall not hang over a man's head, that the sword of Damocles in such a case should either not be suspended or should fall at once; and it is with that view that the section seems to be framed. If you read the section in that light, it seems to me that the words "or otherwise" cannot be construed in the narrow way in which Mr. Bousfield desires them to be construed, so that the Act of Parliament should make a remedy not commensurate with an obvious mischief; and although I agree that you should not find out the mischief in order to extend the remedy, yet, if the mischief is obvious, and apt words are to be found in the section, nothing is plainer than that you ought to expound an Act of Parliament so as to deal with the whole mischief which is disclosed.

What is the explanation of the addition of the words "circulars or advertisements"? I think it is rather to enlarge the words "or otherwise" than to cut them down. It might well be doubted whether a threat, which was not addressed to a particular person, or was not addressed to a particular customer, could be said to be a threat if it was couched in the general form of an advertisement issued to the world, or a circular issued to the trade. It might be said, It is not a threat at all—I am only informing you of the way in which I intend to do my business. The statute says circulars and advertisements, nevertheless, may contain threats, and uses these words so as to sweep into its net every kind of threat, the result of which would be that a man would be paralyzed in his trade by having an action on a patent suspended before his eyes, and an action without the opportunity given to him to determine the suspense at once, and to bring the question which is raised by his antagonist to a speedy and immediate issue. On

these grounds it seems to me that the decisions of Bacon, V.C., and Kekewich, J., are right in the cases which my learned brother has cited, and North, J., in following them in the case of *Barrett* v. *Day* was really doing what was just.

A. L. SMITH, L.J.—I am of the same opinion. I have only to add a few words as to what my view is of the short reading of this section, because it is upon that section 32 that the whole of this case turns. Having heard the able arguments which have been addressed to us, I have arrived at this conclusion, that it is an absolute prohibition against a person threatening, unless the threatener can get himself within either of the two saving clauses at the end of the section. I will say this, that my reading of the section is that you shall not threaten legal proceedings unless the manufacture to which the threat applies infringes the legal right of the threatener, and unless the threatener is about to forthwith bring an action to show the validity of his threats. If he cannot bring himself within those two, what I call, saving clauses at the end of that section, then the section absolutely forbids a man threatening legal proceedings with regard to a patent action at all; and, in my opinion, it is *nihil ad rem* to say that what he did was *bonâ fide*, or that what he did was on a privileged occasion, because the section says you shall not threaten unless you come within those two provisoes at the end.

Then we were pressed very much with the words "circulars, advertisements, or otherwise," and I think Mr. Bousfield's argument was taking, and it looked to me at first as if the words "or otherwise" were confined to circulars or advertisements. But when once you come to the conclusion that this is an absolute prohibition against threatening legal proceedings at all unless the man comes within the two provisoes, I entirely agree with what has been said by my brothers who have preceded me, that, instead of "otherwise" being a word which should be cut down to "circulars or advertisements," it is a word which should be enlarged, so as to increase the means by which a threat can be made. With what was said by Bowen, L.J , I entirely agree. If they had not had in this section circulars or advertisements, a threat to a third person by a letter might have been argued not to have been a threat within the section. In my judgment North, J., is right, and Kekewich, J., was right, and Bacon, V.C., was right, and I agree that this appeal ought to be dismissed

Appeal dismissed, with costs.

On the application of counsel the inquiry as to damages was stayed until the 11th of January, 1893, with liberty to apply after that date, the defendants undertaking in the meantime to amend their patent and prosecute their action with due diligence.

Solicitors for the plaintiffs, *Waterhouse, Winterbotham, & Harrison*, for *Cozens-Hardy & Jewson*, Norwich.

Solicitors for the defendants, *Watkins, Baylis, & Co.*

High Court of Justice.

Chan. Div. North, J. — Nov. 19.

ROBERTS v. BOOTH. (a.)

Practice—Dismissal of action for want of prosecution—Counter-claim—Default of reply thereto—R. S. C., 1883, ord. 21, r. 16; ord. 23, r. 4; ord. 27, r. 11.

The defendant to an action delivered a counter-claim. The action was dismissed for want of prosecution, the plaintiff having failed to deliver a reply.

Held, that, under ord. 27, r. 11, the defendant was entitled to set down the action on motion for judgment on his counter-claim.

Short cause.

This action was commenced on the 24th of November, 1891. By his statement of claim, delivered on the 27th of May, 1892, the plaintiff alleged the existence of a partnership between himself and the defendant, and claimed a partnership account, payment of sums due, and an injunction to restrain the defendant from acts therein complained of.

The defendant delivered a defence and counter-claim on the 21st of June, 1892. By his defence he alleged that the partnership was dissolved about the 7th of October, 1892, and that under an agreement of that date he had employed the plaintiff at a weekly salary subject to a week's notice on either side, and that at the dissolution of the partnership nothing was due to the plaintiff from him or the firm. The plaintiff left the service of the defendant on the 21st of September, 1891. By his counter-claim the defendant alleged that the plaintiff, whilst in his employment under the agreement of the 7th of October, received debts due to the defendant amounting to £66 4s. 10d., and converted the money to his own use, and claimed payment of the said sum, and costs.

The plaintiff having delivered no reply, an order was made in chambers on the 9th of November, 1892, dismissing the action for want of prosecution in default of a reply being delivered within seven days. No reply was delivered.

The defendant now moved for judgment for the relief claimed by his counter-claim.

P. F. Wheeler, for the defendant.—Under ord. 21, r. 16, where a defendant sets up a counter-claim, and the action is dismissed, the counter-claim may be proceeded with. Under ord. 23, r. 4, where a counter-claim is pleaded, a reply thereto shall be subject to the rules applicable to statements of defence. Under ord. 27, r. 11, if a defendant makes default in delivering a defence the plaintiff may set down the action on motion for judgment. If, therefore, the plaintiff makes default in delivering a reply, the defendant may set down the counter-claim on motion for judgment: *Jones* v. *Macaulay*, 39 W. R. 211, [1891] 1 Q. B. 221.

The plaintiff did not appear.

NORTH, J.—I think that is the right construction of the rules. But there is nothing to show that the debt, or some part of it, has not been paid since the delivery of the counter-claim. On production to the registrar of an affidavit by the defendant that the plaintiff has not, since the delivery of the counter-claim, paid any part of the sum therein claimed, and of an affidavit of service of the notice of motion on the plaintiff, there must be judgment for the defend-

(a.) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

ant for the sum claimed by his counter-claim, and costs.

Solicitors, *A. Scott Lawson*, for *W. Foster*, Leeds; *Hamlin, Grammer, & Hamlin.*

Q. B. Div.
(Lord Coleridge, C.J., and Cave, J.) Jan. 13.

LAWSON *v.* MASTER.
CIRENCESTER ELECTION PETITION. (*a.*)

Election law—Parliament—Practice—Election petition—Trial of—Change of venue—Scrutiny—"Special circumstances"—Parliamentary Elections Act, 1868 (31 & 32 *Vict. c.* 125), *s.* 11, *sub-section* 11.

The existence of "special circumstances" is, under section 11, *sub-section* 11, *of the Parliamentary Elections Act,* 1868, *a condition precedent to the exercise by the court of the jurisdiction, under that sub-section, to order that an election petition shall be tried elsewhere than in the county or division where the election took place.*

Where, therefore, an application was made to change the venue of an election petition, upon the grounds that the petition was limited to a scrutiny of certain ballot papers, involving the examination of a very small number of witnesses; that it would materially lessen the expense of the trial; and would otherwise be for the general convenience of the parties, who both concurred in the application,

Held, that the above circumstances did not amount to "special circumstances" within the meaning of the Act of Parliament, and that the court had, therefore, no power to make the order.

By section 11, sub-section 11, of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), it is provided that the trial of an election petition in the case of a petition relating to a county election shall take place in the county, "provided always that if it shall appear to the court that special circumstances exist which render it desirable that the petition should be tried elsewhere than in the county, it shall be lawful for the court to appoint such other place for the trial as shall appear most convenient."

By section 9, sub-section 1, of the Redistribution of Seats Act, 1885 (48 & 49 Vict. c 23), counties returning more than one member are to be divided into the same number of divisions as the number of members. By sub-section 3 of the same section "the law relating to Parliamentary elections shall apply to each division as if it were a separate county."

A petition presented against the respondent, the sitting member for the Cirencester Division of the county of Gloucester, alleged corrupt and illegal practices, and also involved a scrutiny of ballot papers. The charges of corrupt and illegal practices were subsequently withdrawn, and the petition was then confined to the scrutiny, in which the matters to be dealt with were the case of one tendered vote, as to which it was stated that not more than six or seven witnesses would have to be called, and the examination of forty-two ballot papers on the one side and twenty on the other, which at a recount of the votes had been reserved for the opinion of the court.

An application, in which both parties concurred, was now made to the court to order the petition to be tried in London.

A. T. Lawrence, for the petitioner.—Where there are charges of corrupt and illegal practices, the policy of the Act, no doubt, is to provide that the petition shall be heard in the place affected. But where the petition is reduced to a scrutiny, the reason no longer exists, and that fact amounts to such "special circumstances" as will enable the court to consider the convenience of the parties, and change the venue of the petition to London. [CAVE, J.—It is important that in a scrutiny people should see how the ballot papers can be looked at, and not that those who are affected should hear that it is done at a distance.] The division is a large one, and the court has already made an order in this case changing the venue from Cirencester to Gloucester; and in the Thornbury Election Petition the validity of certain ballot papers were reserved by the judges for the opinion of the court in London. [CAVE, J., referred to *Collins* v. *Price*, 5 C. P. D. 544, 29 W. R. Dig. 82.]

Coward, for the respondent, concurred in the application.

Lord COLERIDGE, C.J.—It appears to me that this application must be refused. This statute is very important, and it does not become any court to attempt to evade it. One great end aimed at by the Act is to secure, when it is reasonably possible, that the trial shall take place where the petition arises, and the court has no right to order the trial elsewhere, unless in the opinion of the court "special circumstances" render it desirable. Then, and then only, does the Act use the word "convenient."

When "special circumstances" do exist, then the court may order the petition to be tried where it thinks would be most convenient. But the existence of special circumstances is a condition precedent, and I cannot see anything in the facts or arguments urged here which show that such special circumstances exist in this case.

It is said that the fact that the petition has resolved itself into a scrutiny of ballot papers is sufficient of itself to show special circumstances. But I cannot think that that fact is sufficient, or that it should be the meaning of the statute; it may be a most important reason why the trial should be in the place affected. Indeed, that state of things might well occur in fully half the petitions presented. It does not, therefore, appear to me that that is a sufficient "special circumstance" within the meaning of the Act of Parliament, or one of the conditions precedent contemplated by the Act to the removal of the trial.

The mere question of expense cannot, I think, affect us, for the Act might have said that the trial should take place wherever the court thought would be least expensive. The policy of the Act is to have a local administration of it. Now I have said that there are no "special circumstances" in this case to warrant our ordering the venue to be changed; but I can conceive that when there exists the overpowering influence of one man, strong and excited party feeling on one side or the other, or both, or possible riots, those things may well be "special circumstances." But I think they must be "special circumstances" such as render it, not only more convenient that the place of trial should be changed, but more conducive to the ends of justice. And I think, therefore, that it would be dangerous to allow mere questions of convenience to form the basis of the decision of the court in such cases.

CAVE, J.—I am of the same opinion. I should have been very glad if I could have seen my way to meet the convenience of the parties in this application. It seems, however, impossible in the face of the words of the Act of Parliament; the mere fact that it is less expensive or otherwise more convenient to the parties to remove the trial of the petition out of the

(*a.*) Reported by JOHN P. MELLOR, Esq., Barrister-at-Law.

county is not, in my opinion, sufficient to enable us to make such an order. I entirely agree with my lord's interpretation of the Act, and this application must therefore be dismissed, but as the parties concurred in the application without costs.

Application dismissed.

Solicitors and agents for the petitioners, *H. P. & J. H. Cobb.*

Solicitors and agents for the respondent, *Peacock & Goddard*, for *Mullings & Ellett*, Cirencester.

Q. B. Div.
(Lord Coleridge, C.J., and Wills, J.) Nov. 19; Dec. 5.

WATTEAU *v.* FENWICK. (*a.*)

Principal and agent—Undisclosed principal—Liability for contracts of agent—Secret limitation of agent's authority—Credit given to agent alone.

The ordinary rule of law that a principal is liable for the acts of his agent which are within the authority usually confided to an agent of that character, notwithstanding secret limitations upon that authority, applies also where the existence of any principal was unknown to the person contracting with, and giving credit to, the agent alone.

W. supplied goods to an agent H., on H.'s sole credit, in ignorance that H. had principals. F. & Co., who were in fact H.'s principals, had allowed H. to appear as ostensible principal while managing their business, with secret instructions not to buy goods. H. failing to pay, W. sued F. & Co. for the price of goods supplied, which were such as were ordinarily dealt in and supplied to such a business.

Held, that F. & Co. were liable.

Appeal from a decision of the deputy county court judge at Middlesbrough.

The action was for goods supplied to a beerhouse, the "Victoria," at Middlesbrough. A man named Humble, who had occupied the house previous to 1888, in that year assigned the house to a firm of brewers in the same town, Messrs. Fenwick & Co., the defendants in the action.

Humble, however, remained as manager, his name being continued over the door, and the licence retained in his name. He was also the occupier of another house at a place called Crook.

The plaintiff supplied Humble at the "Victoria" with cigars, corks, and bovril to the extent of £25, and, being unable to obtain payment from him, sued the defendants.

It was admitted that the plaintiff had given credit to Humble alone, and that Humble had never disclosed his principals. He had, moreover, paid sums on account to the plaintiff, and it was also proved that some of the cigars had been taken possession of by the defendants, on Humble leaving his position, and had been sold to the incoming tenant.

It was also proved by the defendants that Humble had no authority to order any goods with the exception of mineral waters, it being stipulated that all others should be supplied by their firm.

The learned county court judge held that the defendants had held out Humble to the world as an agent having a general authority, and that they were, therefore, liable in respect of the claim as to the cigars and bovril, which came within his implied authority as manager, and gave judgment for the plaintiff for £22.

The defendants appealed.

Finlay, Q.C., and *Scott Fox*, for the appellants.—Where a person is known to be in the position of manager only, his principal would be liable, and the same result would follow if the goods were supplied to him on the credit of his principal behind. Where, however, credit is given alone to the person supplied, actual agency in fact must be proved, and the plaintiff could only recover against the defendants for such goods as he had actual authority to buy, and here Humble had no authority to buy bovril and cigars. This is not a case, moreover, of "holding out," inasmuch as the plaintiff knew nothing of the principals, and that doctrine, which rests upon the agent's being clothed with apparent authority, does not apply where credit is given alone to a person alone.

Houghton, for the respondents.—Where the principals clothe a person with apparent authority to do such things as are reasonably necessary to carry on a business, they are liable: *Edmunds* v. *Bushell & Jones*, L. R. 1 Q. B. 97. [WILLS, J.—That case applies if there was a "holding out" of Humble by the defendants.] But the principle is not confined to cases where the principal vouches the agent as having authority; it applies also where he invests him with apparent ownership of the business as ostensible principal. If he does that, he clothes him with every authority incidental to the business. It is true that credit was specifically given to Humble, but the defendants, by their conduct in putting Humble in a position to obtain credit which he might not otherwise have got, rendered themselves liable. No tradesman who knew of the principal would give credit to the agent alone under ordinary circumstances.

He cited also *Yorkshire Banking Co.* v. *Beatson & Mycock*, 28 W. R. 879, 5 C. P. D. 109; *Stracey, Ross and Others* v. *Deey*, in note to *George* v. *Clagett*, 7 T. R. at p. 361; *Ramazotti* v. *Bowring*, 8 W. R. 114, 7 C. B. N. S. 851.

Finlay, Q.C., in reply.—Humble was put by the defendants in the position of "principal" in this business, and he had no general authority to order goods on their credit unless he was held out as an "agent": *Summers* v. *Solomon*, 5 W. R. 660, 7 E. & B. 879. [Lord COLERIDGE, C.J.—If you put a person in a position in which he would ordinarily have authority to order goods, surely you are liable?] Yes, but he was not put forward as having authority to buy goods for anyone but himself, and had in fact instructions not to order goods such as those in question.

Cur. adv. vult.

Dec. 5.—Lord COLERIDGE, C.J., read, and stated that he entirely concurred in, the written judgment of Wills, J.: The plaintiff sues the defendant for the price of cigars supplied to the Victoria Hotel, Stockton-on-Tees. The shop was kept, not by the defendant, but by a person named Humble. This person's name was over the door of the shop. The plaintiff gave credit to him, and to him alone, and had never heard of the defendant. The business, however, was really the defendant's, and he had put Humble into it to manage it for him, and had forbidden him to buy cigars on credit. The cigars, however, were such as would usually be supplied to, and dealt in at, such an establishment. The learned county court judge held that the defendant was liable. I am of opinion that he was right.

There seems to be less of direct authority on the subject than one would expect. But I think the Lord Chief Justice during the argument laid down

(*a.*) Reported by JOHN P. MELLOR, Esq., Barrister-at-Law.

the correct principle—viz., once it is established that the defendant was the real principal, the ordinary doctrine as to principal and agent applies—that the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority. It is said that it is only so where there has been a holding out of authority—which cannot be said of a case where the person supplying the goods knew nothing of the existence of a principal. But I do not think so. Otherwise in every case of undisclosed principal, or at least in every case where the fact of there being a principal was undisclosed, the secret limitation of authority would prevail and defeat the action of the person dealing with the agent and then discovering that he was an agent and had a principal.

But in the case of a dormant partner it is clear law that no limitation of authority as between the dormant and active partner will avail the dormant partner as to things within the ordinary authority of a partner. The law of partnership is, on such a question, nothing but a branch of the general law of principal and agent, and it appears to me to be undisputed and conclusive on the point now under discussion.

The principle laid down by the Lord Chief Justice, and acted upon by the learned county court judge, appears to be identical with that enunciated in the judgments of Cockburn, C.J., and Mellor, J., in *Edmunds* v. *Bushell*, the circumstances of which case, though not identical with those of the present case, come very near to them. There was no question of holding out, as the plaintiff knew nothing of the defendant. I appreciate the distinction drawn by Mr. Finlay in his argument, but the principle laid down by the judgments referred to, if correct, abundantly covers the present case. I cannot find that any doubt has ever been expressed that it is correct; and I think it is right, and that very mischievous consequences would often result if that principle were not applied.

In my opinion this appeal ought to be dismissed, with costs.

Appeal dismissed.

Solicitors for the appellants, *Johnson, Weatherall, & Co.*, for *Marshall*, Sunderland.

Solicitors for the respondents, *Belfrage & Co.*, for *Bainbridge & Barnley*, Middlesbrough.

Q. B. Div.
(Pollock, B., and Hawkins, J.) Nov. 7, 11.

ROBERTSON & EASON (*Appellants*) *v.* JOHNSON (*Respondent*). (*a.*)

Fisheries—Oysters—Sale during close season—Exemption of oysters "taken within the waters of some foreign State"—Oysters taken in French waters and relaid in English waters—Fisheries (Oyster, Crab, and Lobster) Act, 1877 (40 & 41 *Vict. c.* 42), *s.* 4.

Oysters imported alive from foreign oyster-beds and relaid for purposes of storage in English waters, although remaining in the English waters for several months, are oysters "taken within the waters of a foreign State" within the proviso to section 4 *of the Fisheries (Oyster, Crab, and Lobster) Act*, 1877, *and a person who has relaid them from the English waters and sold them during the close season cannot be convicted of an offence under that section.*

Special case stated by an alderman of the City of London, who had convicted the appellants upon an information charging that they did on the 4th of July, 1892, sell a hundred oysters contrary to the Fisheries (Oyster, Crab, and Lobster) Act, 1877.

Section 4 of that Act provides as follows:—"A person shall not sell, expose for sale, consign for sale, or buy for sale—(1) any oysters known at the passing of this Act in the oyster trade as 'deep sea oysters' between the 15th day of June in any year and the following 4th day of August; or (2) any description of oysters other than those aforesaid between the 14th day of May in any year and the following 4th day of August." The section provides for a penalty for offences against its provisions, and proceeds: "Provided that a person shall not be guilty of an offence within this section if he satisfies the court that the oysters alleged to have been sold, &c., (1) were taken within the waters of some foreign State."

The following facts were stated in the special case:—

On the 4th of July, 1892, during the period of close time provided by the Fisheries (Oyster, Crab, and Lobster) Act, 1877, the appellant Eason, who was an assistant to the appellant Robertson, sold at his shop in the City of London, and with his approval, 100 oysters for the sum of seven shillings to an officer of the Fishmongers Co.

The said 100 oysters so sold by the appellants were opened, and one of them was dead, nine were spawning, fifty-seven had just spawned, and the remaining thirty-three were in fair condition.

The oysters so sold were not deep-sea oysters, but had been brought over from France in February or March and deposited on a muddy bottom some fathoms deep at Stangate Creek, in the River Medway.

They were laid in a part of the beds in Stangate Creek which was entirely empty of oysters, and in which no oysters but matured French oysters were placed, and they were dredged up by the appellant Robertson's servants as they were required for the market.

They were brought over in a mature state and practically fully grown, and if used at the time they were imported would have been fit for food. It is the practice in the oyster trade to import French oysters before the hot weather begins, and to relay them in English waters in the manner aforesaid.

Their nurture at Stangate Creek was derived from the water and natural causes, and was not effected artificially. French oysters relaid in the waters at Stangate Creek both grow larger and "spat" or spawn, but such spat or spawn is unproductive, and mature oysters cannot be reared from the spat of imported French oysters.

At Stangate Creek no cultivation of the spawn of French oysters takes place and there is no recognized oyster bed or bank there.

It was contended before the alderman by counsel on behalf of the appellants that they had committed no offence against the statute in question, as the oysters came within the first proviso of the said 4th section, viz., that they were "taken within the waters of some foreign State," to wit, the Republic of France. That the meaning of those words was that the oysters might be dredged and taken within the waters of some State outside the jurisdiction of the said Act, and that the oysters not allowed to be sold in close time were English oysters taken within the jurisdiction of the said statute; that these oysters were originally "taken" in French waters and were merely relaid in

(a) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

English waters at Stangate Creek, such waters being used merely as a warehouse for storing the oysters which could only be kept in water. That oysters could not be imported in the summer time direct from the foreign State because they would die; they were, therefore, imported in cold weather and put in the beds at Stangate Creek to keep for sale during the close time for English grown oysters, and that such re-laying for the purpose of storage was not a bedding of the oyster for the purpose of reproduction. That the statute was passed to provide a close time for English oysters and to prevent English oyster beds from becoming impoverished, and that the words "taken within" in section 4, referred to the original act of dredging from the oyster bed wherein the oysters had been cultivated and had grown from spat to maturity.

The appellants by their counsel referred to the case of *Guyer* v. *Reg.*, 37 W. R. 586, 23 Q. B. D. 100.

The report of the select committee of the House of Commons upon the Oyster Fisheries, and the evidence taken before them, upon which it was alleged the Fisheries (Oyster, Crab, and Lobster) Act, 1877, was based, were referred to in the argument by both parties.

The alderman was of opinion that the case of *Guyer* v. *Reg.*, above quoted, was not in point, the game having been killed in the country from whence it was brought and sold in this country in the same condition as it left the foreign State; that the oysters relaid in beds as described were alive when brought into this country, and that while lying in English waters for four months or thereabouts they materially changed in their condition, and could not be treated as the same oysters as if they had been sold within a reasonable period of their being brought from foreign waters, and without the opportunity of such change taking place; and that the appellants had not satisfied him that the said 100 oysters so sold, as aforesaid were, within the meaning of the statute, "taken within the waters of some foreign State."

He was also of opinion that the oysters, having been relaid in English waters, had so changed their condition as to render them to a large extent not suitable for human food, as nine were spawning, fifty-seven had spawned, and thirty-three only were in fair condition.

Finally, he was of opinion that the statute was passed, not only to provide a close time for English oysters, but to prevent oysters being consumed at a period when they were not in an edible condition, and that the words, "taken within the waters of some foreign State," meant taken for the purpose of as early consumption as the time of transit and sale would permit, and he therefore convicted the appellants.

The question for the court was whether the alderman's determination was correct.

Finlay, Q.C., and *Charles Matthews*, for the appellants.

Poland, Q.C., and *F. Humphreys*, for the respondent.

The arguments of both parties were similar to those used before the alderman and stated above.

Cur. adv. vult.

November 11.—POLLOCK, B.—This is an appeal from a conviction by one of the aldermen of the City of London upon an information charging that the appellants did unlawfully sell a hundred oysters contrary to the statute. [His lordship then read section 4 of the Fisheries (Oyster, Crab, and Lobster) Act, 1877, and referred to the findings of the magistrate as stated in the case, and continued:—] He then goes on further to find that the oysters, after having been relaid in English waters, had so changed their condition that they were to a great extent unsuitable for human food. Now, as to that finding, I think it is immaterial to the question raised by this case. But I think also that the magistrate was influenced in coming to a decision by that finding. This Act has no reference to the question of fitness or unfitness for human food, and there are other Acts which deal with that point. The case also refers us to the report of the committee of the House of Commons upon Oyster Fisheries. That report does not, of course, assist us to construe the words of the Act, but it is important as giving us a history of the trade of importing foreign oysters, and as showing that for some years before this Act was passed there was a very large trade of that kind. The statute deals with fisheries. It is an Act "to amend the law relating to the fisheries of oysters, crabs, and lobsters, and other sea fisheries," and its intention is to preserve them in the fishing grounds around the coast of this country. I am clearly of opinion that the oysters in this case come within the proviso in section 4, and were "taken" within the waters of a foreign State. A somewhat similar case was dealt with in *Guyer* v. *Reg.*, in which it was held that the Game Act, 1831, which prohibits a licensed dealer in game from having game in his shop during the close season did not apply to birds killed abroad. Hawkins, J., in his judgment in that case says (at p. 107): "It might well be contended that a partridge which never was alive in England, but was bred and killed in Russia, cannot be truly said ever to have been an English bird of game within the contemplation of an Act of Parliament which, so far as regards the killing or taking of game birds out of season, could only refer to birds killed or taken on English ground, and as regards the traffic in game out of the prescribed season must be intended to refer to such birds only as are protected by the close season."

It seems to me that the same argument applies to the oysters in this case, and the question for us is, as I have said, whether they were "taken" within the waters of a foreign State or whether they were "taken" when they were removed from Stangate Creek. If they had been very small oysters and had been placed in Stangate Creek in order that they might be nurtured there, they might come within the second category. But if they had been brought from abroad and kept in a tub for a short time, it is clear that this Act would not apply, and I do not think that it applies where the oysters have merely been placed in such a place as Stangate Creek for a short time for purposes of storage. It seems to me to be all a question of degree. I am, therefore, of opinion that the conviction in this case ought to be quashed.

HAWKINS, J.—I am of the same opinion. The intention of the Legislature in passing this Act was to create a close time during which oysters should not be taken from English fisheries, and it was not dealing—as, indeed, it has no power to deal—with the question of taking oysters within the waters of foreign States. The sole question which we have to decide is whether these oysters were taken within the waters of a foreign State within the meaning of the proviso in section 4 of the Act of 1877. After carefully considering this question, I have come to the conclusion that these oysters cannot be considered as being taken in an English fishery, but that they are for all intents and purposes French oysters. It is clear that the Legislature contemplated oysters being brought over alive to this country, and there is nothing to prevent a person receiving them and selling them at once. If they may be brought alive into this country, it is clear

that they may be stored in a tank or other confined place until they are wanted for use. If taken from such a receptacle they clearly could not be said to have been taken from an English fishery. In the case before us, the oysters were brought from France and placed in Stangate Creek, where there were no other oysters; the place where they were put was marked off from the rest of the ground, they were not put there for breeding purposes, and, although Stangate Creek covers a considerable number of acres of ground, I see no reason why oysters should not be stored there as they might be in a smaller space. It seems to me to be rather a question of fact whether they were placed there merely for the purpose of storage. That was so here. They, therefore, never assumed any other character than that of French oysters, and I cannot see that any penalty attaches. I agree that if they were brought over when they were very small and were then placed on a bed and nurtured with English oysters there, that would be making them English oysters, and would be within the mischief that the Act intended to deal with, but if (and I have no reason to suppose the contrary) they were only placed there in the way described by the magistrate, I cannot bring myself to think that the Legislature contemplated dealing with such a case. I therefore agree with Pollock, B., that this conviction must be quashed. It is quite immaterial for the purposes of the present case that when they were sold some of them were unfit for human food.

Conviction quashed.

Solicitors for the appellants, *Powell & Burt.*

Solicitor for the respondent, *C. O. Humphreys.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Bowen and A. L. Smith, L.JJ.) [and Q. B. Div.] (Pollock, B., and Charles, J.) — Jan. 11.

BANKS *v.* HOLLINGSWORTH. (*a.*)

Mayor's Court—Removal of action—Certiorari—*Discretion of judge—Borough and Local Courts of Record Act*, 1872 (35 & 36 *Vict. c.* 86), *schedule, clause* 12.

By clause 12 *in the schedule to the Borough and Local Courts of Record Act*, 1872, *which has been applied by Order in Council to the Mayor's Court, "No action entered in the court shall before judgment be removed or removable from the court into any superior court by any writ or process, except by leave of a judge of one of the superior courts in cases which shall appear to such judge fit to be tried in one of the superior courts."*

Held, that the question whether an action was fit to be tried in the superior court was a matter of opinion for the judge, and that he had a discretion in all cases as to whether an action should be removed into the superior court.

Per Lord Esher, M.R., *and* A. L. Smith, L.JJ.—*The words "fit to be tried" meant "ought to be tried" in the superior court.*

Appeal from an order of Mathew, J., in chambers, affirming an order of the master, refusing to grant a writ of *certiorari* to remove the action from the Mayor's Court, London, into the High Court.

(*a.*) Reported by W. F. BARRY, Esq., and Sir SHERSTON BAKER, Barristers-at-Law.

The action was brought in the Mayor's Court to recover £35 from the defendant, a stock and share dealer, the declaration alleging that the defendant induced the plaintiff to deposit with him £35 by the false and fraudulent representation that he had opened a syndicate for operating in certain stocks and shares. It appeared that the defendant issued a circular to the public inviting them to subscribe to the syndicate, and that the plaintiff thereupon paid £35 to the defendant. There were two other similar actions brought in the Mayor's Court against the defendant in respect of the same circular by different plaintiffs, one for £55 and the other for £10, and the former of the two actions had been already removed into the High Court. The defendant in his affidavit stated that many others of his customers had subscribed for shares in the syndicate in the same way as the plaintiff, and that if the plaintiff succeeded in the action many other claims would be made against him, and that the action, being founded on fraud, was of such a nature and so important to him as to be fit and proper to be tried in the High Court.

35 & 36 Vict. c. 86, schedule, clause 12 (which by an Order in Council dated the 26th of June, 1873, is made applicable to the Mayor's Court): "No action entered in the court shall before judgment be removed or removable from the court into any superior court by any writ or process, except by leave of a judge of one of the superior courts in cases which shall appear to such judge fit to be tried in one of the superior courts, and upon such terms as to payment of costs, security for debt and costs, or such other terms as such judge shall think fit."

Cock, Q.C., and *E. Morten*, for the defendant.

R. T. Reid, Q.C., and *Glyn*, for the plaintiff.

POLLOCK, B.—This is a case in which no doubt the discretion of the learned judge, and of the court upon appeal, must be exercised with caution. For myself I am not inclined to disturb the discretion exercised by my brother Mathew. It is quite clear that the Legislature has made a distinction between cases in which the amount claimed is under £50 and those in which the amount claimed is over £50. That being so, the parties are brought within section 16 of the Mayor's Court Act, except in so far as that section is varied by clause 12 in the schedule to the Borough and Local Courts of Record Act, 1872, and that clause is material only as removing the words in section 19, "after plea pleaded."

It stands upon the merits, therefore, that this case cannot be removed unless the judge certifies or finds that it is fit to be tried in one of the superior courts; but that does not, to my mind, limit the discretion of the judge to the small point to which it is reduced by Mr. Cock: that the judge is to say that this case is fit to be tried in a superior court because such cases are tried in a superior court. That does not seem to me to be the meaning of the Legislature in cases in which the claim is under £50. I quite agree that it is a very serious thing for a defendant to be charged with fraud: but that in itself cannot be the test, and the only test, whether a case is fit to be removed, because there are a great many cases in which, the amount being small, there may be charges of fraud on one side or the other. That, therefore, cannot of itself be a ground of removal.

But then it is said that the defendant here carries on a special business, and that, if the plaintiff wins, other actions of the same kind will immediately be brought against him, and therefore it is a case which ought to be tried in a superior court, because the defendant has a larger interest in it than the plain-

tiff. That is not a ground, I think, upon which we ought to act in a case of this kind, where the plaintiff is entitled to rest upon his particular contract with the defendant, which he says he was induced to enter into by some fraudulent statement on the part of the defendant. This seems to me to be a case which can be properly, and would be properly, tried by a judge and jury in the Mayor's Court; and there are other questions, such as questions of delay and expense, which we ought to consider, and I think my brother Mathew was right in saying that this is not a case which, in his discretion, ought to be removed. It seems to me that this appeal must be dismissed.

CHARLES, J.—I am of the same opinion. The 16th section of the Mayor's Court Act, 1857, is applicable to cases where the amount sought to be recovered shall not exceed £50. Under that section there was a power undoubtedly to a defendant before judgment to remove such a case, either in pursuance of a judge's order, or else after giving security; but taking that section by itself, there was a proviso that any judge of the superior courts might, in the exercise of his discretion, order a writ of *certiorari* to issue to remove any such cause without any such recognizance as aforesaid. Now, however, the defendant has lost the power which he formerly had under section 16, for clause 12 in the schedule to the Act of 1872, which has been referred to, applies to the Mayor's Court, and under that clause no action whatever is to be removed before judgment by any writ or process, except by leave of a judge of the superior courts in cases which shall appear to such judge fit to be tried in one of the superior courts. Therefore, we have to consider this question under the 16th section of the Mayor's Court Act and the 12th clause of the later Act, and it is argued that the mere fact that the action is one for fraudulent representation, and that other actions of a similar character are being brought, or are apprehended, is enough to induce us to say in our discretion that a writ of *certiorari* must issue, although the damages claimed do not exceed £50. I have read the cases of *Cherry* v. *Endean*, 34 W. R. 458, and *Simpson* v. *Shaw*, 56 L. J. Q. B. 92, 35 W. R. Dig. 36, and it appears to me that the effect of these two cases falls far short of what is suggested on the part of the appellant here. It cannot be that simply because a case is one which can be tried, and often is tried, in the superior court, that a judge is bound to say under section 16 of the Mayor's Court Act, 1857, and under clause 12 in the schedule of the Act of 1872, that, even although £50 is not claimed, it is fit to be tried in the superior court, in the sense which is necessary to induce him to issue the writ of *certiorari*. In this case I am not satisfied, in the exercise of my discretion, that this is a case in which a writ of *certiorari* ought to issue. The defendant's affidavit undoubtedly shows that the case is one of great importance to him, but the plaintiff's affidavit—contradicted, it is true, by the defendant's—indicates reasons why the trial should take place at once, and these reasons were satisfactory to my brother Mathew in chambers. I cannot see my way to saying that he exercised his discretion wrongly, a discretion which, as I repeat, appears to be absolutely unlimited in cases under section 16 of the Mayor's Court Act, 1857, although that section must now be read conjointly with clause 12 in the Act of 1872.

The defendant appealed.

E. Morten (*Cock, Q.C.*, with him), for the defendant.—If the action is fit to be tried in the High Court it is a matter of right to have it removed. Formerly by section 16 of the Mayor's Court Procedure Act, 1857, the defendant had a right, upon fulfilling certain conditions, to have an action under £50 removed to the superior court. Now clause 12 of the schedule to the Borough and Local Courts of Record Act, 1872, is applicable, and if the action is "fit to be tried" in the High Court, the defendant has a right to have it removed. This being an action of fraud, it is fit to be tried in the High Court, and must be removed: *Simpson* v. *Shaw*. [They also referred to *Cherry* v. *Endean*.] Secondly, the action ought to be removed as it charges fraud, and as one of the actions has been already removed the others ought to be removed also, with the view to their being consolidated.

R. T. Reid, Q.C. (*Glyn* with him), for the plaintiff.—Clause 12 gives a discretion to the judge. Leave of the judge must be obtained, and the action must "appear to the judge" fit to be tried in the High Court. The words "fit to be tried in the superior court" mean more fit under all the circumstances to be tried there than in the inferior court. The facts in this case are simple. The amount is small, and there is no difficult question of fact or law to be determined.

Morten replied.

Lord ESHER, M.R.—The plaintiff brought an action in the Mayor's Court in respect of an alleged fraudulent representation contained in a circular issued by the defendant, by which he was induced to pay the defendant £35. The defendant took out a summons at chambers to have the action removed into the High Court, and he argues that, as the action charges him with fraud, it is "fit to be tried" in the High Court, and, therefore, that he has a right to have it removed, or, if not, that at any rate it ought to be removed; and the reasons for removing it are enhanced by the fact that there are two other actions of fraud brought against him in the Mayor's Court by different plaintiffs arising out of the same circular, that the first of those actions has been already removed to the High Court, and that it is desirable that the other two should be also removed, so that the actions may be consolidated. Now the case really depends upon the true construction of clause 12 in the schedule to the Borough and Local Courts of Record Act, 1872, which has been applied by Order in Council to the Mayor's Court. That clause is in a negative form. It is said that by section 16 of the Mayor's Court Procedure Act, 1857, a defendant in a case like this would formerly have had a right to have the action removed upon fulfilling certain conditions. That may have been so. But it is obvious that clause 12 is a limitation upon a right which the defendant had before. By that clause a defendant cannot have his action removed unless it appears to a judge of the High Court fit to be tried in the High Court, and the judge gives leave. The clause does not say by leave of a judge in cases which are fit to be tried in the superior court, but in cases which shall appear to such judge fit to be so tried. That gives the judge power, after considering all the circumstances of the case, to make or refuse to make an order. What, then, is the meaning of the words "fit to be tried in one of the superior courts"? It cannot mean an action which the superior court is fit to try, as the superior court cannot be said to be unfit to try any action. It must mean an action which ought to be tried in the superior court.

The question, therefore, in each case must be whether, considering all the circumstances of the case and the interests of all parties, the action is one that ought to be tried in the superior court rather than in the inferior court in which it is brought. That being so, the judge must consider, among other

things, the amount claimed; but, even if the amount is small, yet the judge may consider that the case is of a complex nature and requires the experience of a judge of the superior court to try it, and may on that ground make an order for its removal. There are many other circumstances which may affect the mind of the judge: for example, in which court will more speedy justice be done? I do not say that any one of these circumstances alone would induce the judge to remove the action. The judge must look at all the circumstances, and say whether the action ought to be tried in the superior court rather than in the inferior court. It is a matter within the discretion of the judge. I doubt whether he ought to take into consideration the fact that other plaintiffs have commenced other actions against the defendant in respect of a similar cause of action; but, at any rate, if he can do so, that is only one of the circumstances which the judge has to consider. The exercise of discretion by the judge will not be interfered with on appeal except where the court clearly sees that it has been wrongly exercised. In the present case the discretion has been rightly exercised, and this appeal must be dismissed.

BOWEN, L.J.—This is clearly not a case in which, if the judge had a discretion in the matter, we should interfere. The question depends upon clause 12 in the schedule to the Act of 1872. To ascertain whether the judge has a discretion one must sooner or later consider the words "fit to be tried in one of the superior courts." Is there anything in the context which affects those words? In the first place, no action is to be removed—thus taking away the right to have it removed—except by leave of the judge, and the condition precedent to the leave being granted is that the case must appear to the judge fit to be tried in the superior court. The words which immediately precede the words to be construed are applicable to language of discretion, and show that the question of fitness to be tried is a matter of opinion for the judge. If the matter is one of opinion, and not of law, it follows that the clause leaves the judge free to exercise his opinion as a matter of discretion. This being, therefore, a matter of discretion, we cannot interfere. I agree, however, with the Master of the Rolls that the discretion here has been reasonably exercised.

A. L. SMITH, L.J.—I am of the same opinion. This case goes one step further than the decision in *Cherry* v. *Endean*. It is said that if the case is fit to be tried in the High Court the defendant has a right to have it removed. I agree with the Master of the Rolls in thinking that the words "fit to be tried" mean "ought to be tried," and this is a matter for the judge in the exercise of his discretion to determine.

Appeal dismissed.

Solicitors for the plaintiff, *W. H. Smith & Son.*

Solicitor for the defendant, *C. G. Algar.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Kay, L.JJ.) — Dec. 16.

LONDON COUNTY COUNCIL, *Appellants.*
ASSESSMENT COMMITTEE OF THE WOOLWICH UNION, *Respondents.*
LONDON COUNTY COUNCIL, *Appellants.*
ASSESSMENT COMMITTEE OF THE ST. GEORGE'S UNION, *Respondents.*

Poor rate — Rateability — Sewage works — Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 135, 150.

The appellants were the owners of certain sewage works, consisting of deodorizing and outfall works, pumping engines and machinery, constructed under the Metropolis Management Act, 1885.

Held, that such works were, by section 135 *of that Act, placed on the same footing as sewers, and therefore, on the authority of* London County Council *v.* Churchwardens of West Ham, 40 *W. R.* 659, [1892] 2 *Q. B.* 44, *the appellants were not liable to be assessed to the poor rate in respect of the sewage works.*

Appeal from the judgment of the Queen's Bench Division upon a case stated by quarter sessions on an appeal against the decision of the assessment committee of the Woolwich Union, and a similar appeal against the decision of the assessment committee of the St. George's Union.

The two appeals were argued together.

In the *Woolwich case* the appellants were assessed, as owners and occupiers of certain works, buildings, and land known as the Northern Outfall deodorizing works, at £28,000 as the gross value and £23,000 as the rateable. The quarter sessions reduced the assessment to £20,567 as the gross value, and £17,139 as the rateable value, subject to the case.

The special case was as follows:—

1. The London County Council, the appellants, are the governing body of the administrative county of London and are by virtue of the provisions of 51 & 52 Vict. c. 41 the successors to the Metropolitan Board of Works, and are the present owners of the deodorizing and outfall works, machinery, land, and buildings, the subject-matter of this appeal. The appellants have to discharge all the duties of the Metropolitan Board of Works in reference to the drainage of the metropolis.

2. Pursuant to powers and duties contained in the various Acts passed for the better government and drainage of the metropolis known as the Metropolis Management Acts, 1855, 1858, and 1862, the Metropolitan Board of Works and the appellants designed and constructed a system of drainage and of treatment of sewage for the metropolitan area. Such system is hereinafter referred to as "the said metropolitan system." Under the said system the land in question was purchased by the said Metropolitan Board of Works, and the necessary works, buildings, and machinery have since been constructed thereon by the said Metropolitan Board of Works and by the appellants for the purpose of storing, deodorizing, and otherwise treating the sewage drained from the whole metropolitan area north of the Thames, which averages from 96 to 126 million gallons daily.

3. The said works, buildings, and machinery were specially designed and constructed for the work which they have to do in connection with and for the purpose of the said metropolitan system, of which they form an essential part.

4. The said works, buildings, and machinery were

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

and are suitable and necessary to enable the appellants to discharge their statutory duties under the said Acts and for the advantage of the inhabitants of the metropolis to treat and dispose of the sewage, and are held, occupied, and used by the appellants in the manner and solely for the purposes herein set forth, and the appellants are entitled to levy rates upon the whole metropolitan area, including the parish of Woolwich, to enable them to occupy and use the said land, works, buildings, and machinery as aforesaid. The sewage to be treated is brought to the said premises from places outside the parish of Woolwich, and by reason of the high level of the sewers bringing the same the drainage of the parish of Woolwich north of the Thames is not admitted into the said metropolitan system.

5. The appellants do not derive any pecuniary profit from the said hereditaments, and the works are maintained by the appellants under the provisions of the above-mentioned Acts.

6. By the provisions of 18 & 19 Vict. c. 120, s. 150, and 21 & 22 Vict. c. 104, s. 3, and the Acts amending the same, the Metropolitan Board of Works were, and the appellants are now authorized to purchase or take on lease or otherwise land for the purposes therein mentioned, and they are empowered by 18 & 19 Vict. c. 120, s. 154, to dispose by sale or otherwise of the property so acquired.

7. The court of quarter sessions found as a fact that the appellants were practically the only possible tenants of the said premises so long as they remained part of the said metropolitan system, and that if the said premises belonged to a private owner, he would let, and the appellants would hire, them for the purpose of being used in connection with and as part of the said metropolitan system at a yearly rent sufficiently high to support the gross and rateable values of £20,567 and £17,139 respectively.

8. The court of quarter sessions further found as a fact that, if the said premises were not used in connection with and as part of the said metropolitan system, but were entirely disconnected therefrom, and applied to any other use or purpose for which they could be made available, the gross value thereof was £1,200, and the rateable value £1,000.

9. The appellants contend that the said land, works, buildings, and machinery are only capable of beneficial occupation if used for purposes other than those of the said metropolitan system, and that they should be assessed at the value for which the same would let to a hypothetical tenant from year to year supposing the said land, works, buildings, and machinery were not used as part of the said metropolitan system, but were entirely disconnected therefrom, and applied to any other use or purpose for which they could be made available, and that they should be assessed according to the rule laid down in *Metropolitan Board of Works* v. *West Ham*, 19 W. R. 246, L. R. 6 Q. B. 193.

10. The respondents contend, and the court of quarter sessions held, that it is not necessary to rateability that the premises as actually occupied and utilized should yield or be capable of yielding a commercial profit, and that under the circumstances aforesaid the appellants do beneficially occupy the premises, and ought to be taken into account as possible hypothetical tenants of the said land, works, buildings, and machinery, and that the rule laid down in *London School Board* v. *St. Leonard's, Shoreditch*, 34 W. R. 583, 17 Q. B. D. 738, and in *Mayor, &c., of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent Union*, 38 W. R. 181, 24 Q. B. D. 197, governs the case.

In the *St. George's Union case* the appellants were assessed as owners and occupiers of land, buildings, pumping station, and machinery situate in the parish of St. George, Hanover-square, within the St. George's Union, at £5,858 as the gross value and £3,994 as the rateable value. It appeared from the special case that the circumstances of the appellants' ownership and occupation of the said lands and works were the same as in the *Woolwich case*.

The Divisional Court (Wright and Collins, JJ.) held, upon the authority of *The Mayor, &c., of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent* and *London County Council* v. *Erith Guardians* (unreported) that the appellants were rateable in respect of the works in both cases, and gave judgment for the respondents. (In *London County Council* v. *Erith Guardians*, which was heard in the Court of Appeal on the 16th of May, 1892, the question was as to the rateability of sewage works, the property of the London County Council. The appellants' counsel, on behalf of the appellants, stated to the court that he could not distinguish that case from *Mayor, &c., of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent*, and the court therefore gave formal judgment against the appellants.)

Avory (*Ryde* with him), for the London County Council.—The case is covered by *London County Council* v. *Churchwardens of West Ham*, 40 W. R. 659, [1892] 2 Q. B. 44, in which it was held that sewers were not rateable. The present case is one of sewage works, which are held by the appellants under exactly the same circumstances as the sewers were in the *West Ham case*. The statement by counsel in *London County Council* v. *Erith Guardians* that that case could not be distinguished from *Mayor, &c., of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent* was incorrect, as is shown by the more recent decision of this court in the *West Ham case*. [He was stopped by the court.]

Littler, Q.C., Sinclair Cox (*Cutler* with them), for the Woolwich Union, and

Meadows White, Q.C., and *Danckwerts*, for the St. George's Union, argued that the case was distinguishable from the *West Ham case* and was governed by *London County Council* v. *Erith Guardians*, and, secondly, that the *West Ham case* ought not to be followed because of certain statutes which were not then brought to the attention of the court. Their arguments are fully set out in the judgment of the Master of the Rolls.

The following cases were also referred to:—*Reg.* v. *Metropolitan Board of Works*, 17 W. R. 527, L. R. 4 Q. B. 15; *Metropolitan Board of Works* v. *West Ham*; *Guest* v. *Overseers of East Dean*, 20 W. R. 332, L. R. 7 Q. B. 334.

Lord ESHER, M.R.—I am of opinion that this case is governed by the rules laid down in *London County Council* v. *Churchwardens of West Ham*. That case raised the question of the rateability of sewers which were part of the main drainage system of the metropolis, which system was made and carried on under sections 150 and 135 of the Metropolis Management Act, 1855. This court decided that those sewers were not rateable, and the court came to that decision by reason of the interpretation which they put on sections 150 and 135. By these sections the Metropolitan Board of Works were authorized to purchase land and to construct a sewage system. They had no power to let the lands purchased and used for that purpose, and this court, therefore, held that there could be no hypothetical tenant other than the board, no other person could become a tenant of sewers which the board were bound to maintain and use for the purpose of the sewage system. The only other point left for us to consider in the *West Ham case* was

whether the London County Council could, within the meaning of the *London School Board* v. *St. Leonard's, Shoreditch*, be hypothetical tenants of the sewers. In that case the court held that the owner of land might himself be a hypothetical tenant, and that he might be so if he could be supposed hypothetically to be the tenant of the land or whatever it was which it was proposed to rate. If the owner could legally be the tenant and could pay a rent (because he could not be a tenant without paying a rent), then he might be a hypothetical tenant. In the *West Ham case* we held that the London County Council could not be a hypothetical tenant, because to make it such, it must be supposed that somebody else was the owner of the sewers, or of the land occupied by the sewers, and could lease the sewers or the land so occupied to the council. We said that section 135 of the Metropolis Management Act was absolutely inconsistent with that idea, for if it could be assumed that the council could lease the sewers from a landlord, then you must assume that the landlord could put the ordinary restrictions of a landlord into the lease—for instance, that if the rent were not paid he might re-enter; but that is absolutely contrary to the statutory duties of the council, which are to make and keep the sewers. We, therefore, held in that case that the sewers could not be rated, but the question of the rateability of sewage works was not then raised. We have now, however, to consider that question. What are these works? They are not ordinary pumping engines, but are pumping engines which have been made for the purpose of the drainage system, and they are an indispensable part of that system. They are the works mentioned in sections 150 and 135. Section 135 puts the sewers and the sewage works on precisely the same footing. Therefore, if we have to hold that the sewers, for the reasons which we gave, were not rateable, it must be the same with regard to the works, which are part of the same sewage system. The reasoning and grounds of the judgment with regard to the sewers apply equally to the works.

But it has been argued that we ought to differ from that decision because certain Acts of Parliament were not called to our attention in that case, which at first sight seems a somewhat startling proposition. The first statute we were referred to was the Metropolis Management Act, 1858, section 3 of which provides that the power of taking land given by the Act of 1855 and all other powers in that Act and the Act of 1858 shall extend and be applicable as well to works of deodorizing sewage as to all other works. The effect of that is merely that if the council take land for the purpose of deodorizing they must take it in the same way and subject to the same restrictions as other works. That section does not add to or diminish the effect of sections 150 and 135. We were also referred to section 23 of this Act of 1858. That section merely provides that the expenses incurred in dealing with sewage in the River Thames shall be defrayed in the same manner as under the Act of 1855. It does not affect the present case. The next statute was the Local Government Act, 1888, and it is said that section 40, sub-sections 8 and 9, gives to the County Council a different power with regard to the drainage system, and the taking and using of land for that purpose, than existed in the previous Acts. By sub-section 8 of section 40 the powers, duties, and liabilities of the Metropolitan Board of Works were transferred to the London County Council. That includes the power of taking or leasing land, and the duty of using it only in the way mentioned in section 135 of the Act of 1855. Then sub-section 9 provides that if the London County Council borrow for the purposes of the Act they shall borrow in accordance with the provisions of the Acts relating to the Metropolitan Board of Works; but that, save as aforesaid, part 4 of the Act shall apply to the County Council when acting as successors of the Board of Works. Then it is said that if you refer to part 4, section 65 provides that a county council may for the purpose of any of their powers or duties acquire, purchase, or take land on lease, and it is said that amongst their duties is the duty of dealing with the drainage system. But neither of these sections makes the position of the council with regard to the drainage system different from that of the Board of Works. None of these Acts alter in any way the construction and application of the Act of 1855, upon which we gave our opinion in the *West Ham case*. We are bound by that decision, and, therefore, both these appeals must be allowed.

LOPES, L.J.—I think that these works are not hereditaments for which the County Council can be rated. It appears to me that there is no valid distinction to be made between the works in this case and the sewers in the case of *London County Council* v. *Churchwardens of West Ham*. I think they stand precisely on the same footing, and the same arguments and same reasons which were applicable to the sewers are applicable to these works, therefore I do not propose to go into that matter at any length, or indeed at all. It has been argued before us that there are Acts of Parliament, subsequent to the Act of 1855, which were not brought to our notice in that case which might have been brought to our notice, and which, if they had been brought to our notice, would have affected our decision in that case. Those Acts of Parliament and the different sections have been elaborately brought before our notice now, and speaking for myself I certainly say that they would not have altered the view that I took in the *West Ham case*, and as they would not have altered the view which I took in the *West Ham case*, holding as I do that the works in this case stand in the same position as the sewers there, I say at once that they do not alter the view I take of this case as governed by the *West Ham case*.

I should like to make one observation with regard to rating generally, because I understand that these cases are likely to go to the House of Lords, and because it does appear to me that there are different cases on this subject which are more or less conflicting. The governing case with regard to the rating of hereditaments is no doubt the case of *Jones* v. *The Mersey Docks*, 13 W. R. 1069, 11 H. L. Cas. 443. In that case it was held that every description of property is rateable, but it must be capable of a beneficial occupation. Now, if this was a *res nova* (and if it were not for the *London School Board* v. *St. Leonard's, Shoreditch*, about which I speak with all respect) I should have doubted if an occupier placed under statutory restrictions, who suffers and must suffer a loss by the occupation of his hereditaments, is the kind of hypothetical tenant that was contemplated by the Parochial Assessment Act. I should have thought that the Parochial Assessment Act contemplated an ordinary tenant from year to year, and not a tenant forced by statute to become an occupier at a loss. I should have thought there must have been a possible beneficial occupation to render any hereditament rateable. Subject to that observation (which I should not have made, having proper respect for the case of *London School Board* v. *St. Leonard's, Shoreditch*, unless I understood that the whole of this matter was going to the House of Lords) I think the appeal in both these cases must be allowed.

KAY, L.J.—This is the first case relating to this paricular question which I personally have taken any

part in, and I only wish to make a few observations to show the reasons for which I concur in this decision. The last *West Ham case* came before the court constituted by the Master of the Rolls, and Lopes and Fry, L.JJ., and the Master of the Rolls and Lopes, L.J., have stated their view of what the decision in that case was, and I understand it to be this, that although the Metropolitan Board of Works and their successors, the London County Council, have power to take on lease land for the purpose of making sewers and other drainage works, they have no power whatever to take on lease sewers and drainage works that have been made, "therefore," the Master of the Rolls says in his judgment, "in that case there is no possible hypothetical tenant except the County Council. Then can they be such tenants? I think not, first, because, as I have said they have no power to become tenants of the premises at all." That is explained by what he says rather earlier in his judgment, "I am of opinion that they have no power to take sewers made by other people on lease." Now in that case the sewers had been made by the Metropolitan Board of Works. That is stated in the special case, paragraph 2. "Under the said system the sewers and the pumping station were constructed by the Metropolitan Board of Works." The question as to the works, as the Master of the Rolls said, was not brought before the court in that case, and they had only to deal with the sewers, sewers which, as I understand the case, had been made by the Metropolitan Board of Works and taken over by the London County Council. Those sewers, having been constructed by the Metropolitan Board of Works and taken over by the London County Council, were sewers of which neither the Metropolitan Board of Works nor the London County Council by the terms of their Act of Parliament were authorized to take a lease. They might have taken the land on lease and have constructed the sewers in them, but they could not take the constructed sewer in the land upon lease, therefore they could not be treated as hypothetical tenants of that of which they could never become tenants at all. That was part of the *ratio decidendi* of that case, and I cannot see why it does not apply equally to these works. The County Council might have taken land on lease and constructed the works on that land, but they could not have taken a lease of the works when constructed. I am, therefore, of opinion, that this case is governed by the *West Ham case*.

As to the point raised by Lopes, L.J., that this kind of property, of which the London County Council can have no beneficial occupation, but which they are bound to use at a loss, is not the subject of rating at all, I desire to reserve my opinion, because I do not think it arises in this cases. It seems to me that all property which has or may have an annual value is *primâ facie* the subject of the Rating Acts, and ought to be rated, not according to the value which it actually possesses, but according to the possible value which it might possess. That, however, may not apply to lands and works in possession of the London County Council, for the reasons which are given in the *West Ham case*. I prefer, however, to rest my decision upon the reason which I have already referred to, namely, that this case is governed by the *West Ham case*.

Appeals allowed.

Solicitor for the London County Council, *W. A. Blaxland.*

Solicitor for the Woolwich Union, *Sampson*, Woolwich.

Solicitor for the St. George's Union, *W. J. Fraser.*

From Q. B. Div. (Lindley, Bowen, and A. L. Smith, L.JJ.) — Nov. 30.

In re EVANS.
EVANS *v.* NOTON. (*a.*)

Practice—Attachment—Notice of motion for leave to issue writ—Service of notice where no appearance entered—Filing at Central Office—Rules of Supreme Court, 1883, *ord.* 44, *r.* 2; *ord.* 67, *r.* 4.

A notice of motion for leave to issue a writ of attachment is sufficiently served, where the party against whom the attachment is to issue has not entered any appearance, by filing with the proper officer, pursuant to ord. 67, *r.* 4, *of the Rules of the Supreme Court,* 1883.

Decision of Kekewich, J., *affirmed.*

In re Morris, Morris *v.* Fowler, 38 *W. R.* 522, 44 *Ch. D.* 151, *followed.*

Appeal from a decision of Kekewich, J.

The question was whether notice of motion for leave to issue a writ of attachment against the defendant, who had not appeared, must be served on him personally or was sufficiently served by being filed.

The action was brought to administer the estate of Thomas Evans, deceased, but the defendant did not enter an appearance to the writ. The usual order was made for accounts and inquiries to be taken and made.

On the 4th of March, 1892, a chamber order was made for the defendant to appear on a date, afterwards fixed for the 15th, before an examiner to be examined; the defendant being ordered to produce at such examination all deeds, documents, and securities in his possession relating to the matters of the inquiry. He failed to attend.

On the 25th of March a second order was made ordering him to attend for examination, at his own expense, on a day appointed—the 11th of April. This order and the notice of the appointment for his examination were served on him personally, but he again failed to attend.

Both orders were indorsed, "If you, the within-named defendant, Thomas Noton, neglect to obey the order, you will be liable to process of execution for the purpose of compelling you to obey the same order."

On the 14th of April the plaintiff gave notice of motion for a writ of attachment to issue against the defendant for non-compliance with the orders. This notice was not served personally on the defendant, but was filed at the Central Office at the Royal Courts of Justice.

The motion having come on for hearing, and the defendant not appearing, Kekewich, J., gave leave to issue a writ of attachment against the defendant, who was arrested on the 2nd of November, and committed to the custody of the Governor of Holloway Prison.

Application was then made to Kekewich, J., for his release from prison, on the ground that there had been an irregularity in the serving of the notice of motion for the writ of attachment, that it was not sufficient to file it at the Central Office, but that it ought to have been served on the defendant personally.

Kekewich, J., considered that, if there had been any irregularity, it did not render the order void, and that he had a discretion in the matter, and declined to order the defendant's release.

(*a.*) Reported by ARTHUR LAWRENCE, Esq., Barrister-at-Law.

The defendant appealed.

C. H. Lindon, for the appellant.—The defendant should be released, inasmuch as the notice of motion for his attachment was not duly served; filing is not sufficient; it should have been personally served. [BOWEN, L.J.—Does not ord. 44, r. 2, govern the matter?] It may, and it is in the appellant's favour; but I put it on another ground, that of ord. 68, r. 1, that this is a "criminal proceeding," the procedure in which is not affected by the rules, or at least a *quasi*-criminal proceeding: *Davis* v. *Galmoye*, 37 W. R. 227, 39 Ch. D. 322. [BOWEN, L.J.—That it was not a criminal proceeding was the very ground of the court entertaining the appeal there. A. L. SMITH, L.J.—What crime does a man commit who does not come to be examined?] A misdemeanour: *In re Maria Annie Davies*, 37 W. R. 57, 21 Q. B. D., at p. 238; *In re Pollard*, L. R. 2 P. C. 106, 17 W. R. H. L. Dig. 4. The notice of motion ought to have been served personally, inasmuch as this, though not such a criminal proceeding as to prevent an appeal being brought, is of the nature of a criminal proceeding. [LINDLEY, L.J.—But against that there are the two authorities of *In re Morris*, *Morris* v. *Fowler*, 38 W. R. 522, 44 Ch. D. 151, and *In re A Solicitor*, 28 W. R. 529, 14 Ch. D. 152.] A writ of attachment for contempt is not like a writ of execution or any civil proceeding. [LINDLEY, L.J.—If it is criminal there is no appeal. A. L. SMITH, L.J.—The old rule *nisi* had to be served personally; now that rules *nisi* are abolished, why should not the notice of motion which takes the place be served personally?] That is exactly the appellant's contention. [LINDLEY, L.J.—You contend that *Browning* v. *Sabin*, 5 Ch. D. 511, 25 W. R. Dig. 185, *In re Morris*, and *In re A Solicitor* were all cases in which attachment would have formerly issued *ex parte* as a matter of course under the old system, but that the case we have to deal with is not one of such cases?] Yes. [LINDLEY, L.J.—And so you say that personal service is necessary, or, at any rate, that the party to be attached should have the intention to apply for his attachment brought to his actual knowledge?] Having actual knowledge would not obviate the necessity of personal service: *Mander* v. *Falcke*, 40 W. R. 31, [1891] 3 Ch. 488. The incidents of committal attach to the present case. Again, attachment did not, and does not, apply to the case of a stranger, but only committal (*In re Bell's Estate*, *Foster* v. *Bell*, 18 W. R. 369, L. R. 9 Eq. 172), which leads to the same result; the defendant had not appeared, and therefore was a stranger. [LINDLEY, L.J.—That is a strong thing to say.] Notice was not served in accordance with the rules, which, especially in the case of the liberty of the subject, should be strictly followed: *Nelson* v. *Worssam*, W. N., 1890, p. 216, followed in *Mander* v. *Falcke*. A person who has not appeared can only be called a party in a colloquial sense, not properly.

He referred to Daniel's Chan. Prac., 5th ed., p. 804; Oswald on Contempt, p. 164; *Callow* v. *Young*, 55 L. J. N. S. 543, 35 W. R. Dig. 11; and *Treherne* v. *Dale*, 33 W. R. 97, 27 Ch. D. 66.

Ingpen, for the respondent.—The rules, generally, are so particular in their directions, and inasmuch as they do not state that personal service is necessary in the case of attachment, whereas they do say it is necessary in some cases, it is not to be presumed to be necessary. Besides, the court has discretion not to release the defendant till he has purged his contempt, even if there has been some irregularity. [BOWEN, L.J.—The discretion must come in where all the proceedings have been regular, so as to give the court jurisdiction to adjudicate in the contempt.] A person who has been served has notice, and it is provided that filing shall be good service; actual notice in fact is not necessary.

He cited *In re Morris*, *Morris* v. *Fowler*.

Lindon, in reply.—In all the cases except *In re Morris*, some attempt was made to effect personal service, either through the solicitor or by leaving the notice at the house. That case is the first in which filing merely was held to be sufficient.

LINDLEY, L.J.—This case has been very ably argued by Mr. Lindon, but he has not persuaded me to think that the appeal for which he contends ought to be allowed. The defendant, who is the appellant, is a solicitor. The plaintiff, who is, I suppose a *cestui que trust* or something of that kind, brings this action against the defendant for an account. The defendant does not appear to the writ; and it is argued upon that non-appearance, that he is not a defendant, not a party to the proceedings, because he has not appeared; but that argument does not seem to me to be a good one: it seems to me that a person who is, as the appellant here was, served with the writ becomes thereby a party to the action.

Leaving that point, a motion was then made in the action which resulted in the order of the 25th of March, whereby the defendant was ordered to attend, at his own expense, before an examiner to be examined, and a certain date was fixed for his examination. It is said that that order was not obtained on notice. It is true it was not obtained on notice served personally, but it was on notice served in the mode provided by rule 4 of order 67 in the case of persons who have not appeared—that is, by filing the notice at the Central Office. The order, together with notice of the appointment for his attendance, was served on the defendant personally. He, however, did nothing; he did not attend, and an order was made for the issue of a writ of attachment. The notice of motion for the writ to issue was not served upon the defendant personally, but was served in the mode provided in the case of persons who do not appear, by filing, as required by ord. 67, r. 4, in cases "where personal service is not requisite."

Before the Judicature Acts writs of attachment could be obtained in the Court of Chancery without the order of a judge in the case of breach of a definite order, without more; they issued in such a case as a matter of course. This was altered by the Judicature Act, which made two changes. One was that a writ of attachment cannot issue without leave of the court—a great protection to a party. The other was that the person against whom the writ is to issue must have notice—that is by ord. 44, r. 2, which is as follows: "No writ of attachment shall be issued without the leave of the court or a judge, to be applied for on notice to the party against whom the attachment is to be issued." The rule does not say there is to be "personal service" of the notice; it says nothing about any mode of service, and it is left for the court to see from the rules how notice is to be given. Kekewich, J., was informed, when the order was applied for, of the facts of the defendant not appearing and the notice of motion being served by filing at the Central Office, and he allowed the attachment to go. And from that decision the present appeal is brought. We are asked to say that the order for the writ to issue was made by Kekewich, J., without jurisdiction, practically. If the matter were *res integra*, I think there would be much to say in favour of the view that personal service of the notice of motion in such a case is necessary; it is a strong thing to say that, even with the leave of the court, a man may be sent to prison without personal service or

substituted service of notice of the application, to send him there. But the practice is settled against that view, and in accordance with the decision of Chitty, J., in *In re Morris, Morris* v. *Fowler*, and it ought not to be disturbed.

I have assumed that this is a case in which an appeal lies. I should say this is not a criminal matter. I concur in what was said by Lopes, L.J., and by Cotton, L.J., in *O'Shea* v. *O'Shea*, 38 W. R. 374, 15 P. D. 59, as to there being nothing that can be called a criminal proceeding in the case of an application for attachment against a defendant for disobedience to an order of the court made in some civil proceeding. I should say this is a civil matter. The case of *In re Freston*, 31 W. R. 804, 11 Q. B. D. 545, seems to say otherwise, and so does *Harvey* v. *Harvey*, 26 Ch. D. 644, 32 W. R. Dig. 10. Those cases would have to be considered if it were necessary to decide the point. But I assume that it is not a "criminal cause or matter" within the meaning of section 47 of the Judicature Act, and that an appeal will lie. The appeal, however, must be dismisseed.

BOWEN, L.J.—I also will assume that an appeal lies in this case. That being so, the true view of the rules, in my opinion, is that the appellant is wrong. The distinction between committal and attachment and the practice upon them are, I think, correctly stated by Chitty, J., in *Harvey* v. *Harvey*, which forms Appendix A to Mr. Oswald's Book on Contempt of Court, and in the memorandum of Mr. Lavie. The question is, how far change has been made by ord. 44, r. 2, of the Rules of the Supreme Court. taking the present as a motion for attachment and not for committal. It was to compel the defendant to do something which was for the purposes of the suit, to compel him to attend before an examiner for examination, and accordingly it belongs to the class of cases to which attachment and not committal is applicable; it was to effect something in furtherance of the objects of the suit, and therefore falls within what Cotton, L.J., says in *O'Shea* v. *O'Shea* and Chitty, J., in *Harvey* v. *Harvey*.

As to ord. 44, r. 2, that rule does not in terms require personal service, and I cannot help thinking that in a matter dealing with the liberty of the subject it would state that personal service was necessary, if it were so. I myself should much prefer that personal service should be required in such cases, or such notice as the court might direct. Ord. 67, r. 4, states that where the defendant has not appeared notice is to be filed; that has been done, and so notice has been given so as to satisfy ord. 44, r. 2. The established practice of the Court of Chancery and the case of *In re Morris* tend to show that the view I take is within the meaning, as it is within the letter, of the rule. Under the rules the judge has power to say that, though the rule has been satisfied, yet "under the circumstances I require further notice." I might have done that myself in this case. I agree that the appeal should be dismissed.

A. L. SMITH, L.J.—I have very few words to add. First, was the application to Kekewich, J., for attachment or committal? In my opinion it was attachment, not committal, and was for enforcement of a civil order. Before the Judicature Act such an attachment would have been obtained without further application to the judge, and as a matter of course, on proof of the order and of the breach of it. The second question is, Is this a criminal matter? I think not. Again, have the requirements of the rules been followed? Have ord. 67, r. 4, and ord. 44, r. 2, been complied with? I can find no rule requiring personal service, and ord. 67, r. 4, applies to an order for attachment, and it has been followed. For these reasons I think the appeal must be dismissed.

Appeal dismissed.

Solicitor for the appellant, *R. B. Horman Fisher.*

Solicitors for the respondent, *Hopgoods & Dowson.*

High Court of Justice.

Chan. Div. North, J. — Jan. 13.

In re FRAPE.
Ex parte PERRETT. (*a.*)

Solicitor—Agreement as to costs—Signature by one party—Terms—Parol evidence—Payment—Taxation after payment—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44), *s.* 8, *sub-section* 2—*Attorneys and Solicitors Act*, 1870 (33 & 34 *Vict. c.* 28), *s.* 4.

A solicitor had acted in non-contentious business transactions for a client, including the sale of a freehold property, and paid his client the balance appearing to be due by an account which he rendered. The account, which was in the handwriting of the solicitor's clerk, was headed with the solicitor's name, but was not otherwise signed by him. One of the items in the account to the credit of the solicitor was, "By agreed costs, £80," and the account showed a balance due to the client, for which sum there was at the bottom of the account a receipt signed by the client. The solicitor afterwards, in obedience to an order of the court, delivered various bills of costs relating to the business, which bills the client sought to have taxed.

Held, (1) *that signature by the party to be charged was sufficient under the Solicitors' Remuneration Act*, 1881, *s.* 8, *sub-section* 2, *and that the client would have, under that section, been bound by his signature on the face of the account, if the account had sufficiently contained the terms of an agreement as to costs;* (2) *that there had been no sufficiently definite agreement as to costs;* (3) *that there had been no payment in respect of the bills of costs delivered; and that, consequently, the bills must be taxed.*

Hitchcock *v.* Stretton, 40 *W. R.* 555, *distinguished.*

A Mr. H. D. Frape, solicitor, of Brighton, had acted professionally for a Mr. Perrett, a blacksmith of the same place for ten years in various non-contentious matters, including certain mortgage transactions in which certain other clients of Mr. Frape were mortgagees. A settlement of accounts relating to principal moneys, interest, advances on account of purchase-money, costs, &c., took place between Mr. Frape and Mr. Perrett on the 23rd of February, 1892, when the document to which these proceedings related was signed by Mr. Perrett under the following circumstances. Mr. Frape had a few days previously completed for him the sale of a small freehold property already mortgaged to other of his clients, and was in receipt of the purchase-money. Perrett asked if he could at once settle his account with Mr. Frape. After some discussion the items of the payments for mortgage, principal moneys, &c., were taken down by Mr. Frape's clerk in the form of a draft account. With regard to these items there was no dispute. For agreed costs Mr. Frape undertook to accept £80, to which Perrett agreed. A form of account was then drawn up, headed Mr. Frederick Perrett, senior, in account with H. D. Frape. On one side appeared the items of account due on the

(*a.*) Reported by G. B. M. COORE, Esq., Barrister-at-Law.

part of Perrett to Frape, amounting to the total sum of £334 13s. 10d. On the other the sums due from Mr. Frape to Perrett in respect of the said purchase, amounting to £457 18s. 4d.

The £334 13s. 10d. was on the same page deducted from the £457 18s. 4d., leaving a balance to Perrett of £123 4s. 6d.

The account then continued on the same side:—

	£123	4	6
By "agreed costs" ...	80	0	0
Balance due to Mr. Perrett	£43	4	6

Below was written:—"Received this 23rd day of February, 1892, of Mr. H. D. Frape, the sum of £43 4s. 6d. in settlement of the above account, to which I hereby agree.—F. PERRETT."

On the 25th of April, 1892, Perrett issued a summons in the Queen's Bench Division for delivery by the solicitor of his bill of costs, and an order by consent was made on the 5th of May, 1892. In pursuance of this order ten bills of costs were delivered. On the 13th of July, 1892, a summons to tax the bills was issued in the Chancery Division, and assigned to North, J. North, J.'s chief clerk held, under *In re Lewis, Ex parte Munro*, 24 W. R. 1017, 1 Q. B. D. 724, which was a case under the Solicitors Act, 1870 (33 & 34 Vict. c. 28), s. 4, that as the agreement was not signed by the solicitor it did not bind him, and was consequently invalid. He accordingly directed the accounts to be taxed, to which the solicitor objected. Finally the matter was referred to the judge, and the discussion was adjourned into court.

T. L. Wilkinson, for the applicant.—These bills ought to be taxed. There is no binding agreement between solicitor and client: *In re Lewis, Ex parte Munro*. This case was decided under the Solicitors Act, 1870; but the Solicitors' Remuneration Act, 1881, makes no difference. It only permits an agent to sign for a principal. The agreement is not signed by the solicitor, and the fact that the account is headed with his name will not suffice to bind him. It is, in fact, only a verbal agreement, and as such is bad, for under both Acts there must be a written agreement: *In re West, King, & Adams, Ex parte Clough*, 40 W. R. 644. It is impossible to say in respect of what the £80 was considered to be paid. There was no delivery of bills prior to payment, and there cannot be any payment without delivery. This has been decided in *In re Street*, L. R. 10 Eq. 165, 18 W. R. Ch. Dig. 130, a decision followed by Chitty, J., in *In re Stogdon*, 56 L. J. Ch. 420, 35 W. R. Dig. 60. Again, if there is taken to have been an agreement, it is too vague, and parol evidence is not admissible to explain it. Even if there has been delivery and payment, yet special circumstances will justify an order for taxation. Further, we have had the bills delivered with Mr. Frape's consent, and we are, therefore, entitled to have them taxed. The matter, in short, is a *res judicata*.

C. J. Peile, for the respondent.—These bills are not impeached as unreasonable. If the agreement, then, is binding on both parties the bills cannot be taxed: *In re Palmer*, 38 W. R. 673, 45 Ch. D. 291. [NORTH, J., referred to the question of signature.] Under the Solicitors' Remuneration Act, 1881, this is a good agreement. In *In re Palmer* the signature by the client alone was sufficient. In any case, however, the document is sufficiently signed to bind Mr. Frape by the fact that his name appears at the top of the agreement: *Evans* v. *Hoare*, 40 W. R. 442, [1892] 1 Q. B. 593. In deciding that case Cave, J., observes, "Whether the name occurs in the body of the memorandum, or at the beginning or at the end, if it is intended for a signature there is a memorandum of the agreement within the meaning of the statute." It is clear this is an agreement as to the costs, and parol evidence is admissible to show what those costs are: *Macdonald* v. *Longbottom*, 7 W. R. 507, 1 Ell. & Ell. 977. [NORTH, J.—The agreement does not say all costs which have been agreed to at £80.] When solicitor and client do agree, costs must refer to all costs between them. This is an application to tax a paid bill. The application is not in proper form, nor have any special circumstances been shown: *Hitchcock* v. *Stretton*, 40 W. R. 555, and Stirling, J.'s remarks therein, and *Ex parte Hemming*, 28 L. T. 144, 5 W. R. Dig. 141, were also referred to. *In re Street* was decided on the special circumstances of the case.

T. L. Wilkinson was not called on.

NORTH, J.—In my opinion there must be a taxation of all the bills. The facts arise thus: Mr. Frape acted as solicitor for Mr. Perrett in several matters with respect to a certain property. Various things were done with respect to that, and ultimately it was sold, and the purchase-money came into Mr. Frape's hands. Then an account was prepared by Mr. Frape, or rather by his clerk on his behalf, showing what balance there was to be paid over to Mr. Perrett. It does not refer in any way to the property in question or to any property. It is headed as being "Mr. Frederick Perrett, senior, in account with H. D. Frape." It shows on one side Mr. Frape's receipts—cheque on account of deposits. It refers to certain receipts. First of all, deposit on signing contract £50. Then balance of purchase-money £429 as per account, less certain amounts paid, making a total of £457 odd, to be accounted for by Mr. Frape. Then on the other side he sets out various payments made, including a sum to the client himself, making a total of £334 13s. 10d. Then, deducting that from the moneys received, it leaves a balance in Mr. Frape's hands of £123 4s. 6d. Then the only remaining items are these, "By agreed costs, £80." Deducting that from the £123 4s. 6d. leaves a balance of £43 4s. 6d., besides which is written "Balance due to Mr. Perrett." Then comes a memorandum at the foot, "Received this 23rd day of February, 1892, of Mr. H. D. Frape the sum of £43 4s. 6d. in settlement of above account, to which I hereby agree," and then on the stamp is Mr. Perrett's name.

The application now is for the taxation of ten bills which have been delivered by Mr. Frape to Mr. Perrett in pursuance of an order of the Queen's Bench Division. The answer is that there cannot be any such taxation now that the amount has been the subject of agreement between the parties and settled by the retention by the solicitor of the £80 and the signature of Mr. Perrett on this account.

Now, the first two points which have been raised relate to the question whether there is a binding agreement or not, which is a valid settlement between Mr. Perrett and Mr. Frape. That turns upon the 8th section of the Solicitors' Remuneration Act, 1881. That provides that, "with respect to any business to which the foregoing provisions of this Act relate," within which it is admitted the present business comes, "whether any general order under this Act is in operation or not, it shall be competent for a solicitor to make an agreement with his client, and for a client to make an agreement with his solicitor before or after or in the course of the transaction of any such business, for the remuneration of the solicitor to such amount and in such manner as the solicitor and the client think fit, either by a gross sum or by commission or percentage or by salary or other-

wise." It is said that this was an agreement between the client and solicitor made after the business had been transacted for the remuneration of the solicitor by the lump sum of £80. Now, the first question is whether there is or is not an agreement here independent of any question of signature. The second question arises with respect to the signature. This memorandum is signed by Mr. Perrett alone, as I have mentioned, and not by the solicitor, and the 2nd sub-section of the 8th section says, "The agreement," that means such agreement as the first part of that section contemplated, "shall be in writing signed by the person to be bound thereby, or by his agent in that behalf." The person against whom it is sought to be enforced, who is said to be bound thereby, is Mr. Perrett, and it is beyond all doubt signed by him. The question is whether that is sufficient, or whether it is necessary, to be an agreement within the Act, that it should be signed by the solicitor also. In my opinion it is not necessary. In the case of *In re Lewis, Ex parte Munro* it was held that the agreement in writing under the Solicitors Act in force at that time—namely, the statute of 1870, section 4—implied signature by both parties, because the document could not be said to be an agreement in writing between the parties unless not only the terms of the agreement, but the signatures of the parties, were contained in it. In the present case I have to deal, not with the Act of 1870, but of 1881, and there the language is different. Sub-section 2 provides that "the agreement shall be in writing, signed by the person to be bound thereby, or by his agent in that behalf." In my opinion those words are quite inconsistent with the necessity of the agreement being signed by both parties. The phrase adopted is one that is very familiar in the Statute of Frauds, and one knows well enough what is meant by signature "by the party to be charged therewith," as distinguished from signature by all parties to the agreement or document in question.

Then it is said that the only real meaning of the 2nd sub-section of this Act is that it allows a person to be bound thereby if it is signed not by him but by an agent on his behalf, and it only has the effect of supplementing the Act of 1870, which provides that the agreement shall be by both parties, by saying that in the case of an agreement under the Act of 1881 it must be signed by both parties, subject to the qualification that the signature by the person to be bound may be by an agent instead of the principal. In my opinion that is not the meaning of this sub-section. It deals not only with the case of agent signing for a person, but a case of persons signing themselves, and says the agreement shall be signed by the person to be bound thereby, as well as that it may also be signed by his agent on his behalf. In my opinion, therefore, under this section there is sufficient signature to the agreement to make the agreement binding upon Mr. Perrett, although it has not been signed by the solicitor.

Then the other question with respect to the agreement is this. We have got rid altogether of the question of signature, and the other question is whether, independently of the signature, the agreement in writing is proved from this memorandum. In my opinion there is no defect in the signature. But is there any defect in the terms of the agreement? In my opinion the agreement in writing must show what the material terms are, and you cannot refer to any other document not incorporated with the document signed, nor any parol evidence for the purpose of showing what these terms are. The terms of agreement must be found within the agreement itself, including in the agreement itself any other written document sufficiently incorporated. Now what is the agreement here? The agreement is that £80 is to be deducted in respect of what? Agreed costs. There is nothing to show on the face of the writing what the agreed costs are. It is quite true that the moneys received by the solicitor came from the proceeds of the sale of certain property, but there is nothing here referring to the property itself in any way. There were, as known at that time, certain proceedings in respect of which the solicitor had acted for the client. It was not known to the parties at that time in what bills those would be included, whether one or more. That would depend very much upon the way in which the solicitor, in making out his bills, chose to make them out. They have been made out, and properly made out, by the solicitor in ten different bills. Those bills, Mr. Peile tells me, are divisible in this way: they all relate to one property; but the first three bills relate to previous costs which had been incurred by the client to the solicitor, in respect of the property, but not in any way relating to the sale of the property, which was afterwards carried out and which produced the money. The remaining seven bills are said to have referred more or less to the disposition of this property, which ultimately produced the sum which came to the solicitor's hands.

Now the statement is that £80 is deducted in respect of the agreed costs, but there is nothing whatever to show what the agreed costs are. If it had been said it was in respect of all the costs the solicitor had against the client that would be a different matter. But it may be that they related to the costs relating to the transaction of the sale of this property, and did not refer to other costs. But I am only suggesting one mode in which they might be divided. The flaw in the alleged agreement, in my opinion, consists in this, that it is in respect of agreed costs and there is nothing to show on the face of the agreement what are the costs which were the subject of the agreement between the parties. It is suggested that they apply to all the costs. If so it would have been very easy indeed to express the agreement in that way, but where the reference merely is to agreed costs, that does not show what the costs are which have been agreed at £80, and you have, therefore, to go outside the agreement to identify what those costs are. It was suggested by Mr. Peile that where there was a written contract referring to, say, a house, you must always be able to produce evidence to show what that house is. I agree. If in this case the reference had been for instance to "my bills of costs, which have been made out against you" there might have been evidence to identify the bills of costs which had been made out as those referred to in the agreement. But here the reference is not to costs due from one person to another, or the claim of the one against the other in respect of costs, but it is "my costs which have been the subject of agreement." Therefore, it is necessary to refer to some evidence not contained in this document itself to find what the agreement between the parties actually has been. In my opinion, therefore, the agreement fails, not for want of signature, but for want of definiteness in stating the important matter of what the agreement was and to what costs the agreement did relate—whether to some or all.

It is said that the fact that bills have since been delivered identifies what they were. It is not so in any way. It has been open to Mr. Frape afterwards to deliver such bills as he thought fit, and the fact that the person to whom he delivered them was to be bound by the handing over of such of his bills as he thought fit to deliver, does not seem to me to be a matter that could be of the slightest weight.

Then there is a third point taken. It is said that, assuming there is no agreement within the statute,

still the bill has been paid, and there can be no order for taxation of the bill after payment in the absence of special circumstances, which have not been adduced here—which have not been opened here before me. I have not seen the evidence, and it is not necessary to go into it. Before I go to that, there is one point I should mention with respect to the agreement. Mr. Peile says that here it is signed by both parties because the name of the solicitor appears in the head of the account, and also in the memorandum at the foot of it; and therefore it is signed by him, and for that he refers to a case of *Evans* v. *Hoare*. I do not find anything in this document before me that I think amounts to a signature by the solicitor, or that was intended as a signature by him, and I find in *Evans* v. *Hoare* Cave, J., lays down the law in this way: "I am of opinion that the principle to be derived from the decisions is this. In the first place, there must be a memorandum of a contract, not merely a memorandum of a proposal; and, secondly, there must be in the memorandum somewhere or other, the name of the party to be charged, signed by him or by his authorized agent. Whether the name occurs in the body of the memorandum or at the beginning or at the end, if it is intended for a signature, there is a memorandum of the agreement within the meaning of the statute." Accepting that and applying it, Is there here the name of the solicitor intended for a signature? In my opinion there is not; therefore that case does not affect the question.

Then, coming to the third point, it is said that his bill has been paid, and the cases of *Ex parte Hemming* and *Hitchcock* v. *Stretton* were relied upon for that purpose. Now what happened here was this. No bills whatever were delivered before this account was settled. They were applied for afterwards. The solicitor would not deliver them, and the order was obtained in the Queen's Bench Division directing delivery. They have been delivered, and are, as I have said, ten in number. Now, it is said that, these bills having been delivered by the order of the court, it must be taken that there has been delivery of a bill. The cases of *In re Street* and *In re Stogdon* seem to me both to be confirmed by the observations of the judges in the case of *In re West, King, & Adams, Ex parte Clough*. It is said that the case of *Ex parte Hemming* and the decision of Stirling, J., in *Hitchcock* v. *Stretton* laid down some different law. In my opinion those cases cannot get rid of the obligation imposed upon me by the decisions in *In re Street* and *In re Stogdon*. Moreover, there is a great distinction between *Ex parte Hemming* and *Hitchcock* v. *Stretton* and the present case. In *Hitchcock* v. *Stretton* Stirling, J., proceeds upon *In re Street* and *In re Stogdon*, and says that, in his opinion, the case before him is not inconsistent with the authority of *In re Street*; therefore he is not dissenting from that decision. His lordship says: "It seems to me that the explanation given by the learned judge of the case *Ex parte Hemming* comes to this, that although if no bill of costs is delivered at all, then there is no payment within the meaning of the 41st section of the Attorneys and Solicitors Act, 1843, yet if a bill is delivered after a payment previously made, then the court may look at the whole circumstances and come to the conclusion that the payment which has been made is referable to the bill which is subsequently delivered, and in that case, unless the court finds special circumstances such as would justify the taxation of a bill under section 41, it is not a matter of course that the bill should be taxed." In the present case what I find is this. There was a payment of £80. It was in respect of something; I do not know what, because the agreement does not show what the bills are which are agreed at the sum of £80. It is impossible, therefore, for me to say that this payment of £80 was a payment made in respect of all the bills or of any of the bills in particular, and therefore the *ratio decidendi* of *Hitchcock* v. *Stretton* does not, in my opinion, apply to this case. To say that this payment of £80 was made in respect of these ten bills subsequently delivered would be an assumption, in my opinion, entirely at variance with the fact; and I have not the least doubt the intention of the parties at this time was to have a settlement without any bill being delivered, and to avoid the necessity of delivering bills; and to say that the payment was made in reference to bills to be delivered would, I am satisfied, be drawing an inference or coming to a conclusion entirely at variance with the facts of the case.

Under these circumstances the conclusion I come to is that there must be a taxation of these bills.

Solicitors, *Atkinson & Dresser*, for *Trevor, Pollard, & Co.*, Brighton; *Venn & Woodcock*, for *H. D. Frape*, Brighton.

Chan. Div. Stirling, J. — Oct. 27; Nov. 12.

In re INGHAM.
JONES *v.* INGHAM. (*a.*)

Mortgage—Priority—Executors—Negligence of one of legal mortgagee's executors—Subsequent equitable mortgage—Recovery of title deeds.

A mortgagee of leasehold property died, having by his will appointed his widow and his son executrix and executor, and he left all his estate to his widow for her life, with remainder to his son, and also gave to them, as joint tenants, his trust and mortgage estates. The widow and son duly proved the will. The widow took possession of the title deeds, and pressed for repayment of the mortgage debt. The mortgagor replied that he could only pay by raising a fresh loan, and that for that purpose he should require the title deeds. The widow sent the deeds to the mortgagor, who, being unable to borrow the money, purported to return them in a paper parcel. The widow died, and shortly afterwards the mortgagor also died. The son found only the mortgage deed in the parcel, the other deeds being missing; and it then appeared that the mortgagor had, in the lifetime of the widow, but without giving any notice of the existing mortgage, mortgaged the leasehold property to a bank, and had deposited the title deeds with them, but he had never paid off any part of either of the mortgages.

The son, who denied that he had any knowledge of the deeds having been sent to the mortgagor, claimed to be entitled to his security in priority to the bank, and asked that the bank should be ordered to deliver up the deeds to him as owner of the legal estate.

Held, that, whatever might have been the rights of the bank as against the widow, the son had not been guilty of fraud or of any such negligence as would postpone him to the bank; that he was entitled to priority, and that the deeds should be delivered to him.

The acts of one of several executors cannot bind their testator's estate so as to preclude other persons interested in that estate from relying on their legal title, unless the legal owner himself, or some predecessor of his in title, has personally either been guilty of misconduct or conferred on the mortgagor an apparent authority to deal with the mortgaged property as if it were unincumbered.

Further consideration.

(*a.*) Reported by W. A. G. WOODS, Esq., Barrister-at-Law.

This was a creditor's action for the administration of the estate of Thomas Ingham, deceased. The estate was insolvent, and the usual judgment had been given. Two creditors, Thomas William Pedley, the surviving executor of John Pedley, deceased, and the National Bank of Wales, carried in claims against the estate; they each claimed to be entitled to securities for their debts on a portion of the testator's estate, which was insufficient to pay both in full, and there was a dispute between them as to their priorities. It was agreed that Stirling, J., should decide all the questions which had arisen between the parties (including their respective rights to the title deeds of the property), and they consented to be bound in like manner as if an action had been brought by one against the other, and the defendant in such action had delivered a counter-claim.

The circumstances which gave rise to the dispute were these. By two several indentures, dated respectively the 9th of March, 1872, and 30th of August, 1872, two distinct leasehold properties were assigned to the said Thomas Ingham.

In 1879 Ingham borrowed £650 of John Pedley, and to secure repayment of that sum executed in Pedley's favour a legal mortgage dated the 29th of September, 1879, of both leasehold properties, and handed over to Pedley, as such mortgagee, the two deeds of assignment. About the same time Ingham borrowed of Pedley a further sum of £150, the repayment of which was secured by three promissory notes for £50 each

On the 3rd of September, 1880, Pedley died. By his will, dated the 3rd of July, 1875, Pedley appointed his wife, Ann Pedley, and Thomas William Pedley (one of the present claimants) his executrix and executor; he devised and bequeathed all his real and personal estate to Ann Pedley for life, with remainder to T. W. Pedley; and he devised and bequeathed all estates vested in him as trustee or mortgagee to Ann Pedley and T. W. Pedley as joint tenants upon the usual trusts. Ann Pedley and T. W. Pedley proved the will.

The assignments of 1872 and the mortgage of 1879 were after the death of J. Pedley taken possession of by Ann Pedley, and remained in her custody down to the year 1884. Mrs. Pedley employed one Aaron Tunnicliffe to collect for her the income which she was entitled to receive under her husband's will, including the interest on the mortgage debt of £650 and the three promissory notes for £50 each. In 1884, according to the evidence of Tunnicliffe, he, by the direction of Mrs. Pedley, pressed Ingham for payment of the £800 so due, and in answer to an application Ingham wrote to Tunnicliffe a letter dated the 10th of January, 1884, to the effect that he had done all in his power to borrow the money, but had failed, as people were investing their money in shares in ships, and that if Mrs. Pedley must have the money, he could only get it through a building club, but in order to do so he should have to get the deeds, so as to have other deeds made from them by the club. Mrs. Pedley agreed to this course, and on the 6th of June, 1884, Tunnicliffe obtained the deeds from her and made them up into a parcel, and sent them to Ingham by post.

It was not clear what subsequently took place, but Ingham never paid off the £650, or any part of the same.

On the 4th of March, 1890, Mrs. Pedley died, and on the 4th of September, 1890, Ingham died.

After Mrs. Pedley's death the mortgage deed of the 29th of September, 1879, was found by T. W. Pedley amongst her papers wrapped up in a piece of brown paper, but the two assignments of 1872 were missing. It appeared after Ingham's death that, on the 5th of May, 1885, Ingham had handed over to the National Bank of Wales one of those deeds, executing at the same time what purported to be a legal mortgage of the property comprised in the deed by way of security to the bank for £200, and that on the 19th of August, 1887, he had deposited the other deed with the same bank by way of equitable security for £300. Both these sums of £200 and £300 remained due to the bank. T. W. Pedley deposed that he had no knowledge of the deeds having been sent to Ingham in the way above mentioned, and there was no evidence to the contrary, nor was there any evidence as to when the mortgage deed had been returned to Mrs. Pedley.

Hastings, Q.C., and *Warrington*, for T. W. Pedley.—Pedley is a first mortgagee, having the legal estate, and can only be postponed by fraud or such gross negligence as amounts to fraud: *Evans* v. *Bicknell*, 6 Ves. 174; *Martinez* v. *Cooper*, 2 Russ. 198. There is a reasonable excuse for his not having the title deeds. The cases of *Perry-Herrick* v. *Attwood*, 6 W. R. 204, 2 De G. & J. 21, and *Briggs* v. *Jones*, L. R. 10 Eq. 92, 18 W. R. Ch. Dig. 84, in which the legal mortgagee himself parted with the deeds to enable the mortgagor to raise money for his own purposes, and not to pay off the mortgage debt, do not apply. It must be assumed that Ingham assured Mrs. Pedley that the deeds were in the parcel returned to her, and that the mortgage to the bank was effected subsequently: *Hunt* v. *Elmes*, 9 W. R. 362, 2 De G. F. & J. 578, 28 Beav. 631; *Ratcliffe* v. *Barnard*, 19 W. R. 764, L. R. 6 Ch. 652. The authorities are all referred to in *Northern Counties of England Fire Insurance Co.* v. *Whipp*, 32 W. R. 626, 26 Ch. D. 482. It may be that the bank are entitled as against Mrs. Pedley's life estate, but T. W. Pedley has done nothing, and he is not affected by her acts. [STIRLING, J., referred to Fonblanque on Equity, 5th ed., p. 166.]

Buckley, Q.C., and *Knowles Corrie*, for the bank.—The court will postpone the prior legal estate to the bank's subsequent equitable estate, for the bank is within class (*b*) referred to in the judgment (p. 494) in *Northern Counties of England Fire Insurance Co.* v. *Whipp*: "Where the owner of the legal estate has constituted the mortgagor his agent with authority to raise money, and the estate thus created has by the fraud or misconduct of the agent been represented as being the first estate." The cases draw a distinction between fraud and authority given to raise money, and turn upon the purpose for which the deeds were handed over. We rely upon *Perry Herrick* v. *Attwood* and *Briggs* v. *Jones*. Our case depends, not upon negligence, but on the authority given to Ingham. There is no evidence that any parcel was returned. As to the argument that Mrs. Pedley's acts do not affect T. W. Pedley, they were co-executors, and as executor she was competent to bind the estate. The presumption, as there is no evidence to the contrary, is that Mrs. Pedley, in the transactions in question, acted, not as tenant for life, but as executrix, and dealt with the bank, not personally, but through her agent. [STIRLING, J., asked if there were any authority that one of two executors could bind the estate otherwise than in reference to the estate—*i.e.*, either by sale or pledge made in favour of a person dealing with the executor on the faith of his executorial authority, and referred to *M'Leod* v. *Drummond*, 14 Ves. 353, 17 Ves. 152, 170.] One of two executors can bind the estate in respect of anything done by him as executor. The court will not, on the application of one executor, set aside a security given to a *bonâ fide* holder for value without notice through the action of a co-executor. The acts

of one co-executor are the acts of all: Williams on Executors and Administrators, 8th ed., 950; *Simpson* v. *Gutteridge*, 1 Mad. 609, 616. [STIRLING, J., referred to *Lepard* v. *Vernon*, 2 V. & B. 51.] In that case the court was asked to assist in equity so as to defeat other creditors, but here we are asking for assistance against the estate, and not against creditors. Mrs. Pedley as executrix had power to dispose of the property, and as she employed a fraudulent agent the estate must take the consequences of Ingham's act. We cannot be ordered to give up the deeds in our possession: *Wallwyn* v. *Lee*, 9 Ves. 24.

Hastings, Q.C., in reply.—Mrs. Pedley intrusted the deeds to Ingham to enable him to raise money to pay off her mortgage. It is immaterial whether she acted as tenant for life or as executrix. If she acted as tenant for life her acts could not affect our title, which is not derived through her. In the cases cited the dealings were with executors, and the purchaser was, in the absence of proof of collusion, held to be protected. The bank dealt with the mortgagor as the owner of the property, and took their title from him, and cannot, therefore, set up any question of executorship: *Sneesby* v. *Thorne*, 3 W. R. 438, 605, 7 De G. M. & G. 399. Even if she acted as executrix her acts would have amounted to a devastavit, for which her co-executor would not be liable: Williams on Executors and Administrators, 8th ed., 1827, 1828. As to the deeds this court can administer legal relief, and so has power to order them to be delivered up to us: *Heath* v. *Crealock*, 23 W. R. 95, L. R. 10 Ch. App. 22; *Cooper* v. *Vesey*, 30 W. R. 148, 648, 20 Ch. D. 611, at pp. 624 and 631; *Manners* v. *Mew*, 29 Ch. D. 725, 33 W. R. Dig. 144.

Cur. adv. vult.

Nov. 12.—STIRLING, J., stated the facts, and continued:—The first question is whether T. W. Pedley or the bank is entitled to priority. Now the legal title to the property is vested in T. W. Pedley as surviving executor and devisee and legatee of mortgage estates of John Pedley, and he relies on his legal title. He contends that he has been guilty neither of fraud nor of any such negligence as would postpone him to a subsequent equitable mortgage: *Evans* v. *Bicknell*; *Northern Counties of England Fire Insurance Co.* v. *Whipp*. I think this contention is well founded. Fraud is not imputed to him, and there is no evidence of any negligence on his part; Ann Pedley was co-executrix and co-trustee with himself. She was also sole beneficiary during her life, and under these circumstances no blame can attach to him for leaving the deeds in her custody.

It is, however, contended on behalf of the bank that Ann Pedley returned the deeds to Ingham for the express purpose of raising money on them, and that she could not set up the mortgage of 1879 against the bank, which lent money in reliance on the deeds: *Perry-Herrick* v. *Attwood* and *Briggs* v. *Jones*; and it is further said that, as she was executrix of John Pedley, her acts bind his estate, and consequently T. W. Pedley in his capacity of beneficiary under the will. An attempt was made to distinguish the present case from those of *Perry-Herrick* v. *Attwood* and *Briggs* v. *Jones*, but though the facts differ somewhat, I am not satisfied that the principle of those cases would not apply so as to preclude Ann Pedley from setting up the mortgage of 1879, so far as she had a beneficial interest in it, against the bank; but no authority was cited for the proposition that her acts bind John Pedley's estate so as to preclude other persons interested in that estate, or T. W. Pedley in particular, from relying on the legal title now vested in T. W. Pedley. No doubt one of several executors has at law large powers of binding the testator's estate by his acts; but it is not contended that anything was done by Ann Pedley to affect her title at law.

All that is asked on behalf of the bank is that effect should be given to an equity in its favour. There are, no doubt, cases in which effect is given in equity to rights arising from the acts of a single executor. For example, I take it that the court will, as a general rule, enforce an equitable security on part of the assets of a testator created by one of several executors in favour of a mortgagee for value dealing with him in good faith: see *Macleod* v. *Drummond*. Here the bank did not deal with Ann Pedley; and there are on the other hand cases, such as *Lepard* v. *Vernon* and *Sneesby* v. *Thorne*, in which the court has refused its assistance to persons seeking to enforce in equity rights claimed by virtue of what has been done by a single executor, contrary to the wishes of the co-executor. No case has been cited in which a court of equity has interfered against the legal title under circumstances similar to the present, except where the legal owner has been guilty of misconduct, or has conferred an apparent authority to deal with the mortgaged property as if it were unincumbered. The equity to which effect was given in *Perry-Herrick* v. *Attwood* and *Briggs* v. *Jones* arose out of the personal acts of the legal mortgagee, and it seems to me that the authorities, all, or nearly all, of which are cited and commented on in *Northern Counties of England Fire Insurance Co.* v. *Whipp*, are adverse in principle to interference against the legal title, except where the owner himself, or some predecessor of his in title, has personally either been guilty of misconduct or conferred such apparent authority as I have mentioned. T. W. Pedley has himself been guilty of no misconduct. He did not either in appearance or in fact authorize Thomas Ingham to deal with the property as unincumbered; and he does not derive his title from or through Ann Pedley; his title, whether as executor or trustee or beneficiary, is co-ordinate with hers. I think, therefore, that he is entitled to priority over the bank.

The order will contain a declaration of such priority, and T. W. Pedley will be admitted to prove against the estate for the amount of his debt after deducting the value of his security. The bank will be admitted to prove against the estate for the full amount of its debt.

I am further to decide whether the bank is entitled as against T. W. Pedley to retain possession of the deeds of 1872. Now it is laid down by James, L.J., in *Heath* v. *Crealock* that a court of equity never takes away from a purchaser for value without notice anything which he has honestly acquired; and if my jurisdiction were equitable merely, I could not deprive the bank of the deeds on the faith of which its money was honestly lent to Thomas Ingham. But since the Judicature Acts this court has had power to decide on legal as well as equitable claims; and *Cooper* v. *Vesey* is a case in which a mortgagee was ordered to deliver up the title deeds at the instance of a legal owner. T. W. Pedley, as surviving executor of John Pedley, and as legal owner of the mortgaged property, possesses a title to the deeds, to the assertion of which the bank, as it seems to me, has no answer at law. I must therefore make an order that the bank deliver up the deeds to T. W. Pedley. As regards the costs of these proceedings, both parties will be at liberty to add theirs to their respective debts, but there will be no other order.

Solicitors for T. W. Pedley, *Wilkins, Blyth, Dutton, & Hartley*, for *C. S. Brooke*, Nantwich.

Solicitors for the bank, *Saffery, Huntley, & Co.*, for *O. Lewis Edwards*, Pwllheli.

Q. B. Div.
(Pollock, B., and Charles, J.) Dec. 21.

PONTIFEX v. FARNHAM. (a.)

Solicitor—Client—Solicitors Act, 1870 (33 & 34 *Vict. c.* 28), *s.* 4—*Agreement in writing between solicitor and client as to payment in full without taxation.*

A solicitor wrote to a client on whose behalf he had done work and incurred expenses, saying, "If you are not prepared to settle the whole amount, I must ask at least for £100 on account." Receiving no answer he wrote again, threatening proceedings unless the client "was prepared to send a cheque for the whole amount." Subsequently the client paid £100 on account, and, in consequence of communications made to him by a third party, wrote: "I am off to Scotland, and will send you a cheque for the whole amount on my return."

Held, that the letters did not disclose any agreement between solicitor and client within section 4 of the Solicitors Act, 1870, *so as to deprive the client of his right to taxation.*

This was an appeal from a decision of Mathew, J., in chambers, holding that certain letters constituted an agreement between solicitor and client within section 4 of the Solicitors Act, 1870, by which the defendant, the client, had bound himself to pay the whole amount of the plaintiff's, the solicitor's, bill of costs without taxation. In the first of the letters in which it was alleged the agreement was contained (dated the 1st of July) the plaintiff wrote, "If you are not prepared to settle the whole amount, I must ask at least for £100 on account." That letter was not answered, and on the 12th of July he wrote again threatening legal proceedings unless the defendant "was prepared to send a cheque for the full amount." That letter was not answered, but the defendant paid £100 on account, and subsequently, not in answer to any letter written to him by the plaintiff, but in consequence of a letter written by the plaintiff to a third party and communicated to him, he wrote on the 6th of August, "I am off to Scotland, and will send you a cheque for the whole amount on my return." The plaintiff sued upon his bill for work and labour done, and on a summons to refer the bill to taxation contended that the defendant, by the agreement which the letters disclosed, had deprived himself of the right to taxation. This view was upheld by Mathew, J., who dismissed the summons.

The defendant appealed.

Hickey, for the defendant, referred to *In re Raven, Ex parte Pitt*, 30 W. R. 134; *In re Lewis, Ex parte Munro*, 24 W. R. 1017, 1 Q. B. D. 724; *In re Fernandes*, W. N., 1878, p. 57; *In re an Agreement between Hemsworth and Spyer*, 27 SOLICITORS' JOURNAL, 499; *In re Stogdon*, 56 L. J. Ch. 420, 35 W. R. Dig. 60, following *In re Street*, L. R. 10 Eq. 165, 18 W. R. Ch. Dig. 130.

Lawson Walton, Q.C., and *Muir Mackenzie*, for the plaintiff.

POLLOCK, B.—In this case an appeal has been brought from a decision of Mathew, J., that the bill which formed the subject-matter of the action was not subject to taxation, on the ground that the case comes within section 4 of the Solicitors Act, 1870. By that section it is provided that "an attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by such attorney or solicitor, whether as an attorney or solicitor or as an advocate or conveyancer, either by a gross sum, or by commission or percentage, or by salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated." The section intended to take out of the ordinary provisions of the statute the case in which client and solicitor have made an agreement in writing by which the solicitor is to receive in respect of his costs a sum greater than, or different from, that to which, under the ordinary provisions of the law, he would after taxation be entitled. This is a case of some little importance, and I know from my own experience in chambers that other cases may be governed by it. My own inclination is much the same as that of Mathew, J., it seems to be a considerable hardship that the solicitor must have an actual agreement in writing to escape taxation, but I cannot help thinking that Mathew, J., had not the decisions before him, and was misled in consequence. He thought there was a good contract with a new consideration, but looking at the correspondence I cannot think that view is a correct one. In the first letter, dated the 1st of July, 1892, the plaintiff writes to the defendant, "If you are not prepared to settle the whole amount, I must ask at least for £100 on account." It cannot be said that it was brought to the mind of the client there that his payment was to be without taxation. But no answer is sent to that letter, and on the 12th of July another letter is sent threatening legal proceedings "unless you are prepared to send us a cheque for the whole amount." Then comes the letter written to the third party, which is answered by the defendant on the 6th of August. He says, "I am off to Scotland, and will send you a cheque for the whole amount on my return." Apart from the Solicitors Act that would be a good agreement, but is it an agreement in writing within section 4? I cannot think that we can hold that the case comes within the section, which would appear to be clearly contrary to the spirit of the decisions and to the dictates of sound sense apart from authority. It was said that the defendant agreed to pay these costs in full, and that he paid money on account, but that question was dealt with in *In re Fernandez*, W. N., 1878, p. 57. The client means to admit that the work was done, but not to forego his right to taxation.

CHARLES, J.—I am of the same opinion, and have little to add. The main question is whether there is disclosed in the correspondence an agreement within section 4 of the Act of 1870. I am unable to say that there is. I do not decide that the signatures of the plaintiff and his client must be on the same piece of paper, it may be that you can obtain a complete agreement on two pieces of paper, but you must have a complete agreement signed by both parties, and I cannot regard the letters of the 12th of July and the 6th of August as constituting such an agreement. The letter of the 6th of August is not an answer to the letter of the 12th of July, but to a different letter altogether, the defendant having received an extract from a letter of plaintiff to another person altogether. I think the solicitor has failed to make out an agreement within section 4, nor has there been an account stated. The appeal must, therefore, be allowed, and the bill must go before a master to be taxed.

Appeal allowed.

Solicitors for the plaintiff, *Pontifex, Hewitt, & Pitt.*

Solicitors for the defendant, *Spencer Whitehead*, for *Milward & Co.*, Birmingham.

(a.) Reported by J. E. ALDOUS, Esq., Barrister-at-Law

Q. B. Div.
(Lord Coleridge, C.J., and Wills, J.) Nov. 16, 21.

BUCKLEY v. CRAWFORD.
TOWNEND (*Claimant*). (a.)

Attachment—Jurisdiction—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *ss.* 4, 5—"*Default in payment of a sum of money*"—*Order to pay money in pursuance of undertaking—Contempt of court.*

An execution creditor gave, in interpleader proceedings, an undertaking to make good any deficiency on sale, which was embodied in an order made directing the sheriff to sell the goods seized. There was a deficiency on the sale, and the master made an order directing the amount to be paid by the execution creditor to the claimant. This order not being obeyed, an order was made by a judge attaching the execution creditor and committing him for contempt of court; but there was no proof of means to pay.

Held, that the case was one of "default in the payment of a sum of money" which had become due as a debt, and was within section 4 of the Debtors Act, 1869, *and that there was, therefore, no jurisdiction to make the order for attachment.*

Appeal by the plaintiff from an order of Bruce, J., at chambers, directing a writ of attachment to issue against him.

The plaintiff, Buckley, had recovered judgment against the defendant, Crawford, and issued a writ of execution under which the defendant's goods were seized. The claimant, Townend, claimed the goods under a bill of sale, and upon interpleader his claim was allowed.

The plaintiff, in order to obtain control of the sale of the goods, gave, in the course of the interpleader proceedings, an undertaking which was embodied in the master's order directing the sheriff to sell, the order concluding "the plaintiff undertaking to make good any deficiency on sale."

An actual deficiency was made on the sale of £139 0s. 10d., and an order was made by the master directing the plaintiff to pay the amount within four days.

The plaintiff failing to comply with the order, a summons for attachment was taken out by the claimant, upon which Bruce, J., made the order appealed against. There was no evidence that the plaintiff had means to pay, which was also denied by his affidavit.

C. C. Scott (*E. C. Robinson* with him), for the appellant.—The order was made without jurisdiction, as it seeks to compel payment of a sum of money by imprisonment, and by section 4 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), it is provided that, "with the exceptions hereinafter mentioned, no person shall be imprisoned for making default in payment of a sum of money." By the provisions of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 103, and the Lord Chancellor's Orders of the 1st of January, 1884, and the 4th of March, 1885, made in pursuance of that section, the order could only be made by a judge in bankruptcy, and, this case not being within any exception, it could only be made upon proof of means. This is clearly a case of a debt within the Act: *Hewitson* v. *Sherwin*, 18 W. R. 802, L. R. 10 Eq. 53; and there is no provision under R. S. C., 1883, ord. 42, rr. 3, 4, 6, and 24, for recovering such a debt by attachment. The undertaking was crystallized into the order, and the obligation was thereby merged.

He cited also *Esdaile* v. *Viner*, 28 W. R. 281, 13 Ch. D. 421; *De Lossy* v. *De Lossy*, 38 W. R. 511, 15 P. D. 115; *Reg.* v. *Pratt*, 18 W. R. 626, L. R. 5 Q. B. 176; *Dillon* v. *Cunningham*, L. R. 8 Ex. 23, 21 W. R. Dig. 90; *Jackson* v. *Mawby*, 24 W. R. 92, 1 Ch. D. 86.

Oswald, for the respondent.—The judge had jurisdiction to make this order; this was an undertaking given to the court, and it is none the less so because it is for the payment of a sum of money. It can, therefore, be enforced in the same way as the breach of an injunction under ord. 42, r. 7. If the plaintiff had given no undertaking he would not have obtained the management of the sale, and the court has a right to treat a breach of that undertaking as a contempt of court and punish it by attachment. The cases cited are distinguishable from the present case, and the object of the Debtors Act was to prevent committal for ordinary debts: *Bates* v. *Bates*, 37 W. R. 230, 14 P. D. 17.

He also cited *Preston* v. *Etherington*, 36 W. R. 49, 37 Ch. D. 104.

Scott, in reply.

Nov. 21.—Lord COLERIDGE, C.J.—In this case we are of opinion that there was no jurisdiction to make this order. Our reasons for coming to that conclusion will be given more fully by my brother Wills.

WILLS, J.—In this case an application was made for an order to commit the plaintiff in the action for disobedience to an order which had been made directing him to pay a sum of money to the claimant in the interpleader. This was a simple order to pay money, but the claimant seeks to treat the disobedience to it as a contempt of court, on the ground that it was made in pursuance of an undertaking which had been given by the plaintiff to pay the money.

There is, however, no difference between an order to pay a sum of money in pursuance of an undertaking and any other order to pay a sum of money. It is true that the undertaking is the original ground of the liability, but an order for attachment is never granted except for disobedience of any order to do or to abstain from doing some specific thing.

Now in this case the only order that could be made in pursuance of the undertaking is an order to pay the money. The words of the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4, show that under such circumstances, if the case does not fall within any of the exceptions therein mentioned, imprisonment cannot be inflicted for default in payment, for the money becomes due as a debt, and there is abundant authority which supports this proposition.

In the case of *Reg.* v. *Pratt* an order had been made by quarter sessions for payment of costs, and it was there held that the case came within the second exception in the 4th section of the Debtors Act, 1869, inasmuch as the order could be enforced by a justice by warrant of distress, and in default by commitment, and the exception in the section said, "Default in payment of any sum recoverable summarily before a justice or justices of the peace," and the person ordered to pay the costs was not protected from imprisonment. Lush, J., in giving judgment, said: "The words in the enacting part, default in payment of a 'sum of money,' are advisedly used instead of 'debt' in order to include cases which might not properly have been called cases of debt, such as costs on a judgment of nonsuit, or costs on a verdict for the defendant, or damages in an action of tort, or costs under a rule of court. The enacting part therefore uses the words 'sum of money,' and this clearly applies to and includes costs; and the same expression in the second exception must also equally apply to costs."

(a.) Reported by JOHN P. MELLOR, Esq., Barrister-at-Law.

Now I think it is quite clear from this that Lush, J., held that an order for the payment of costs was *primâ facie* within the Act, and that, had it not been within an exception, the Act would have applied to it.

In *Hewitson* v. *Sherwin* it was held by James, V.C., that a sum of money payable for costs under an order of the court was a debt within the meaning of the Act. And in *Dillon* v. *Cunningham* the Court of Exchequer held that an order for payment, as distinguished from an order for commitment, might be made without proof of means, and it was said by Kelly, C.B., in giving judgment that it was quite clear that the Act was intended to be of general operation, and to apply to every description of persons; and that the object was that there should be no imprisonment except for wilful default.

In *Jackson* v. *Mawby* a defendant was committed for contempt of court in not filing an answer. After his committal he filed his answer, but did not pay the costs incident to the contempt, and Hall. V.C., held that the court had no power under the Debtors Act, to keep him in prison for non-payment of the costs.

Again, in *Marris* v. *Ingram*, 28 W. R. 434, 13 Ch. D. 338, Jessel, M.R., in the course of an elaborate discussion of the meaning and effect of the Act, expressed his opinion that the power of imprisonment in the excepted cases reserved by the Act was punitive, and could only be exercised for the punishment of a dishonest debtor.

In the present case it is not shown that the debtor was dishonest, and in my opinion, therefore, the case falls within the words and the policy of the Act, which was passed for the express purpose of getting rid of the indefinite, and often lifelong, imprisonment to which debtors were liable under the old law. A case was cited to the learned judge at chambers in which Charles, J., had made an order for committal against a man named Harvey. But my brother Charles informs me that in that case he was satisfied that Harvey had the money, and he therefore treated the case as one of dishonesty and of wilful default.

For the reasons I have given I am of opinion that there was no jurisdiction to make this order for attachment, and that it must be set aside.

Appeal allowed.

Solicitors for the appellant, *Burgoyne, Watts, & Co.*

Solicitor for the respondent, *Arthur Harris.*

Q. B. Div.
(Mathew and Bruce, JJ.) Oct. 31.

FOSTER *v.* OWEN. (*a.*)

Mine — Working discontinued — Mine abandoned — Securely fencing side entrance—Metalliferous Mines Regulation Act, 1872 (35 & 36 *Vict. c.* 77), *s.* 13.

After the passing of the Metalliferous Mines Regulation Act, 1872, *a copper mine was abandoned and the working thereof discontinued. There was a side entrance into the mine, which was, for the purposes of the arguments and judgment, assumed not to be dangerous. The only fence round or about the side entrance was a stone wall erected many years previously to the mine being abandoned. The wall enclosed an area of about ten acres, and within this area the mine and side entrance were situated.*

Held, that the side entrance was not securely fenced within the meaning of section 13 *of the Act.*

This was a case stated by justices of the county of Merioneth at the request of the Attorney-General and the appellant Foster, an inspector of metalliferous mines.

The question was whether a side entrance to an abandoned copper mine, of which the respondent Owen was owner, was securely fenced within the meaning of section 13 of the Metalliferous Mines Regulation Act, 1872. It was assumed for the purposes of the arguments and judgment that the side entrance was not dangerous. The mine had been abandoned and the working discontinued since the passing of the Act. The side entrance into the mine was driven from the surface into the side of a hill. The only fence was a stone wall erected many years previously to the mine being abandoned. The stone wall enclosed an area of about ten acres, and within this area the mine and side entrance were situated. With the exception of this wall no fence of any description existed around or about the side entrance. There was no thoroughfare through the enclosed area, and the only persons entitled to access to the enclosed area were the respondent and his tenants. An information had been preferred by the appellant against the respondent under section 13 of the Act for failing to cause the side entrance to the mine to be kept securely fenced.

The justices dismissed the information, being of opinion that the side entrance was securely fenced by the wall above described.

By section 13 of the Act it is enacted that "where any mine to which this Act applies is abandoned or the working thereof discontinued, at whatever time such abandonment or discontinuance occurred, the owner thereof, and every other person interested in the minerals of the mine, shall cause the top of the shaft and any side entrance from the surface to be and to be kept securely fenced for the prevention of accidents."

Sutton, for the appellant.—I assume that the side entrance is not dangerous, still there must be fencing round the side entrance itself. The wall is not sufficient. Proviso (2) of section 13 of the Act shows that it is not sufficient that mines abandoned since 1872 should be enclosed in this way. The inspectors would have to walk all round the wall to see if it were properly kept.

Griffith Jones, for the respondent.—The section says nothing about the mouth of the side entrance. Under section 47 of the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), now repealed (see Coal Mines Regulation Act, 1887, 50 & 51 Vict. c. 58), a general rule as to fencing was made. No such rule has been made under section 37 of the Coal Mines Regulation Act, 1887, which is similar to section 47 of the Coal Mines Regulation Act, 1872. It is a question of fact, and the magistrates have found that the side entrance is securely fenced.

MATHEW, J. — I think the magistrates ought to have convicted. The question is whether the side entrance is protected as required by 35 & 36 Vict. c. 77, s. 13. [The learned judge read the section.] The section directs that at the time of abandonment the owner shall cause the top and the side entrance to be securely fenced. In this case the mine was abandoned since 1872, therefore the Act applies to this mine. The side entrance is within an enclosure of nine or ten acres surrounded by a fence. It is not suggested that that fence is for any such purpose as is contemplated by the statute. The magistrates held that the fact that this wall is around the space of nine or ten acres is sufficient to show that the side entrance is securely fenced within the section. Cattle might find their way into this space. The statute has not been

(*a.*) Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

complied with. It is not sufficient that there is a wall which will prevent accidents. The case must go back to the magistrates with an intimation that the side entrance is not securely fenced within the meaning of the Act.

BRUCE, J.—I am of the same opinion. The statute applies to all circumstances, whether the mines are on level ground or not. We are not concluded by the finding of the magistrates.

Case remitted to the magistrates.

Solicitor for the appellant, *Solicitor to the Treasury.*

Solicitor for the respondent, *J. C. Hughes*, Dolgelly.

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) — Jan. 24.

ATTORNEY-GENERAL *v.* ROBERTSON. (*a.*)

Inland revenue—Succession duty—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 15, 20, 38.

By a marriage settlement a sum of money was settled upon trustees upon trust to pay the income to the wife during her life, and after her death to pay the income to the husband, if he should survive her, during his life, with remainder, in default of issue, to the wife absolutely. The husband died leaving the wife surviving him, and there was no issue.

Held, that, on the death of the husband, the widow became entitled in possession to a succession, and that succession duty was payable on the amount of the fund, less the value of her life interest therein.

Appeal from the judgment of a divisional court on the hearing of an information by the Attorney-General claiming succession duty.

The information stated that by an indenture of the 30th of November, 1872, made in contemplation of a marriage between Alexander T. A. Sherriff and Annie Robertson, Henry Robertson, the father of the intended wife, settled a capital sum of £10,000 upon trust to pay the income thereof to the wife during her life, and after her death to pay the income to the husband, if he should survive her, during his life, and after the death of the survivor upon trust for the issue of the marriage, and in default of issue upon trust for the said wife, her executors, administrators, and assigns. The marriage was duly solemnized. Mr. Sherriff died on the 8th of February, 1880, leaving Mrs. Sherriff surviving him. There was no issue of the marriage. Mrs. Sherriff died on the 24th of July, 1889, having by her will appointed the defendant and another, her executors, and they duly proved the will. The other executor died in 1891. The information further stated that Mrs. Sherriff, on the death of her husband, became absolutely entitled to the settled trust fund, and it was accordingly transferred to her by the trustees of the settlement, and was part of her estate at her death, and the defendant administered the same accordingly.

The Attorney-General claimed a declaration that upon the death of Mr. Sherriff succession duty became payable on the capital sum of £10,000, less the value at the time of the husband's death of Mrs. Sherriff's life interest under the settlement, and that the defendant, as executor of Mrs. Sherriff, was personally accountable to her Majesty for such duty.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Probate duty at 3 per cent. and legacy duty at 3 per cent. had been paid upon the amount of the fund.

By the Succession Duty Act, 1853, s. 2: "Every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person in possession or expectancy, shall be deemed to have conferred on or to confer on the person entitled by reason of such disposition or devolution a 'succession,' and the term 'successor' shall denote the person so entitled."

By section 15: "Where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place."

By section 20: "The duty imposed by this Act shall be paid at the time when the successor, or any person in his right or on his behalf, shall become entitled in possession to his succession, or to the receipt of the income and profits thereof; except that if there be any prior charge, estate, or interest not created by the successor himself upon or in the succession, by reason whereof the successor shall not be presently entitled to the full enjoyment and value thereof, the duty in respect of the increased value accruing upon the determination of such charge, estate, or interest shall, if not previously paid, compounded for, or commuted, be paid at the time of such determination."

By section 38: "Where any successor upon taking a succession shall be bound to relinquish or be deprived of any other property, the commissioners shall, upon the computation of the assessable value of his succession, make such allowance to him as may be just in respect of the value of such property."

The Divisional Court (Wright and Collins, JJ.) gave judgment for the Crown.

The defendant appealed.

Crackanthorpe, Q.C., and *Ingle Joyce*, for the appellant.—No succession at all took place on the death of the husband. During his life Mrs. Sherriff had a life interest in the fund, and also the ultimate remainder. After his death she still had her life interest and the ultimate remainder; for, both estates being equitable, there was no merger. The only thing that happened on his death was, that thereby, the possibility of his coming into possession after her death ceased. He never enjoyed any interest in the property; and therefore it is clear that in fact there was no succession. If property is settled on A. for life, with remainder to B. for life, with ultimate remainder to C., and B. dies first, there is no succession to C. on B.'s death; for A.'s life estate still stands between C. and the property. There can be no succession so long as an intervening life estate exists; for the word "interval" in section 2 cannot be held to cover an intervening life estate. Here the widow's own life estate intervened between herself and the property. Therefore, there could be no succession during her life. If Mrs. Sherriff can be said to have succeeded to anything on the death of her husband, what she succeeded to was a reversion.

But section 20 says that the duty imposed by the Act shall become payable when the successor becomes "entitled in possession to his succession." Here the reversion did not come into possession during Mrs. Sherriff's life, and therefore, according to section 20, duty did not become payable till after her death. And probate duty and legacy duty having been paid on this fund, it is exempt from succession duty. Moreover, it is obvious that the trustees of the settlement were not necessarily bound to pay duty immediately on the husband's death. Mrs. Sherriff might have wished to leave the fund in their hands for a time. And the true view seems to be that a successor cannot be said to be entitled to possession until duty has been paid. Again, admitting that Mrs. Sherriff succeeded to the reversion in her lifetime, the last part of section 15 is applicable. Her succession to the reversion was accelerated by the extinction of a prior interest—viz., her husband's life estate. Therefore, according to that section the duty became payable at the time when it would have become payable if no such acceleration had taken place—that is to say, not till after the death of both of them.

They cited the following cases:—*Attorney-General* v. *Noyes*, 30 W. R. 434, 8 Q. B. D. 125; *Ex parte Sitwell*, 37 W. R. 238, 21 Q. B. D. 466; *Lord Braybrooke* v. *Attorney-General*, 9 W. R. 601, 9 H. L. Cas. 150.

Sir John Rigby, S.G. (*Vaughan Hawkins* with him), for the Crown.—This statute ought to be construed according to the ordinary use of terms, and not according to the strict construction of language adopted by conveyancers: see *Lord Braybrooke* v. *Attorney-General, per* Lord Campbell, C. The technical rules of equity as to merger and reversion must be disregarded, and the substance of the matter must be looked at. The real substance of this disposition was that, if the wife survived her husband, and there were no children, all the property was to be hers at his death, and that in the meantime she was to have the income. The fact that the husband was to have a life estate, if he survived her, does not affect the matter for the present purpose; for that event did not happen. And the fact that the husband never enjoyed any interest in the property is immaterial. It is not necessary, in order to constitute a succession to the wife, that she should take from him; it is only necessary that she should take by occasion of his death. Did she take anything in possession on the death of her husband? She became then and there absolutely entitled in possession to the whole property. Before his death she was only entitled to the income, she could not deal with a penny of the capital; after his death she was absolutely entitled to the capital to do whatever she liked with it. This was clearly a case of succession, and succession duty was payable on the husband's death subject to an allowance under section 38 in respect of the wife's life interest. The fact that she had the reversion already must be ignored. *Wilcox* v. *Smith*, 5 W. R. 667, 4 Drew. 40, and numerous other authorities, show that in cases such as this the reversion always is ignored. Section 15 does not apply to this case. There was here no acceleration within the meaning of that section, which deals with the case where "the title to any succession shall be accelerated by the surrender or extinction of any prior interests." This must be construed to mean an acceleration by something outside the intention of the settlement, *e.g.*, a voluntary surrender or disclaimer. Here nothing happened except what was contemplated by the settlement. The wife took her succession at the time when, and in the manner in which, the settlement contemplated that she should take it in the events which happened.

Crackanthorpe, Q.C., in reply.—It is a mistake in substance to ignore the fact that she had the reversion already. The case may be tested thus:—If she had sold her life interest during her husband's life, the purchaser would have been in possession for the term of her life, and if then her husband had died, she would in that case certainly have succeeded to the remainder only.

Lord ESHER, M.R.—Notwithstanding the ingenious argument on the part of the appellant, I am of opinion that this appeal should be dismissed. We are called upon to interpret and apply the Succession Duty Act. The first point to determine is when the Act applies, and to what. It does not apply to anything which happens until a succession falls. And it has been already determined that it ought to be applied to the real facts of a case, and not according to the description of facts given by conveyancers. We must, therefore, in this case look to the moment of the death of the husband, and see what effect the death had with regard to the wife, what the law at that moment gave her in consequence thereof. What the law gave her in consequence of her husband's death was the difference between what the law gave her just before his death and what the law gave her just after his death. By what the law gave her, I mean what the settlement gave her according to law. Now what had she by the settlement the moment before her husband's death? She had a life interest in the £10,000, that is to say, she was entitled to the income of the £10,000 during her life, but she had no power to deal in any way with the capital sum itself. What had she by the settlement the moment after her husband's death? The right to the enjoyment of the £10,000 to do what she liked with it. What she acquired, then, by her husband's death was the difference between the value of her life interest without any power of dealing with the capital sum and the value of having the capital sum absolutely as her own. That difference was the thing to which she succeeded. Was that thing an interest in remainder? An interest in remainder means an interest in property the enjoyment of which is in somebody else for a time, but will afterwards come to the person in question. But no one else had the enjoyment of this difference in value before the husband's death. This was not the case of a postponed enjoyment, it was a right to immediate possession. The wife was the only person who ever acquired this interest, and she acquired it by virtue of the settlement in immediate possession on the death of her husband.

Then there is another rule which we must apply in the interpretation of this Act. In looking to see what the law gives to a person who is a successor under the Act, we must treat the question as if nothing had been done by that person in the way of dealing with the property. We must strike out of consideration all such acts done by him. If this lady had sold her interest under the settlement during her husband's lifetime, that would have had no effect on the rights of the Crown. Those rights are to be considered as if she had done nothing; and if she did nothing she would be entitled on the death of her husband to the immediate possession of the whole property. Now the difference in value between what she then became entitled to and the life interest which she had before, was a substantial benefit, a tangible advantage; and she acquired it by reason of her husband's death and the application of the settlement to that death. I am of opinion that that is a succession within section 2 of the Succession Duty Act on which succession duty is payable.

If that is so, was not the duty, by virtue of section 20, immediately payable? The exception in that section does not apply; for there was no

prior interest in this succession: she was the only person who had any interest in that. The section says that the duty shall be paid at the time when the successor shall become entitled in possession to his succession. I cannot assent to the proposition that she does not become entitled in possession until the duty is paid. The duty is not due before she gets into possession. The meaning is that the two things happen together: she becomes entitled in possession and the duty becomes payable at the same time. The fact that the trustees were bound to reserve the duty payable to the Crown does not affect the fact that on the death of the husband she became entitled to immediate possession. Under section 2 she became entitled to the succession, and by section 20 the Crown became entitled to duty at that time. Do any other sections of the Act apply? I think that section 38 applies in terms. Duty must be paid on what she succeeded to subject to the mode of valuation pointed out by that section. As to section 15, I am unable to see that there was any acceleration in this case. What the wife got she got by the settlement, and the time of her getting it was determined by the settlement, and by it alone. Neither was there any surrender or extinction of any prior interest. No right at all existed to this difference in value, to which the wife succeeded, until the moment of the husband's death. I am of opinion that nothing was accelerated and nothing extinguished. The judgment must be affirmed.

LINDLEY, L.J.—The Solicitor-General has converted me, though at first I did not think he was right. There seems to me to be some ambiguity about the use of the word "succession" in this Act. It is not a reversion, that is to say, an interest in property, the enjoyment of which is postponed. It is defined in section 1 as being property itself, it denotes "any property chargeable with duty under this Act." Section 2 speaks of a succession being conferred by certain dispositions or devolutions of property. And by sections 5 and 7 the word includes an increase of benefit or of beneficial interest accruing on the death of any person. We must look at the facts to which the statute has to be applied. [His lordship stated the facts.] What had this lady got before her husband's death? Her life interest and her reversionary interest subject to her husband's life estate. What she had not got was the power to dispose of the sum of £10,000 as a sum in possession. By the death of her husband she lost her life interest and her reversionary interest, and she got the power to dispose of the capital sum absolutely as she wished. That is a succession within the Act. I think that the difficulty as to section 15 has been got rid of by the Solicitor-General. That section applies where the title to any succession has been accelerated. Here the title to succession was not accelerated; it was the possession which was accelerated.

LOPES, L.J.—The critical time was the moment of the death of the husband. If the wife survived her husband she was to have the property absolutely. Before his death she had the income, but she could not deal with the capital. After his death she had a beneficial interest in the capital. Therefore upon his death she became entitled, according to the settlement, to something to which she was not entitled before. I think this case comes within section 2 of the Succession Duty Act. At first I thought that the concluding part of section 15 presented a difficulty, but the Solicitor-General has changed my opinion. I think there is no acceleration within that section when the succession comes at the moment when it was intended to come by the settlement. The section seems to refer to the case where acceleration is caused by something outside the settlement.

Appeal dismissed.

Solicitors for the appellant, *Meredith, Roberts, & Mills*, for *Birch, Cullimore, & Douglas*, Chester.

Solicitor for the Crown, *Solicitor of Inland Revenue.*

From Q. B. Div.
(Lord Esher, M.R. and Lindley and A. L. Smith, L.JJ.) Jan. 20.

In re MILLER.
Ex parte OFFICIAL RECEIVER. (*a.*)

Bankruptcy — Preferential payment — Friendly society —Bankruptcy of officer—Debt due to society—Friendly Societies Act, 1875 (38 & 39 *Vict. c.* 60), *s.* 15, *sub-section* 7—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 40—*Preferential Payments in Bankruptcy Act*, 1888 (51 & 52 *Vict. c.* 62), *s.* 2 (1).

By the Friendly Societies Act, 1875, *it is provided that "Registered societies shall be entitled to the following privileges": Section* 15, *sub-section* 7: *"Upon the death or bankruptcy or insolvency of any officer of a society having in his possession, by virtue of his office, any money or property belonging to the society, or if any execution, attachment, or other process be issued or action or diligence raised against such officer or against his property, his heirs, executors, or administrators, or trustee in bankruptcy or insolvency, or the sheriff or other person executing such process, or the party using such action or diligence respectively, shall, upon demand in writing of the trustees of the society, or any two of them, or any person authorized, by the society or by the committee of management of the same, to make such demand, pay such money and deliver over such property to the trustees of the society in preference to any other debts or claims against the estate of such officer."*

The treasurer of a friendly society, who carried on business as a publican, became bankrupt. He was at the time indebted to the society in the sum of £100 6s. 7d., *which he had received by virtue of his office. The money did not exist in any specific or traceable form, but his property realized in the bankruptcy some* £290. *Upon a claim by the trustees of the friendly society to be paid in preference to the other creditors,*

Held (*affirming the* Divisional Court), *that it was not the intention of the above section of the Act of* 1875 *to repeal then existing privileges of friendly societies; that its application was not restricted to specific moneys, or to such as could be specifically traced; that the bankrupt had in his possession, by virtue of his office,* £100 6s. 7d. *belonging to the society; and that the trustees of the society were entitled, therefore, to be paid that sum in preference to any other claim upon the bankrupt's estate.*

Ex parte Edmonds, In re Atkins, 30 *W. R.* 432, *approved.*

Appeal from the Divisional Court.

The bankrupt, Miller, who also carried on business as a publican, was treasurer of a friendly society. As such he received subscriptions from members and payments on behalf of the society. At the time of his bankruptcy he was indebted to the society in respect of moneys so received to the extent of £100 6s. 7d., which he ought to have paid over. None of this money, however, could be specifically traced or earmarked, and the total amount standing to his credit at the bank was £13. The bankrupt absconded, and

(*a.*) Reported by JOHN P. MELLOR, Esq., Barrister-at-Law.

his property realized in the hands of the trustee some £290. Immediately after the receiving order had been made, a claim under the Friendly Societies Act, 1875, was made by the trustees of the society upon the official receiver. The official receiver applied to the court for directions, and the county court judge held, allowing the official receiver's objection to the claim, that there was no proof that the bankrupt had in his possession by virtue of his office £100 6s. 7d., the sum claimed. The trustees of the society appealed, and the Divisional Court (Vaughan Williams and Wright, JJ.) reversed the decision of the county court judge, and the official receiver now appealed from that decision.

Sir C. Russell, A.G., and *Muir Mackenzie*, for the appellant.—The language of section 15, sub-section 7 is different from that of the Act of 1855, which provides that any "debt" due from the officer to the society shall be preferential. Under the present Act the money or property is only to be handed over in preference to the claims of other creditors when it is the specific money or property in the specific possession of the bankrupt or is traceable. It is not because the court might think that a mistake had been made by the Legislature in dropping out the words of the former statute that it ought to be prepared to amplify this unless it will clearly bear the larger construction. The money must be in the bankrupt's possession just as the property must be "in his possession." The Act does not include property which may be turned into money. The section was required in 1875 to make the law clear as to money and property which could be followed: *In re Hallett*, 28 W. R. 732, 13 Ch. D. 696.

Herbert Reed, Q.C., and *F. Mellor*, for the respondents, cited *Ex parte Edmonds, In re Atkins*, 30 W. R. 432, and *Crowther* v. *Elgood*, 35 W. R. 369, 34 Ch. D., judgment of Cotton, L.J., at p. 695.

Lord ESHER, M.R.—In this case the treasurer of a friendly society has been made a bankrupt, and had, at the time of his bankruptcy, some money in his possession. There were also book debts owing to him, and other property which would produce money in collection, and all of which in the hands of his trustee would be distributable among the creditors. That being the state of things, the trustees of the benefit society, whose treasurer he was, and in respect of which he had received subscriptions which he had not paid over, claimed to be entitled to sums amount-to £100 6s. 7d. to be paid to them in preference to the other creditors. Now, whether they were so or not depends upon the construction of sub-section 7 of section 15 of the Friendly Societies Act, 1875. The trustees of the society say that gives them the right to be paid in preference out of any money of the bankrupt's in the bankrupt's trustee's hands; but it was said against that, on the other side, that they have no such privilege under the section, because they cannot say that the bankrupt officer had in his possession money of the society at the time of the bankruptcy according to the true interpretation of the section.

The Attorney-General admitted that if his contention was right the whole course of legislation was altered in 1875 in respect of these privileges after they had existed by legislation since 1793. The question, therefore, is, Do the words of the sub-section oblige the court to say that the Legislature had intended to make this startling alteration? If they do not oblige this court to come to such a conclusion, then the proper course for this court to adopt is to construe the section so as not to alter the long course of legislation. But when we come to think of this, it seems impossible to suppose that the Legislature did not intend to continue these privileges, unless, indeed they have not done so by inadvertence. These friendly societies have the money of poor people, often their entire savings, and if their money is to be treated in the hands of their officer as his money for the purpose of giving him credit, then poor people who had no control over it might be ruined. That would be a startling proposition to my mind at the present moment, when friendly societies are crashing, in many cases through the misconduct of some of their officers. I believe, however, that the course I have indicated is the right judicial course to take with regard to every Act of Parliament.

Now does this sub-section clearly take away the privileges which the friendly societies have enjoyed? There are other considerations which make the matter pretty clear, but if the section stood alone, and had been enacted for the first time, I should say that it did not. The sub-section speaks of any money "belonging" to the society. That is not a technical term, it is not "which is the property of the society," but is the largest term which the Legislature could use. The section goes on to deal with bankruptcy and the rights of the sheriff, and then it says that, upon demand in writing of the trustees of the society, the trustees in bankruptcy shall "pay" the money and "deliver over" the property of the society, thus clearly distinguishing the two things, and showing, to my mind, that property does not include money.

If it had been necessary to identify the actual money or property deposited I cannot think the terms used would have been "pay such money and deliver over such property": they ought to have been "deliver over such money and property." But then, further, you come to this: the section says, "in preference to any other debts." Now that is an English idiom, and the word "other" couples the two things together and shows that the payment of money is of the same kind as any other debt. And in the same way the property is to be delivered over in preference to any other claim; that is, something in actual existence, it must be claimed and delivered over in preference to the claim of delivery of some other property. Therefore the section shows that in given cases it is treated as money in the ordinary sense, and thus, if the bankrupt had money at the time of his bankruptcy, it is not to be said that it was not the very same which he received, and when you are treating of a bankrupt's estate, then everything he has which will be money in the hands of the trustee is money. There is this further consideration: the object of section 15 is expressed to be to give "the following privileges"; it follows, therefore, that sub-section 7 is a privilege. If, therefore, it means that the bankrupt's trustee is to hand over property which, without the section, he would be obliged to hand over by ordinary law, then the section would give no privilege at all. Therefore, in my opinion, the section means property beyond what can be affected by the ordinary law, and the only way in which this construction can be carried out is to apply it to money which is not specific money; and I think it is, perhaps, as clear as legislation generally is.

This larger interpretation was given to the section by Bacon, V.C., in 1872, and in *Ex parte Edmonds, In re Atkins*, and since that decision it must have been acted upon in hundreds of cases and never challenged. If, therefore, it is reasonably capable of the larger construction, that decision ought not to be upset. Moreover, since that decision was given, two statutes dealing with priorities—the Bankruptcy Act, 1883, and the Preferential Payments Act, 1888—have been passed, and in neither case was any step taken

to disturb it. That is not fatal it is true, but it is an observation, and I feel strongly, for my own part, that the decision was right. The appeal must therefore be dismissed, with costs.

LINDLEY and A. L. SMITH, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellant, *The Solicitor to the Board of Trade.*

Solicitor for the respondents, *A. H. Arnould.*

From Q. B. Div. (Lindley, Bowen, and A. L. Smith, L.JJ.) — Dec. 12, 13; Jan. 14.

ATTORNEY-GENERAL *v.* SMITH AND COCKS. (*a.*)

Inland revenue—Probate duty—Under-estimate of value—Close of administration—Subsequent discovery of true value—"Person acting in the administration of the estate"—Customs and Inland Revenue Act, 1881 (44 *Vict. c.* 12), *ss.* 32, 37.

Upon the death of a testator, who died in 1883, *a valuation for probate purposes of* (inter alia) *certain paintings, forming part of the estate, was made by a competent valuer, and the executors delivered an affidavit of account stamped on the basis of such valuation, and obtained probate. In* 1886 *the executors had fully administered and distributed the testator's estate, and since that date they had not any part of the testator's estate in their hands or under their control as executors. In* 1888 *it was for the first time discovered that the paintings had been considerably undervalued. No suggestion was, however, made of any* mala fides *or negligence on the part of either the executors or the valuer. Upon an information claiming to recover from the executors further duty upon the true value of the pictures, under section* 32 *of the Customs and Inland Revenue Act,* 1881,

Held, that the words "the person acting in the administration of such estate and effects" in section 32, *meant the person who is acting in the administration of the estate when the mistake as to undervalue is discovered; that, in the present case, the executors, having fully administered the estate at the time when the mistake as to the undervalue of the paintings was discovered, were not persons acting in the administration of the estate within the meaning of section* 32; *and, accordingly, that the Crown had no remedy against them.*

Decision of the Divisional Court (Hawkins *and* Wills, JJ.) (*reported* 40 *W. R.* 671, [1892] 2 *Q. B.* 289) *affirmed.*

Appeal by the Crown from the decision of the Divisional Court (Hawkins and Wills, JJ.), reported 40 W. R. 671, [1892] 2 Q. B. 289.

The defendants, the present respondents, were the executors under the will of a testator who died on the 3rd of June, 1883. The testator bequeathed to the defendants, his executors, six pictures—four of which were by Gainsborough, one by Sir Joshua Reynolds, and one by Hoare—as heirlooms, to go with the settled estate. In the valuation for probate duty, the picture by Hoare was by mistake omitted, and the other pictures were valued by a skilled valuer at £1,194 10s. Before probate was granted the Controller of Probate and Legacy Duties sent to the executors these questions:—"Is the value put upon the furniture such as would be accepted on a sale? And are any paintings or articles of *virtu* included? If so, please give particulars. Should a sale take place during the course of administration and a larger sum be realized additional duty will be payable." The following answer was given:—"The paintings and articles of *virtu* and most valuable portions of the furniture are made heirlooms, and will in the ordinary course not be saleable till the eldest son, now four or five years old, attains twenty-one. If the executors had been directed to sell them, they would have sold them on the value put upon them in the valuation for probate if more had not been offered." After the receipt of this answer the Controller raised no further question; the probate duty was paid on the basis of that valuation, and probate was granted on the 15th of August, 1883. Shortly afterwards the executors assented to the bequest of the pictures as heirlooms, and delivered them to the trustees, by whom they were handed over to the tenant for life of the settled estate.

The testator's estate was fully administered and wound up, and the administration was closed in March, 1886. Since then the defendants had not as executors had any part of the estate in their hands or under their control, nor had they in any way acted as executors. In 1888 leave was granted by the court under the Settled Land Act, 1882, to the tenant for life to sell certain of the pictures, and in the following September and January the six pictures were sold, and realized a sum of £14,500, of which £500 was for the omitted picture by Hoare.

In May, 1889, an account was delivered to the commissioners (by the solicitor to the tenant for life and to the defendants) of the income arising from this sum, and duty thereon was in course of payment by instalments. The commissioners thereupon brought the discrepancy in value thus disclosed to the notice of the defendants, and required them to deliver a further affidavit, stamped to cover the full value of the pictures. This the defendants, the executors, having fully wound up the estate and closed up the administration, declined to do.

An information was accordingly filed by the Attorney-General on behalf of the Crown, for the purpose of enforcing payment of further duty upon the affidavit for probate, under section 32 of the Inland Revenue Act, 1881.

The Divisional Court held that the defendants, the executors, were not, at the time of the discovery of the extra value of the pictures, "persons acting in the administration of the estate," and that the Crown was not entitled to recover further duty from them: 40 W. R. 671, [1892] 2 Q. B. 289.

Section 32 of the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), provides that, "if at any time it shall be discovered that the personal estate and effects of the deceased were, at the time of the grant of probate or letters of administration, of greater value than the value mentioned in the certificate . . . the person acting in the administration of such estate and effects shall, within six months after the discovery, deliver a further affidavit with an account to the Commissioners of Inland Revenue duly stamped for the amount which, with the duty (if any) previously paid on an affidavit in respect of such estate and effects, shall be sufficient to cover the duty chargeable according to the true value thereof."

The Crown appealed.

Sir Charles Russell, A.G., and *Vaughan Hawkins*, for the Crown.—The words "the person acting in the administration of such estate," &c., in section 32 of the Act of 1881 are intended to cover both an executor and an administrator, and they are equivalent to "legal personal representative." They would therefore include the executor of the executor of the original testator. An executor or administrator is answer-

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

able to the extent of the assets for any unsatisfied liability. The word "acting" means anyone who is bound to act.

They referred to sections 38, 40, 41, 43, and 51 of 55 Geo. 3, c. 184 (the former Probate Duty Act), and sections 26, 30, 32, 35, and 37 of the Act of 1881, and to *Jervis* v. *Wolferstan*, L. R. 18 Eq. 18; 22 W. R. Dig. 251.

Cozens-Hardy, Q.C., and *Dibdin*, for the respondents.—Various expressions are used in the Act of 1881. In section 27 the expression is "the person applying for the probate." In sections 32, 35, and 37 the expression is "the person acting in the administration of such estate." Section 42 uses the words "person acting in the execution of the will." Section 31 recognizes the fact that there is a period after which the administration must be recognized as closed; that section limits the period allowed for a return of overpaid duty in respect of debts to three years after the grant of probate, but there is nothing in that section to prevent an executor being allowed a return of overpaid duty in respect of other things at any time during the administration of the estate. We contend that the expression "the person acting in the administration of such estate" in section 32, implies that the administration is still going on, and that it has reference to an estate which is being administered. The Crown is protected against hasty administrations by section 37. In the Scotch Act (48 Geo. 3, c. 149, s. 38) the expression used is the "person intromitting with or assuming the management of," which shows that it has reference to an estate which is being administered. If the Legislature intended to throw a personal liability for all time on executors, it should in section 32 have used the words "legal personal representative" instead of "person acting in the administration of the estate"; it is, however, unreasonable to suppose that the Legislature intended to make a personal representative who has no assets in his hands liable to the Crown for the default perhaps of a previous representative of the estate.

Vaughan Hawkins, in reply.—I withdraw the contention that section 32 applies to an executor of an executor. Section 35, I admit, shows that the liability does not go beyond the original executor; the words mean, the person who acts under the probate or letters of administration dealt with in the section; the same is true of section 43 of the former Act. I contend that the words "person acting" in these sections mean, without reference to any particular period of time, the person who acts. I admit that under section 37 the Crown cannot call for explanations within the three years' limit from an executor of a deceased executor; if the original executor dies within the three years' limit, it is so much the worse for the Crown.

January 14.—A. L. SMITH, L.J., read the following written judgment of the court:—The point to be determined is, What is the true meaning of the phrase "the person acting in the administration of such estate and effects" in section 32 of the Customs and Inland Revenue Act, 1881? Does it mean the person who has acted by applying for and obtaining probate or letters of administration, or the person who is acting in the administration of the estate at the time the question arises as to the payment of further duty? By 48 Geo. 3, c. 149, s. 38, executors and others intromitting in Scotland with the effects of deceased persons were to exhibit an inventory thereof in the commissary court there, duly stamped, and if at any subsequent period a discovery should be made of any other effects belonging to the deceased, an additional inventory or inventories were to be made, verified by an affidavit by "any person or persons intromitting with or assuming the management of such effects," and in default a penalty was imposed. By 55 Geo. 3, c. 184, prior Acts were repealed, and the duties therein prescribed were imposed upon probate of wills and letters of administration in England and upon confirmations of testaments, testamentary or dative, and inventories to be exhibited in the commissary courts in Scotland. By section 41 of that Act it was enacted that "where any person on applying for the probate of a will or letters of administration" should have estimated the estate and effects of the deceased to be less than the same should afterwards prove to be, and should in consequence have paid too little duty, it should be lawful for the commissioners of stamps, on delivery to them of an affidavit of the value of the estate, to cause the probate or letters of administration to be duly stamped on payment of the full duty, and a further sum or penalty payable by law for stamping deeds after execution; and there was a proviso that the penalty might be remitted if the application was made within six months after the true value of the estate was ascertained and there had been no intention to deceive. By section 43 it was enacted that where too little duty should have been paid in consequence of mistake or misapprehension, "if any executor or administrator, acting under such probate or letters of administration," should not within six months after the passing of the Act or after discovery of the mistake or misapprehension, apply to the commissioner of stamps to make up the duty which ought to have been paid, he should forfeit £100, together with 10 per cent. upon the deficiency.

Now, pausing here, what is the meaning of the terms "any person applying for the probate of a will or letters of administration" and "any executor or administrator acting under such probate or letters of administration"? They appear to cover—first, the case of the person who was applying for the probate and letters of administration; and, secondly, the case of the person who, having obtained them, was then acting as executor or administrator under them. It was pointed out by Wills, J., in his judgment in the court below that, if the words "acting under such probate or letters of administration" were to have no meaning attached to them, he did not see why they were inserted, for the words "executor or administrator" would carry all that was desired, and in this we agree. The terms of the Scotch Act (48 Geo. 3, c. 149) appear to be synonymous with the words "an executor acting under such probate." The words are not "any person who has intromitted or has assumed the management of such estate," but intromitting with or assuming the management," which we read "is intromitting with or is assuming" such management. In our judgment these sections limited the liabilities therein imposed to those executors or administrators who were in fact acting when the liability arose, and the liabilities did not attach to those who, having once been executors or administrators, had ceased to act, having fully administered the estate of their deceased. In the year 1842, by 5 & 6 Vict. c. 82, the probate duty in Ireland, theretofore imposed by other statutes, was assimilated to that payable in Great Britain.

Such being the state of the law prior to 1881, we now come to the Act upon which the present question arises—viz., 44 Vict. c. 12. It will be noticed that sections 27, 28, and 29 use the same phrase as section 41 of 55 Geo. 3, c. 184—viz., "the person applying for the probate or letters of administration." In section 31 the phrase is, "if at any time after the grant . . . and during the administration." In sections 32, 35, and 37 the last phrase is omitted, and

there is inserted, "the person acting in the administration of such estate and effects." This is equivalent to the phrase "an executor or administrator acting under such probate or letters of administration." In section 43 it is "the person acting in the execution of the will." Neither the Attorney-General nor Mr. Vaughan Hawkins was able to give any intelligible reason for these alterations of language, though one would suppose, if the Act had been carefully drawn, that some such reason would have become apparent. In these circumstances what does section 32 mean? The Crown argues that the true meaning is that the executor or administrator who has applied for and obtained the probate or letters of administration is the person to file the affidavit and personally pay for the extra stamp, no matter whether he has long since ceased to act, having fully administered the estate, and has no assets whereout to recoup himself. The defendants' reading is, that the executor or administrator who is acting at the time the mistake is discovered is the person to file the affidavit and pay, for he personally would be able to recoup himself out of the estate he is administering; and that the section does not apply to an executor or administrator who has ceased to act, having fully administered the estate. There is obviously this result if the last reading be correct—viz., that at times the Crown may be unable to obtain the duty which it was entitled to, but we can find nothing in the Act of 1881 to show any intention to alter the liability of an executor or administrator to that which theretofore existed, and we may add that it would appear from Mr. Hanson's book that the practice of Somerset House has been only to look to the executor or administrator whilst the estate was being administered. In the next place, if the Crown's contention is right, it leads to what is a manifest absurdity—viz., that the executor of an executor might be personally liable for an accidental omission of his testator which took place whilst that executor was administering the estate of his testator, the mistake not being discovered until after the death of the first executor.

Mr. Vaughan Hawkins in reply, finding he could not maintain this proposition, abandoned it, and he then said that section 32 applied only to the personal liability of the executor who had made the mistake. By this means he hoped to surmount the difficulty, but we can find in the section no such limitation of liability if the words "the person acting in the administration of such estate" are read as applying to a person who had once acted by taking out probate or letters of administration. An executor, it must be remembered, is not usually liable to pay out of his own assets for the acts of his testator, and yet upon the Crown's construction of the section he may be. We are fully alive to the difficulty presented by section 37. It is pointed out, and with truth, that the words in this section 32 and in section 37 are the same, and it is said that if section 32 be read as the defendants contend, then the Crown may be deprived of the three years within which it may require explanations under section 37. This is so, but we answer that when once the Crown abandoned its claim to look to the executor of an executor it abandoned its indefeasible right to the three years under section 37, for an executor might well die within three years, and it had to be admitted that then the Crown's right was at an end.

In the result we read the words in section 32 as meaning the person who is acting in the administration of the estate when the mistake is discovered, and if there is no such person, the estate having been fully administered, the Crown is without remedy. It must not be forgotten that this is a taxing Act imposing pecuniary burdens, and it is well settled that all charges upon the subject, must be imposed by clear and unambiguous language. This certainly is not so in the present case, and no one can say that it is. In our judgment this appeal must be dismissed, with costs.

Appeal dismissed.

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

Solicitors for the respondent, *Wade & Lyall.*

High Court of Justice.

Chan. Div.
Vaughan Williams, J. } Jan. 16, 26.

FOWLER v. BROAD'S PATENT NIGHT LIGHT CO. (*a.*)

Company—Winding up—Debentures charging uncalled capital—Debenture-holder's action—Official receiver—Duty to make call—Companies Act, 1862, *ss.* 92, 95, 98, 102—*Companies (Winding-up) Act,* 1890, *ss.* 12, 13—*Companies Winding-up Rules,* 1890, *r.* 92.

When an order has been made for the winding up of a company by the court, the power of the company and its directors to make calls is ipso facto *at an end, and the only power to make calls is in the liquidator in the winding up. Consequently, an application after the winding up, asking that a company, by the official receiver, should make a call on shareholders for the amount unpaid on their shares, and that a receiver appointed in a debenture-holder's action should get in the amounts due on the shares, must be intituled in the winding up, as well as in the debenture-holder's action.*

The above-named company was incorporated in 1890 as a company limited by shares for the purpose of purchasing as a going concern the business belonging to James Broad and G. C. Fowler. There were never more than seven shareholders of the company—namely, Fowler, Broad, and T. G. Driver, who had each subscribed for one £1 founder's share, and 1,000 £1 ordinary shares, the remaining four shareholders having subscribed for one ordinary share.

The company had issued mortgage debentures which charged the undertaking and all the property of the company whatsoever, including its uncalled capital for the time being. All the debentures were in the hands of Fowler and Broad.

On the 2nd of December, 1891, Fowler commenced an action against the company and Broad, on behalf of himself and the other holders of first mortgage debentures in the defendant company, for an account to have the debentures enforced by sale, and for a receiver.

On the 23rd of January, 1892, an order was made by North, J., for the usual accounts and inquiries, and that the property comprised in the first debentures (other than the uncalled capital of the company) should be sold, and an inquiry what steps ought to be taken as to realizing and getting in the uncalled capital of the company if and so far as the same was comprised in and charged by the said debentures.

On the 4th of December, 1891, a petition was presented by an unsecured creditor, and on the 16th of January, 1892, an order was made for winding up the company, but leave was given to the plaintiff in the

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

debenture-holder's action to proceed with his action, notwithstanding the winding-up order.

A receiver and manager had been appointed in the debenture-holder's action.

The official receiver challenged the validity of the debentures on various grounds, but an agreement of compromise was executed on the 24th of June, 1892, between the official receiver and Fowler and Broad, whereby it was agreed that a sum should be paid to the official receiver to be applied first in payment of the costs of the winding up and of the liquidator of and incidental to the debenture-holder's action, and the preferential debts of the company; and next in payment to the creditors other than the debenture-holders of sums equal to 10s. in the pound on the amount of their debts provable in the winding up, and that on such payment being made the official receiver would not commence, take, or prosecute any proceedings for disputing the validity of the debentures.

Fowler now took out a summons, intituled in the debenture-holder's action alone, that the defendant company by the official receiver might make a call upon all the persons appearing in the share register to be members of the company, of 19s. on each share, and that the receiver in the action should get in and receive the amounts due in respect of the shares (other than the shares held by Fowler and Broad) on the allotment thereof and in respect of such call from (and, if necessary, take proceedings for the purpose in the name of the company against) all the shareholders except Fowler and Broad, and that the amount of the sums due and to become due in respect of the shares held by Fowler and Broad should be set off against the sums owing on the debentures.

J. G. Wood, for the summons, referred to *The Phœnix Bessemer Steel Co.*, 44 L. J. Ch. 683, 23 W. R. Dig. 45.

Muir Mackenzie, for the official receiver, said he objected to any order being made on the official receiver.—The liquidator cannot be asked to make the call as a mere ministerial act. The powers conferred on the official liquidator are confined to the powers conferred by section 95 of the Companies Act, 1862. The making of a call must be done by a resolution of the directors, and cannot be done by merely affixing the seal of the company.

He cited *Pyle Works*, 38 W. R. 674, 44 Ch. D. 534.

J. G. Wood in reply.—Every power which the company has vests in the liquidator, who has power "to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's seal" (Companies Act, 1862, s. 95). The liquidator is now asked to carry out the contract of the company, which is to be specifically performed by a call being made. I ask for nothing in the winding up. Whatever the company ought to have done when it was a going concern at the instance of the debenture-holders ought now to be done in the debenture-holder's action, and the liquidator must give effect to it. The official receiver has all the powers which were vested in the directors, and can make a call in the same way as they could have done, without settling a list and without any leave from the court.

At the conclusion of the argument VAUGHAN WILLIAMS, J., said he had no doubt that the applicant was substantially entitled to what was asked for, but he would like to consider the form of the order.

VAUGHAN WILLIAMS, J.—I have no jurisdiction to make the order asked for in the debenture-holder's action, though ultimately the applicant is entitled to the order he asks for—namely, to have the call made and to have the assistance of the official receiver in making it. I cannot make the order in the action. On a winding-up order being made, the power of making calls is confined to the powers conferred by statute of making calls. The powers of the directors to make calls then come *ipso facto* to an end, and the only power is in the official receiver, as liquidator in the winding up. The application must be amended by intituling it both in the winding up and in the action, and the official receiver must take proper steps for making and enforcing the call as asked by the summons. The receiver in the action will be at liberty to bring such actions or take such proceedings as may be necessary for getting in such call (except in respect of the shares of Fowler and Broad), and the other amounts mentioned in the summons, on the applicant giving an indemnity, to be settled in chambers if necessary, against all costs which the official receiver may incur or become liable for in respect of the incidental proceedings in the winding up or otherwise.

Solicitors, *Faithfull & Owen; James White; Coode, Kingdon, & Cotton.*

Q. B. Div.
(Day and Collins, JJ.) Jan. 26.

O'HARA, MATTHEWS, & Co. v. ELLIOTT & Co. (a.)

Practice—Costs—Taxation—Refresher fees—R. S. C., ord. 65, r. 27 (48).

By ord. 65, r. 27 (48), where a cause is tried upon vivâ voce *evidence in open court, "if the trial shall extend over more than one day, and shall occupy, either on the first day only or partly on the first and partly on a subsequent day or days, more than five hours, without being concluded, the taxing officer may allow for every clear day subsequent to that on which the five hours shall have expired" refresher fees to counsel.*

Held, that, when a trial has not occupied five hours on the first day, but on the second day the five hours are completed and a further period is occupied on that day before the case is concluded, a "clear day" begins after the expiration of the five hours, and refresher fees may may be allowed in respect of the further period of work done on the second day.

Walker *v.* The Crystal Palace District Gas Co., 39 *W. R.* 716, [1891] 2 *Q. B.* 300, *not followed.*

The Courier, 40 *W. R.* 336, [1891] *P.* 355; Gibbs *v.* Barrow, 30 *S. J.* 538; *and* Collins *v.* Worley, 60 *L. T. N. S.* 748, 37 *W. R. Dig.* 58, *approved.*

Appeal from chambers.

The action was tried before Lawrance, J., at the Guildhall, on the 15th and 16th of November, 1892, and lasted for upwards of four hours on the first day and for over five hours on the second day of the trial, resulting in a verdict and judgment for the plaintiffs with costs.

The plaintiffs carried in their bill of costs for taxation; it included an item of ten guineas for a refresher fee to the plaintiffs' leading counsel, which was disallowed by the master. The plaintiffs objected to this disallowance, and the master refused to alter his taxation on the following grounds: "As the five hours in this case did not expire on the first day and the case was concluded on the second day, it is clear according to the express wording of rule 48 as

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

explained by Wills, J., in *Walker* v. *The Crystal Palace District Gas Co.*, 39 W. R. 716, [1891] 2 Q. B. 300, that the plaintiffs' counsel are not entitled to refreshers. It is true that in *The Courier*, 40 W. R. 336, [1891] P. 355, Sir Charles Butt appeared to take a different view, but of the two judgments I infinitely prefer that of Wills, J., by which I consider myself bound (even if I disagreed with it, which I do not), and always act upon it. In truth the question of refreshers does not arise in this case, as on the first day the case did not last five hours, and no question of refresher arises until the day after that on which the five hours expire."

The plaintiffs appealed, and Mathew, J., in chambers, referred the question to the court.

Ord. 65, r. 27 (48), provides as follows:—"As to refresher fees when any cause or matter is to be tried or heard upon *vivâ voce* evidence in open court, if the trial shall extend over more than one day, and shall occupy either on the first day only, or partly on the first and partly on a subsequent day or days, more than five hours, without being concluded, the taxing officer may allow, for every clear day subsequent to that on which the five hours shall have expired, the following fees:—To the leading counsel, from five to ten guineas, &c. The like allowances may be made where the evidence in chief is not taken *vivâ voce*, if the trial on hearing shall be substantially prolonged beyond such period of five hours, to be so computed as aforesaid, by the cross-examination of witnesses whose affidavits or depositions have been used."

Trevor White, for the plaintiffs.—The decision of the master was wrong. The meaning of the sub-rule is that counsel must give a clear day of five hours for the fee on his brief; when the five hours have expired another clear day begins—not necessarily a new day of the week—and in respect of this new period after the five hours he is entitled to be allowed a refresher fee on taxation. *The Courier* was decided after the decision in *Walker* v. *Crystal Palace District Gas Co.*, and is inconsistent with it; other decisions in my favour, since the Rules of 1883, are *Gibbs* v. *Barrow*, 30 SOLICITORS' JOURNAL, 538, and *Collins* v. *Worley*, 60 L. T. N. S. 748, 37 W. R. Dig. 58; and in *Boswell* v. *Coaks*, 36 W. R. 209, 36 Ch. D. 444, North, J., appears to take a similar view. This construction is borne out by the second paragraph of the sub-rule.

Wildey Wright, for the defendants.—The construction of the rule is clear; no refresher fee can be allowed except for time occupied on a day of the week subsequent to that on which the first five hours have expired. [COLLINS, J.—Does not "clear day" mean a new period clear of the first five hours?] "Clear day" means a distinct day of the week, so that if three hours are occupied on a Monday and two on the Tuesday, no part of Tuesday can be a clear day. The words in the second paragraph cannot control the clear words of the first paragraph.

DAY, J.—I quite agree with what the late Sir Charles Butt said in *The Courier* with reference to that case—that it was not altogether free from difficulty. I think this case presents a great deal of difficulty, and I am by no means satisfied that we have arrived at the right construction of this sub-rule. But any other construction would lead to so much inconvenience and injustice, and would be so inconsistent with the practice of the profession, that I think we are justified in adopting the subtle, yet sound, construction which has been suggested by my brother Collins. I have considered that suggestion, which I think avoids the mischief of the construction which was put upon the sub-rule in *Walker* v. *Crystal Palace District Gas Co.*, and I shall adopt it. The sub-rule is peculiar in its language, but it seems to me that it does not exclude the right to a refresher where a case is prolonged on the second day of the hearing over and above the first five hours. Its object was to prevent the allowance of refreshers where a case began late on one day and ran into an hour or two on the second day; it makes an attempt to regulate the length of the working day in estimating the number of days occupied by a case.

If this is not a sound construction, the sub-rule for the regulation of refresher fees is a very inconvenient one, and not, as I think, in accordance with sound reason. It provides that "when any cause or matter is to be tried or heard upon *vivâ voce* evidence in open court the trial shall extend over more than one day, and shall occupy"—here the length of the first day is regulated—"either on the first day only, or partly on the first and partly on a subsequent day or days, more than five hours without being concluded"—that means, in my view, that the first day is, for the purposes of this sub-rule, to be considered as a period of at least five hours, and the five hours may be made out partly on the first and partly on the second day of the week, but until the first five hours run out there is to be no question of refresher fees—when they have run out "the taxing officer may allow for every clear day subsequent to that on which the five hours shall have expired the following fees." What is meant by "clear day"? I think it means such a clear day as is referred to in the preceding words—namely, another day clear and distinct from the five hours. After they have expired there must be some time occupied, but not necessarily on a different day of the week. If you have to borrow from one day to the other to make up the five hours, the second day must not begin to be reckoned until the five hours have been made up. Thus, if a case lasts for three hours on Monday and for two hours on Tuesday—that is five hours altogether—when those hours have expired another day begins—a clear day, clear from the five hours; it is then that time can be reckoned for a refresher fee. That is the view which Sir Charles Butt took in *The Courier*, and, as he points out, on any other construction it is difficult to give a meaning to the subsequent provision of the same sub-rule: "the like allowance may be made when the evidence in chief is not taken *vivâ voce* if the trial or hearing shall be substantially prolonged beyond such period of five hours, to be so computed as aforesaid, by the cross-examination of witnesses whose affidavits or depositions have been used." The construction put upon the sub-rule in *Walker* v. *The Crystal Palace District Gas Co.* is not easily reconcileable with that provision.

For these reasons I think the decision of the master was wrong, and must be reversed.

COLLINS, J.—I am of the same opinion. No doubt the sub-rule is difficult to construe in such a way as to give the effect to it which we must suppose to have been intended by its framers. But the part of the rule which it is easy to understand helps us to understand the part which is not so clear. It is clear that there must be five hours to start with—that time, is considered to represent one full day's work. After that time has expired it would seem to follow that the right to refresher fees for work done afterwards should begin; it would seem to follow that after the five hours were made up, refresher fees should be allowed for work done on each subsequent day of the week. If the five hours are completed on the first day and counsel are occupied for some hours more upon that day it may be taken to have been the intention that they should throw that extra time in, as

it were, for the brief fee. In making a claim for a refresher fee in respect of that extra time no clear day subsequent to the expiration of the five hours can be pointed to, and it may be that the rule is intended to exclude such extra time on the first day. But the five hours may be made up (as in this case) out of the first and second days together, and on the second day there may be some hours' work over and above the five hours; then counsel is able to point to a clear day on which he has done work without counting the five hours. If it had been necessary to count any of the five hours there would be no clear day, because some of the hours have to be borrowed from the preceding day; but if he can show so many hours' work on the second day of the week clear of the five hours he is not bound to draw upon the five hours in order to justify his claim for a refresher fee for work done on that second day; that work is, in my opinion, done on a clear day within the meaning of the sub-rule. That construction is made possible by the second part of the rule, which deals with cases where the evidence in chief is on paper and the cross-examination is *vivâ voce*. There is no reason why the measure of time should not be the same in both parts of the sub-rule, and I think that the words "such period of five hours to be so computed as aforesaid" give an intimation that the framers of the sub-rule thought that they had provided in both parts of it for the same period of time after which the allowance of refresher fees might begin. It is true that Denman and Wills, JJ., decided otherwise, but Sir Charles Butt differed from that view in *The Courier*, and Grantham, J., in *Gibbs* v. *Barrow*, after consulting with another judge, and Chitty, J., in *Collins* v. *Worley* decided in the sense of our present decision. It appears, therefore, that the weight of authority, as well as of common sense, is in favour of our view.

Appeal allowed.

Solicitor for the plaintiffs, *A. M. Bradley.*

Solicitor for the defendants, *S. W. Riley.*

Q. B. Div.
(Lord Coleridge, C.J., and Cave, J.) Jan. 19.

WHITE *v.* COHEN. (*a.*)

County court—Practice—Costs—Action commenced in High Court and transferred to county court—Less than £20 recovered—County Courts Act, 1888 (51 *&* 52 *Vict. c.* 43), *ss.* 65, 116.

Section 116 *of the County Courts Act,* 1888, *provides, with respect to any action brought in the High Court which could have been commenced in a county court, that "if, in an action founded on contract, the plaintiff shall recover a sum less than twenty pounds, he shall not be entitled to any costs of the action."*

Held, that the above provision applies to actions commenced in the High Court and transferred to a county court under section 65 *of the same Act; and that, therefore, where a plaintiff in such an action has recovered less than £20 at the trial in the county court, that court has no power to allow him any costs.**

Harris *v.* Judge, ante, *p.* 9, [1892] 2 *Q. B.* 565, *commented on and followed.*

Appeal from the decision of the judge of the City of London Court upholding the refusal by the registrar of that court to tax the plaintiff's costs of the action.

The action was brought in the High Court, the plaintiff claiming £27 10s. for goods sold and delivered. By an order made under section 65 of the County Courts Act, 1888, the action was transferred before trial, to the City of London Court. The defendant pleaded a set-off of £8 2s. for goods sold and delivered. The case was by consent of both parties tried before the registrar, who found that the plaintiff was entitled to succeed on his claim and the defendant on his set-off. He accordingly entered judgment for the plaintiff for £19 8s. The plaintiff carried in a bill of costs for taxation, but the registrar was of opinion that he had no power to tax it by reason of the provisions of section 116 of the County Courts Act, 1888. The judge of the City of London Court, upon appeal, upheld the decision of the registrar. The plaintiff then appealed to this court.

The County Courts Act, 1888, provides as follows: Section 65. "Where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed one hundred pounds, or where such claim, though it originally exceeded one hundred pounds, is reduced, by payment, an admitted set-off, or otherwise, to a sum not exceeding one hundred pounds, it shall be lawful for either party to the action at any time, if the whole or part of the demand of the plaintiff be contested, to apply to a judge of the High Court at chambers to order such action to be tried in any court in which the action might have been commenced, or in any court convenient thereto, . . . and the action and all proceedings therein shall be tried and taken in such court as if the action had been originally commenced therein; and the costs of the parties in respect of proceedings subsequent to the order of the judge of the High Court shall be allowed according to the scale of costs for the time being in use in the county courts, and the costs of the order and all proceedings previously thereto shall be allowed according to the scale of costs for the time being in use in the Supreme Court."

Section 116. "With respect to any action brought in the High Court which could have been commenced in a county court, the following provisions shall apply:

"(1) If in an action founded on contract the plaintiff shall recover a sum less than twenty pounds he shall not be entitled to any costs of the action; and if he shall recover a sum of twenty pounds or upwards, but less than fifty pounds, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county court."

Sub-section 2 makes provision as to the costs of actions founded on tort, and the section continues: "Unless in any such action, whether founded on contract or on tort, a judge of the High Court certifies that there was sufficient reason for bringing the action in that court, or unless the High Court, or a judge thereof at chambers, shall by order allow costs."

Hume Williams (*Herdman* with him), for the plaintiff.—The decision of the county court judge was wrong. As soon as this case was transferred to the county court it became a county court action for all purposes, and the costs are to be taxed upon the county court scale. That is laid down by section 65, which is the section dealing with transferred actions and their costs. Section 116 only applies to actions which remain in the High Court and are tried there. That that is so, is clear from the language of the proviso, which gives power to "a judge of the High Court" to certify that there was sufficient

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* But see *Armitage* v. *Fison*, 67 L. T. N. S. 415.

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

reason for bringing the action in that court. It has been held by the Court of Appeal in *Harris* v. *Judge*, *ante*, p. 9, [1892] 2 Q. B. 565, that a judge of the High Court cannot give this certificate in the case of a transferred action, and a county court judge cannot do so. Therefore, if section 116 applies to transferred actions, the plaintiff has no power of obtaining such a certificate entitling him to costs. The corresponding section (section 5) of the County Courts Act, 1867 (30 & 31 Vict. c. 142), gives a similar power to certify to "the judge," and that power was exercised in transferred actions by the judge of the county court where the case was tried: *Taylor* v. *Cass*, 17 W. R. 860, L. R. 4 C. P. 614. The Legislature, when, by section 116 of the Act of 1888, they confined the exercise of this power to "a judge of the High Court," gave in compensation to the county court by section 65 the sole control over the costs of transferred actions.

Haldinstein, for the defendant, was not called upon to argue.

Lord COLERIDGE, C.J.—In this case it appears to me that the contention of the appellant is wrong, and that the decision of the judge of the City of London Court was correct. Whatever may have been the practice before the year 1888, I am of opinion that since the passing of the County Courts Act of that year there is no jurisdiction in the county court judge to allow costs in such a case as this. That is the point before us, and it is all we have to decide.

The case of *Taylor* v. *Cass*, which was cited to us, although it seems to me to be an unsatisfactory decision, is an authority for the statement made by counsel for the appellant, that a county court judge before whom a remitted action was tried exercised the power given under the earlier Act to grant a certificate entitling the plaintiff to costs, and if we were dealing with a case under the earlier Act I should yield to that decision. But the more recent enactment is inconsistent with the decision in *Taylor* v. *Cass*, and I need not further discuss that case; it has been removed by the effect of the County Courts Act, 1888.

That Act must be construed according to its literal sense, unless some monstrous result arises from so construing it. The plain words of an Act of Parliament must be followed, and if consequences arise which were unexpected, it must be left to the Legislature to correct the effect of the Act. But in the present case I do not see that the enactment is an unwise one, and I am quite sure that it is very plain. The provisions of section 116 are to apply "with respect to any action brought in the High Court which could have been commenced in a county court"; that is precisely the case here: the section continues, "if in any action founded on contract the plaintiff shall recover a sum less than twenty pounds he shall not be entitled to any costs of the action." It is impossible to doubt what that means. Here the plaintiff has brought in the High Court an action which could have been commenced in the county court, and he has recovered less than twenty pounds. Therefore this is a case in which his costs are taken away by the Legislature in plain, unambiguous words.

Then it is said that there are words in the section which show that that was not the intention of the statute—"unless in any such action, whether founded on contract or on tort, a judge of the High Court certifies that there was sufficient reason for bringing the action in that court." It appears from those words that the only person who can interfere with the universality of this enactment, which absolutely takes away costs in certain cases, is "a judge of the High Court." The section does not merely say "a judge"; so that there can be no doubts, and no such practice can arise as to the exercise of this power by the judge of the county court as appears to have arisen under the earlier Act. This certificate can only be given by a judge of the High Court, and it is therefore impossible for the county court judge to allow costs in a case which comes within section 116.

It was said, again, that this statute has received judicial construction from the Court of Appeal, by which we are bound. But the case of *Harris* v. *Judge*, so far from giving countenance to the contention of the appellant, is in favour of the respondent. That was an action remitted to a county court in which the plaintiffs recovered more than £20, though less than £50. It was sought to obtain, after the trial in the county court, an order to tax the costs upon the High Court scale, and the Lords Justices held that there was no jurisdiction to make such an order. They all concurred in holding that the Act of 1888 applies to such an action, and that if a plaintiff brings such an action in the High Court he does so at the peril of being deprived of his costs. It is said that that is a hardship; but it seems to me that the view taken by the Legislature is that a suitor cannot be prevented from bringing his action in the High Court, but that he must run the risk, if he fails to recover £20 in an action founded on contract, of losing all costs whatever. I can see nothing inexpedient in that view. Not only are we deciding according to the express words of the statute, but our decision is supported by the judgment of the Court of Appeal in the case to which I have referred.

CAVE, J.—I am of the same opinion. The question we have to decide is whether this case is governed by section 65 or by section 116 of the County Courts Act, 1888. Section 65 applies only to actions founded on contract brought in the High Court, but it includes certain actions founded on contract which could not have been commenced in a county court; it gives power to order the transfer of such actions to the county court, and it deals with the costs of such actions—"the costs of the parties in respect of proceedings subsequent to the order of the judge of the High Court shall be allowed according to the scale of costs for the time being in use in the county courts." That is a general provision, and I do not apprehend that there is anything to prevent the Legislature from introducing exceptions with respect to actions which would otherwise fall within section 65. They have done so by section 116, which relates to actions founded upon contract and also to actions founded upon tort, but only to actions which could have been commenced in a county court; that section, therefore, only deals with a part of the subject-matter which is dealt with by section 65.

For saying that section 116 applies to actions which have been remitted from the High Court to the county court we have the authority of the Court of Appeal in *Harris* v. *Judge*, for all the judges who decided that case were agreed that it applies. The judgment of Lindley, L.J., is not quite so clear as to this, as are the judgments of the other two Lords Justices, who are very express on the point. But that that was the view of Lindley, L.J., is manifest, because he held that the plaintiff in that case, who had brought his action in the High Court, and whose action had been remitted to the county court, could not have his costs upon the High Court scale when he had recovered more than £20, but less than £50. Lindley, L.J., therefore, as well as the other Lords Justices, held that section 116 applied, and also that a judge of the High Court had no jurisdiction to grant a certificate under that section. The other Lords Justices are express upon the question, and Kay, L.J.,

at the close of his judgment puts it in the strongest possible language. He says:—"Section 65 empowers a judge at chambers to transfer any actions in which not more than £100 is claimed to a county court, and provides that when the order is made, 'the action and all proceedings therein shall be tried and taken in such court as if the action had been originally commenced therein.' The costs subsequent to the transfer are to be on the county court scale, 'and the costs of the order and all proceedings previously thereto shall be allowed' on the High Court scale. After such transfer therefrom the judge of the High Court has no further jurisdiction in the action. And as to costs, if less than £50 is recovered, in my opinion, section 116 applies, and not section 65, and only county court costs can be given as to any part of the action." Therefore the Lord Justice expresses a strong conviction that section 65 is qualified by section 116, and that section 116 applies to all actions which might have been commenced in a county court when they have been commenced in the High Court and transferred to a county court. If section 116 applies, it is clear that if the plaintiff recovers less than £20 he cannot get any costs unless he brings himself within the proviso. Lindley, L.J., in *Harris* v. *Judge* says:—"In a transferred action the rules contained in section 116 must, in my opinion, be applied by the judge of the county court to which the action has been transferred." I should have a difficulty in following that, and the other Lords Justices express no such view. But that question does not arise here, for the plaintiff does not rely on any certificate under the proviso in section 116, but asserts that he is entitled to his costs without any such certificate. I think it is clear, and in accordance with the decision in *Harris* v. *Judge*, that in the absence of such a certificate—which the plaintiff has not obtained, and, perhaps, could not obtain—he is not entitled to have his costs taxed by the registrar, and that the county court judge was right in so holding.

Appeal dismissed; leave to appeal granted.

Solicitor for the plaintiff, *Henry Pumfrey.*

Solicitors for the defendant, *Prince, Ayres, & Austen.*

Q. B. Div.
(Lord Coleridge, C.J., and Wills, J.) Nov. 19.

REG. v. JUSTICES OF MISKIN HIGHER. (*a.*)

Licensing law — Renewal — Grounds of objection — "Disorderly character"—Evidence—Justices' discretion—Licensing Acts, 1872 (35 & 36 *Vict. c.* 94), *s.* 42; *and* 1874 (37 & 38 *Vict. c.* 49), *s.* 26.

Upon an application for the renewal of a licence, the notice of objection pursuant to section 26 *of the Licensing Act,* 1874, *stated three grounds of objection, one of which was, "That your house is of a disorderly character." Upon the hearing of the application the justices admitted evidence of three convictions against previous holders of the licence, but it was admitted that the applicant bore a good character.*

Held, that the evidence was properly admitted, inasmuch as it was not necessary that evidence directed to the disorderly character of a licensed house, should be confined to such matters only as affected the personal character of the applicant by showing that he himself had contributed to the disorderly character of the house.

(*a.*) Reported by JOHN P. MELLOR, Esq., Barrister-at-Law.

Rule *nisi* for a *mandamus* to justices to hear and determine.

The facts are shortly as follows: An application was made to the justices of Miskin Higher by a man named Pitman, the licensed occupier of the Angel Inn at Aberdare, for a renewal of his licence. Previous to the general annual licensing meeting he had received notice of opposition from the superintendent of police for the district in the following terms: "That I shall at the next general licensing meeting object to the renewal to you of the licence to sell intoxicating liquors at your house, 'The Angel Inn,' upon the following grounds: That a house licensed for the sale of such liquors is not required in the neighbourhood in which your house is situate. That your house is of a disorderly character. That your house is not structurally adapted for the business carried on there."

At the general annual licensing meeting on the 23rd of August, 1892, the application was adjourned as objected to, until the adjourned licensing meeting on the 27th of September, and notice was served on the applicant requiring him to attend personally. On the hearing of the case evidence was tendered in support of the objection to the effect that in 1880, 1890, and 1891 previous holders of the licence had been convicted of permitting drunkenness and of keeping the house open on Sunday. This evidence was objected to by the solicitor to the applicant, as no notice had been received that such ground would be relied upon, but the justices admitted the evidence. Evidence was also given as to the structural defects, but that ground was ultimately withdrawn, and it was admitted that the applicant was of good character. The justices decided to refuse the renewal of the licence, the chairman stating that they did so on the ground of the previous convictions. A rule *nisi* was then obtained for a *mandamus* to the justices to rehear the application.

By section 42 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), it is provided that "where a licensed person applies for the renewal of his licence the following provisions shall have effect":—Sub-section 2. "The justices shall not entertain any objection to the renewal of such licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence has been served on such holder not less than seven days before the commencement of the general annual licensing meeting: provided that the licensing justices may, notwithstanding that no notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard, and the objection considered, as if the notice hereinbefore prescribed had been given." "Subject as aforesaid, licences shall be renewed, and the powers and discretion of justices relative to such renewal shall be exercised as heretofore."

By section 26 of the Licensing Act, 1874 (37 & 38 Vict. c. 49), it is provided that ". . . a notice of an intention to oppose the renewal of a licence under section 42 of the principal Act shall not be valid unless it states in general terms the grounds on which the renewal of such licence is to be opposed."

J. V. Austin, for the justices, showed cause.—First, if the applicant is properly before the court on any objection whatever the justices have jurisdiction to exercise their discretion judicially upon any ground, even although it is not specified in the notice of objection. The sections nowhere say that the only grounds on which the justices shall act are those specified: see *per* Lush, L.J., in *Ex parte Martin*, 40

J. P., at p. 133. The 42nd section leaves the justices' discretion unfettered when the provisions of the section have been complied with, and when the objection is not personal to the applicant notice is not necessary: *Sharp* v. *Wakefield*, 39 W. R. 561, [1891] A. C., *per* Lord Hannen, at p. 188. Secondly, the previous convictions were evidence of the disorderly character of the "house," which was one of the grounds specified in the notice of objection, and the only way in which you can arrive at what "is" the character of the house is by reference to its history.

J. Paterson, in support of the rule.—As to the second point, evidence of conviction of previous holders of the licence could not be relevant against the present applicant. The disorderly character contemplated by the objection must mean the character of the man, not of the house: bricks and mortar could not be disorderly. But even if it were relevant such evidence would not make the house of a disorderly character; every technical irregularity renders a landlord liable to conviction. [Lord COLERIDGE, C.J.—But the Act of 1872 enacted that it should be a ground of objection that the house was of a disorderly character, which seems to show that the Legislature were not of your view.] That must mean in strictness the character of the occupier. [WILLS, J.—But by the Wine and Beerhouse Act, 1869, it is a ground of objection to an applicant for the first time.] Even if this were a house within that Act, and the applicant was found to be of good character, no conviction of a former holder of the licence would be admissible in evidence: *Reg.* v. *Justices of Merthyr Tydvil*, 14 Q. B. D., *per* Lord Coleridge, C.J., at p. 587, 33 W. R. Dig. 122. [Lord COLERIDGE, C.J.—My remarks there applied to a different part of the section.]

Lord COLERIDGE, C.J.—I am of opinion that this rule must be discharged. It is an application for a *mandamus* to the justices to hear and determine, and their answer is that they have done so. It is said that the application was not heard upon proper grounds or upon proper evidence. I don't agree. I think the justices have acted within their powers.

Now the applicant was a man of good character. The notice of objection stated that "the house is of a disorderly character." The evidence given in support of that was three convictions, all of which might have taken place without personal discredit to the applicant, but were such as, in the minds of the justices, showed that the house was disorderly. Mr. Paterson says that bricks and mortar cannot be "disorderly"; but in one sense I do not agree with him, and Parliament apparently does not do so either, because Parliament, in the Wine and Beerhouse Act, 1869, s. 8, sub-section (2), says that the licence may be refused to a new applicant because the "house" is "disorderly." That is a parliamentary phrase, and in the Act it is distinguished from the character of the applicant, and the objection is, therefore, a perfectly fair one.

Then it is said, even supposing it is so, the evidence here is not receivable, because it has nothing to do with the personal character of the applicant. True; but it applies to the house, and I have already observed that the house and the character of the applicant are distinguished by the Legislature. Again, it is said that the evidence was insufficient. That is, of course, a question of fact for the justices. There are cases in which one conviction would suffice; there are others in which very many would not.

The larger question has been practically settled in the House of Lords, and it is not for other tribunals to fritter away their decision; but I give my judgment upon the ground that the justices had jurisdiction.

WILLS, J.—I am of the same opinion. I think the short result of *Sharp* v. *Wakefield* as to this is that the justices are at liberty to go into other relevant grounds which may suggest themselves, but when the objection is not personal to the applicant it is not necessary to give notice. But here I think that does not apply, because they did act upon the ground specified in the notice of objection. The question is, therefore, whether they had any evidence of it. It is no doubt a good objection if it is not specified, but Mr. Paterson says that it means no more than that the applicant has contributed to the disorderly character of the house. I cannot agree, for I think the policy of the Act was to mean a good deal more. In the Wine and Beerhouse Act of 1869 expressions are used which show what really is meant. Under that Act a certificate is granted for a year, and it is made an objection to a new applicant that the "house" is of a disorderly character (section 8, sub-section (2)). I think the policy of the Act was intended to insure good order. Everyone knows what a well-conducted house means; it is in one sense a solecism, but it is a common expression applicable to what is done in the house, and I think the Legislature deliberately intended, no matter whose hands the house was in, that if the house had a certain character stamped upon it, the justices might consider it. I think the evidence was perfectly legitimate, and if I had to decide the question of character, about the first question I should ask would be, whether there had been any previous convictions. I think that Parliament intended that that state of things should not be got rid of, by merely transferring the business.

Rule discharged.

Solicitors for the justices, *Bell, Brodrick, & Gray*, for *Lewis & Jones*, Merthyr Tydfil.

Solicitors for the applicant, *Purkis & Co.*, for *Phillips & Son*, Aberdare.

Q. B. Div.
(Lord Coleridge, C.J., and Wills, J.) — Nov. 17, 18.

FELLOWS *v.* OWNERS OF THE VESSEL "LORD STANLEY." (*a.*)

County court—Practice—Liverpool Court of Passage—Admiralty jurisdiction—Rule empowering registrar to give summary judgment—Invalidity—Prohibition—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *ss.* 10, 12, 23, 25, 35—*County Courts Admiralty Jurisdiction Amendment Act*, 1869 (32 & 33 *Vict. c.* 51), *ss.* 1, 6.

Under section 6 *of the County Courts Admiralty Jurisdiction Amendment Act*, 1869, *the assessor of the Court of Passage, Liverpool, has power to make general rules and orders for regulating the practice and procedure of the admiralty jurisdiction of that court.*

Held, that a rule conferring on the registrar of the court a power of summary judgment similar to that exercised under order 14 *of the Rules of the Supreme Court*, 1883, *was invalid.*

Motion for a prohibition to prohibit the enforcement of an order made by the deputy registrar of the Liverpool Court of Passage, referred to the court by the judge in chambers.

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

The action was an admiralty action *in rem* brought in the Court of Passage, Liverpool, to recover a sum of money alleged to be due to the plaintiffs for services rendered by them as seamen on the vessel *Lord Stanley*.

The action was defended by the mortgagee in possession of the vessel.

The plaintiffs took out a summons in the Court of Passage, calling on the defendant to show cause why the plaintiffs should not sign final judgment in the action.

The defendant objected that there was no jurisdiction in the Court of Passage to make a summary order for judgment, but the deputy registrar overruled the objection and made an order giving the plaintiffs leave to sign final judgment for the amount claimed and costs. The deputy registrar acted under an order for "regulating and amending the practice and procedure" of the Court of Passage made on the 10th of February, 1882, by the assessor and presiding judge of the court. That order was as follows:—"Whereas it is desirable in admiralty actions *in rem* or *in personam* brought in the said Court of Passage to recover a debt or liquidated demand in money, with or without interest, upon a contract, express or implied (as, for instance, for wages, necessaries, towage, or payment of a liquidated amount of money), and the writ of summons has been specially indorsed with the particulars of the amounts sought to be recovered after giving credit for any payment or set-off, the plaintiff shall be at liberty where the defendant appears to a writ of summon so indorsed, or where a third person, by leave of the court, intervenes in any such action, to apply for leave to enter up judgment or decree, and to issue execution thereupon as hereinafter mentioned; I do order that when an appearance has been entered to a writ of summons so specially indorsed as aforesaid, the plaintiff may, on affidavit made by himself or by any other person who can swear positively to the debt or cause of action, verifying the cause of action and stating in his belief that there is no defence to the action, call on the defendant or such third person to show cause before the assessor or registrar why the plaintiff should not be at liberty to enter up judgment or decree for the amount so indorsed, together with interest, if any, and costs. A copy of the affidavit shall accompany the summons or notice of motion. The assessor or registrar may thereupon, unless the defendant or such third person as aforesaid, by affidavit or otherwise, satisfy the assessor or registrar that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to enter up judgment or decree accordingly, and to proceed to execution thereupon as in ordinary cases in admiralty actions in the said court."

J. D. Crawford, in support of the writ.—Admiralty jurisdiction was conferred on the Court of Passage by section 25 of the County Courts Admiralty Jurisdiction Act, 1868, which gave it the same powers in admiralty as were conferred on county courts which have admiralty jurisdiction. Section 13 of that Act provides that admiralty causes in county courts are to be heard by the judge, and (section 10) are to be tried in the same way as civil causes. This order as to procedure made by the assessor, conferring jurisdiction on the registrar, is contrary to these provisions. Section 6 of the amending Act of 1869 (which Act is to be read as one with the Act of 1868) gives the assessor power to make rules and orders regulating the practice and procedure of the Court of Passage, but it was only intended that the assessor should have the same power of making rules as county court judges had by section 35 of the Act of 1868. This order gives, in effect, the procedure of order 14 to the Court of Passage, but county courts have no such procedure, and it was the intention of these statutes to deal with the Court of Passage on the same basis as county courts.

He referred to *The Ganges*, 5 P. D. 247, 29 W. R. Dig. 61; *Speers* v. *Daggers*, 1 Cababé & Ellis, 503.

Dr. Commins, for the plaintiffs.—The writ should be refused. This is not a question of jurisdiction, but of procedure, and the order is a valid order.

Pickford (*Joseph Walton, Q.C.*, and *W. F. Taylor* with him), on behalf of the Mayor and Corporation of Liverpool, opposed the motion for the writ.—The assessor of the Court of Passage had power to make this rule. The power to make rules given to him by section 6 of the Act of 1869 is the same as that given to the judges of the High Court. The latter have in certain cases delegated their jurisdiction to masters, and so in this case the assessor has delegated his jurisdiction to the registrar. The assessor has power to make rules and regulations dealing with the practice and procedure of his court. The use of the word procedure shows that something wider than practice in the ordinary sense of the word was intended, and it would include such a rule as this one, for the power to proceed summarily is a procedure.

He referred to *In re Mills*, 35 W. R. 65, 34 Ch. D. 24; *Ind* v. *Emmerson*, 36 W. R. 243, 12 App. Cas. 300.

Crawford replied.

Lord COLERIDGE, C.J.—The question to be determined in this case is whether the judge of the Court of Passage, Liverpool, had power to make a rule of practice which, in effect, applies order 14 to the practice of the Passage Court. The argument that he had such power depends on a number of statutes and on rules which have been made by the judges dealing with practice and procedure. It might be hard to say that the subject-matter of this rule is not covered by the word procedure; but I do not decide the question on that ground. The case turns on the construction of two Acts of Parliament, the County Courts Admiralty Jurisdiction Act, 1868, and the amending Act of 1869, which are to be read together as one Act. By the Act of 1868 it is enacted that admiralty cases in county courts and in the Liverpool Court of Passage shall be heard and determined by the judge, and by the judge alone, in like manner as civil cases are heard and determined in county courts. By section 35 general orders are to be made for the purpose of regulating the practice and procedure of the admiralty jurisdiction of county courts and by section 6 of the Act of 1869 the assessor of the Court of Passage is empowered to make rules and orders as to the procedure and practice of that court. Taking into consideration the fact that the two Acts are to be read together as one Act, it cannot be doubted that the judge of the Court of Passage had the same power to make rules as a county court judge, and I do not think it can be contended that, this jurisdiction having been conferred on a particular set of courts, of which the court in question is one, those courts had the power of altering their jurisdiction and proceeding in a manner contrary to the definite enactment of the statutes. But it is said that there is a difference as to the judge of the Court of Passage, because by the later statute he has apparently the power to make rules without the sanction of the Lord Chancellor, and that therefore he can proceed in a way in which no other county court judge can. I am not prepared to say that that may not be the case, but in my opinion that does not signify, because the question is whether, reading the two Acts together, a power is given to

the assessor of the Court of Passage which it is impossible to argue is conferred on county court judges. The Acts are to be read as one Act, giving for the first time a statutory jurisdiction, and ordering in plain terms that statutory jurisdiction to be exercised in a particular way, and I do not see how they can be read as giving power to repeal a part of the Act itself and to exercise the jurisdiction in a different way.

Now that would probably be sufficient to decide this case—namely, that the jurisdiction for this purpose is statutory; that the judge has powers which are statutory powers; that he is to exercise them according to the statute, and that there is in this Act of Parliament nothing to show that he has power to repeal the very Act which confers the jurisdiction upon him, and to exercise that jurisdiction in a way totally contrary to that Act. It has been pointed out, if this power exists in the judge of the Passage Court, it exists without the limitations which have been thought necessary to the exercise of the powers in every other case. No other county court has got it. No set of rules framed by the county court judges contain this power, and, further, in the cases of the superior courts the power to apply order 14 has been limited by a variety of safeguards which do not exist in this Act. The rules have to be laid before Parliament and are liable to be annulled. But there is no such provision here with regard to the judge of the Passage Court, so that, if the power contended for exists, the assessor of the Passage Court might make a rule of this sort without appeal and without its being annulled or altered or varied by any authority except his own.

It appears to me, apart from the conclusions to be drawn from the plain words of the Act of Parliament, that such a conclusion as that, which must be the result of the argument on the other side, is a very strong argument in support of the conclusion at which I have arrived from the words themselves. I am aware that where words of a statute are clear, we must interpret them according to their natural meaning, whatever the consequences may be; but it is a strong argument in favour of the reasonable conclusion to show that a conclusion that is unreasonable would follow from a construction that is not in accordance with the plain words of the Act. I am, therefore, of opinion that this prohibition should go.

WILLS, J.—I am of the same opinion, and have very little to add. It seems to me that Mr. Pickford is right in saying that, as far as the expression "practice and procedure" is concerned, it is sufficient to cover, at all events, one part of the subject-matter of this rule, namely, the application of what is commonly called order 14; whether it is sufficient to cover the other part, namely, the transference of jurisdiction from the judge of the Passage Court to the registrar, may be more open to question I think, because it does not seem to me that the relative positions of the judge of the Passage Court and the registrar of the Passage Court are at all analogous to the relations which subsist between the judges of the High Court and the masters. As I had occasion to point out in a similar case—*Speers* v. *Daggers*—the assessor of the Passage Court occupies a somewhat anomalous position, and is not like a judge of the High Court. He is only a statutory assessor who has the right to preside at trials and to give judgment there. He has no jurisdiction in chambers, nor indeed any jurisdiction except that conferred by certain Acts of Parliament. Under them there is no appeal from the registrar to the assessor. Therefore the analogy relied on in support of the power to transfer the jurisdiction is incomplete. But I do not think that it is necessary to decide that question, and I would rather leave it to be further considered should a similar question arise on a future occasion. It seems to me that the answer to Mr. Pickford's argument is what the Lord Chief Justice has pointed out, namely, that in section 10, section 13, and section 23 of the County Courts Admiralty Jurisdiction Act, 1868, the jurisdiction to deal with admiralty matters is in terms cast upon the judge, and there is the very significant fact that section 23 provides that "the court may order, and the registrar, on such order, may seal and issue process."

I think that this rule which the learned assessor has made amounts to a repeal of part of the very Act under, and for the purposes of, which the rule was made. The power to make the rules is confined to making rules under the Act, and I think a rule which repeals so important a part of the Act as I have indicated, and takes away the jurisdiction of the assessor and casts it upon the registrar is a repeal *pro tanto* of the Acts of 1868 and 1869.

I therefore come without hesitation on this part of the case to the same conclusion as has been already arrived at by the Lord Chief Justice, and I think this prohibition must go.

Motion granted.

Solicitor for the plaintiffs, *W. A. Tetlow*, Liverpool.

Solicitors for the defendant, *Pritchard, Englefield, & Co.*, for *Miller & Williamson*, Liverpool.

Solicitors for the Corporation, *F. Venn & Co.*, for *Atkinson*, Town Clerk of Liverpool.

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams, J.) — Jan. 30.

In re POTTS.

Ex parte TAYLOR & SONS. (a.)

Bankruptcy — Judgment creditors — Appointment of receiver of equitable interest—Secured creditors—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 9, 45, 168.

In July, 1891, *judgment was obtained by the applicants in an action for* £316, *under which execution was issued against the debtor's goods with no effect. In January*, 1892, *the debtor became entitled under the will of his mother to a share in the residuary real and personal estate of the testatrix; and in March*, 1892, *the applicants obtained an order in the action appointing a receiver in respect of such share. In May*, 1892, *the debtor was adjudged bankrupt. On motion by the applicants for a declaration that they were secured creditors in respect of the share to which the debtor was entitled in the residuary estate under his mother's will, by virtue of the order appointing the receiver by way of equitable execution of the said share,*

Held, that the order obtained by the applicants did not constitute them secured creditors of the debtor, and that the application for a declaration to that effect must, therefore, be refused.

Application for a declaration that certain creditors of the debtor were secured creditors.

On the 25th of July, 1891, the applicants, Messrs. Daniel Taylor & Sons, recovered judgment against the debtor in an action in the Queen's Bench Division for £316 15s. for goods sold and delivered, and £7 10s. costs. Under this judgment the applicants

(a.) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

issued a writ of *fi. fa.* against the goods of the debtor, but were unable to recover anything.

In January, 1892, the debtor became entitled, under the will of his mother, to a share in the residuary real and personal estate of the testatrix; and on the 31st of March, 1892, the applicants obtained in the action an order appointing one Edward Cecil Moore receiver of the moneys receivable in respect of the share to which the debtor was entitled in the residuary estate under the will of his mother. The order further provided that such receiver should have liberty, if he should think proper, out of the moneys to be received by him, to keep down the interest on any prior incumbrances, and be allowed such payments in passing his accounts, and that "such receiver shall, on the 30th day of June next, and at such further and other times as may be ordered by the master, leave and pass such accounts, and shall, on the 30th day of July next, and at such further and other times as may be hereafter ordered by the master, pay the balance or balances appearing due on the accounts so left, or such part thereof, as shall be certified as proper to be so paid, such sums to be paid in or towards satisfaction of what shall for the time being be due in respect of the judgment signed on the 25th day of July, 1891, for the sum of £316 15s. debt, and £7 10s. for costs, making together the sum of £324 5s."

The estate of the debtor's mother consisted of land and other property, and the executors, in pursuance of the trusts of the will for sale and conversion, got in the estate, and were now in a position to distribute to the beneficiaries and persons claiming through them.

On the 16th of May, 1892, a receiving order was made against the debtor on his own petition upon which he was adjudicated bankrupt.

No payment had yet been made by the executors either to the receiver appointed in the action or to the trustee in the bankruptcy, and application was in consequence now made to the court by Messrs. Taylor & Sons, the applicants asking by their notice of motion for a declaration that they were secured creditors of the debtor in respect of the share to which the debtor was entitled in the residuary estate under the will of his mother, by virtue of the order appointing the receiver by way of equitable execution of the said share.

Herbert Reed, Q.C., and *Micklem*, for the applicants.—The real question is the proper construction to be put on the order appointing the receiver. Section 45 of the Bankruptcy Act, 1883, clearly contemplates a procedure such as this, and that in the case of an equitable interest execution is to be by appointment of a receiver. There is no means of getting at an equitable interest except in that way. In the case of *In re Dickenson, Ex parte Charrington & Co.*, 37 W. R. 130, 22 Q. B. D. 187, the receiver was merely a receiver against goods, and the decision really only dealt with the particular order in that case. It cannot be intended that no process shall be available against a debtor's equitable interest. What was said in the later case of *Levasseur* v. *Mason*, 39 W. R. 596, [1891] 2 Q. B. 73, gets rid of any general effect of the decision in *In re Dickenson*. The applicants are clearly, secured creditors in respect of the bankrupt's interest under his mother's will by virtue of the order which they obtained.

Muir Mackenzie, for the trustee.—The case of *In re Dickenson, Ex parte Charrington & Co.* is an authority that a receivership order does not give a mortgage, charge, or lien, and does not make a creditor a secured creditor. That view was also taken by Cave, J., in the case of *In re Tillett, Ex parte Kingscote*, 6 Morrell's Bankruptcy Cases, 70; and your lordship expressed the same opinion in the recent case of *In re Hastings, Ex parte Brown*, 9 Morrell's Bankruptcy Cases, 234. The order which the applicants obtained does not make them secured creditors; and, in any event, it is not a process of execution which has been completed.

VAUGHAN WILLIAMS, J.—This is an application by Messrs. Daniel Taylor & Sons for a declaration that they are secured creditors of the debtor in respect of the share to which the debtor is entitled in the residuary estate under the will of his mother, by virtue of an order appointing a receiver by way of equitable execution of the said share. I am of opinion that Messrs. Taylor & Sons are not entitled to the order for which they ask. Mr. Reed argued this case principally with reference to section 45 of the Bankruptcy Act, 1883. His contention was that equitable execution of the character which one has in this case was execution within the meaning of section 45; and then he said that the execution had been completed and that under those circumstances he was under the terms of section 45 entitled to the benefit of the execution. In my opinion the position of Messrs. Taylor & Sons in this case is not that of creditors who have issued execution within the meaning of section 45. I think that section 45 only applies to the cases which are specified in it, and this case is not one of those cases. Under those circumstances I pass by section 45 because I think it has no application.

That being so the only remaining question is whether Messrs. Taylor & Sons are secured creditors. The person who drafted the notice of motion in this case seems to have apprehended very clearly the true question to be decided. In my opinion Messrs. Taylor & Sons are not secured creditors. Section 9 of the Bankruptcy Act, 1883, provides that after the making of a receiving order no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings. But this section shall not affect "the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed." The result of that is that if a creditor is not a secured creditor he is debarred by section 9 from taking advantage of any legal process against the debtor, and section 10 expressly provides for the stay of any such process. Therefore I have only to ascertain what is the definition of a secured creditor, and to see whether Messrs. Taylor & Sons bring themselves within it. The definition of secured creditor is in section 168, which says "secured creditor" means "a person holding a mortgage, charge, or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor." I am of opinion that the result of what happened in this case has not been to make Messrs. Taylor & Sons secured creditors within the definition. I think that the case of *In re Dickenson, Ex parte Charrington & Co.*, although it is in some respects a decision on the particular order which was brought before the court in that case, yet it does decide some matters generally with regard to the effect of an order appointing a receiver obtained by a judgment creditor for the purpose of what is called an equitable execution. And it seems to me it does plainly decide that such an order obtaining a receiver against goods does not make the person who has obtained it a secured creditor. In the case of *In re Tillett, Ex parte Kingscote*, Cave,

J., seems to have taken the same view. It is said that I ought not to deal with the case of *In re Dickenson* as having decided that a person who has obtained such an order is not a secured creditor within the meaning of the Bankruptcy Act, because the later case of *Levasseur* v. *Mason* has in effect decided that the decision in *In re Dickenson* was not a decision deciding any such general proposition, but was merely a decision as to the effect of a particular and somewhat imperfect order. But I do not so understand the judgments in *Levasseur* v. *Mason*. I am very far from saying that there are not expressions in the judgment of Lord Esher, M.R., which do look as if he were speaking of judgment creditors who obtain the order for a receiver as having obtained by the order rights with regard to the goods which made them secured creditors. But he in no part of his judgment really decides anything of the sort. On the contrary, the case of *In re Dickenson* is cited to him, and he in no way expresses disapproval of it. Then when I read the other judgments of the court it seems to me they take the view of the effect of an order such as this, which is entirely consistent with the view taken in *In re Dickenson*. The receivership order does not alter the property in the goods, and it does not give the person who obtains the order any lien on the goods. Under those circumstances I must refuse the present application, with costs.

Application dismissed.

Solicitors for the applicants, *Leyton, Sons, & Lendon.*

Solicitor for the trustee, *The Solicitor to the Board of Trade.*

Court of Appeal.

From Chan. Div. (Lindley, Lopes, and Kay, L.JJ.) — Feb. 1.

In re MAHON & SAYER. (*a.*)

Solicitor — Remuneration — "Attendances"—Discretion of taxing master—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*General Order, Schedule* 2.

Under Schedule 2 of the General Order under the Solicitors' Remuneration Act, 1881, *prescribing a charge of* 10s. *for an "ordinary" attendance, and giving the taxing master power in "extraordinary cases" to increase or diminish that charge "if for any special reasons he shall think fit," it is a question for the discretion of the taxing master whether or not a case is "extraordinary" as being more simple or more difficult than a normal fair average case. In extraordinary cases, where the taxing master increases or diminishes the "ordinary" charge, he must have special reasons for so doing, but he is not bound to state his special reasons till he formally answers the objections to his taxation.*

Decision of North, J., ante, *p.* 37, *affirmed.*

Appeal from a decision of North, J., reported *ante*, p. 37, where the facts are considered to be set out sufficiently for the purposes of the present report.

The solicitors appealed against so much of the decision as dealt with their first objection—that of "attendances."

Sir Horace Davey, Q.C., and *R. F. Norton*, for the appellants.—The answer of the taxing master shows that he took a wrong basis for his taxation; he took 6s. 8d. instead of 10s. as the proper charge for an ordinary attendance. He must state his special reasons, which he did not do.

J. G. Butcher, for the respondent, was not called upon to argue.

LINDLEY, L.J.—I do not think we need hear the respondents in this case. This is an appeal from a decision of North, J., upholding the master in the taxation of a bill of costs, to which objections had been taken in the ordinary course. The appeal raises, or is intended to raise, a question of some little importance upon that part of Schedule 2 of the General Order relating to the remuneration of solicitors, which runs thus—under the head of "Attendances": —"In ordinary cases, 10s.; in extraordinary cases the taxing master may increase or diminish the above charge if for any special reasons he shall think fit." In this particular case the solicitors have carried in bills, and the taxing master has either disallowed or reduced a great number of charges of 10s. for attendances. The solicitors have carried in objections to forty-three items, and they have very properly grouped them together, and their objection runs thus: "The attendances represented by the items the subject of this objection were ordinary attendances in an ordinary case, for each of which attendances the solicitors are entitled to charge 10s. under Schedule 2"—which I have just read—"and it is submitted that, this not being an extraordinary case within the meaning of the same schedule, a taxing master has no discretionary power to increase or diminish the authorized charge. It is further submitted that in no case can a taxing master diminish the authorized charge for an attendance without special reasons. It is also submitted that as solicitors were formerly entitled to 6s. 8d. an hour, they were now entitled to 10s. an hour."

Now the taxing master has put in an answer to those objections, and I will read the first half page. He says, "This objection" (that is, the one I have referred to) "comprises a large number of items of the same class—*i.e.*, 'attendances'—for each of which the solicitor has made a charge of 10s. at least. Many of these items I have in my discretion diminished. It is contended by the objectors that I have no discretionary power either to increase or diminish the 10s. items in question, on the ground that they are not of an extraordinary nature within the meaning of the General Order. I am not sure I precisely understand what is here meant by 'extraordinary.' In the present case many of the attendances were of an extraordinarily simple character, as will be found on reference to the items themselves."

Then there are some further observations which I will not read. Sir Horace Davey, I think, read them, and they are fresh in our recollection.

Now the points which are important are these. First of all, what is meant by an "ordinary" attendance, and who is to decide when an attendance is "ordinary" or "extraordinary"? I take it that "extraordinary" means in the schedule everything which is not ordinary. An attendance may be such as to deserve a payment of more than 10s., and if the taxing master thinks so he can allow it. An attendance may be such that it may not deserve 10s. In that case the taxing master need not allow it, but he is to allow 10s. for an ordinary attendance if it is in his judgment properly necessary, about which I will say something presently. I do not know how to define "ordinary attendance" except by repeating the word "ordinary," or by adopting the

(*a.*) Reported by ARTHUR LAWRENCE, Esq., Barrister-at-Law.

paraphrase put upon it by North, J., a normal fair average case.

Now, it has been contended by Sir Horace Davey that the taxing master has taken the wrong standard, and has applied the rule that 6s. 8d., and not 10s., ought to be allowed for ordinary attendances. If that had been made out I think the taxing master would have misconstrued the rule, and would have been wrong. I do not think it is made out. When you look at the bill of costs it appears to me that what he has done is this. He has looked at each item and considered, first of all, whether it is a case in which an attendance ought to be charged for at all. It does not follow that because there has been an attendance 10s. is to be had for it. A great deal of business may be done by attendances, for the purpose of getting 10s., which ought to be done in some other way, so as to avoid so large a charge. The taxing master has a discretion. He is not bound to 10s. because there has been an attendance and something has been done. That is not what he is bound to do. He is bound to protect people against unnecessary attendances, and that is no easy matter. I am satisfied that the taxing master has not done that which it was contended he had done—namely, adopted a 6s. 8d. instead of a 10s. rule—but what he has done is what he ought to have done. He has looked at each attendance and considered whether it was proper to have an attendance at all, and sometimes he has struck them out altogether; and what is very curious is that a great many of these are not objected to. But when he has not done that, he has considered the nature of the thing, and he has come to this conclusion, that, if the work done at an attendance was so trifling that it might well be done in some other way, he has not disallowed it altogether, but he has struck off 3s. 4d., or 6s. 8d. sometimes, and has reduced it; he is quite right, and if there was an attendance, and the work was done properly at an attendance, but still the work was so slight that 10s. is an absurd charge, he has not allowed it; but what he has done is precisely what he ought to have done: he has considered each attendance separately by itself, and he has not done that which it was urged he had done. So, therefore, it appears to me he has not gone wrong.

Then it was said there must be special reasons, and he must state them. Reasons of course he must have; reasons for departing from the rule must exist, but he is not bound to state the special reasons every time he marks off 3s. 4d. or 6s. 8d. He must state his reasons some time or other, and the time for stating his reasons is when he formally answers the objections which are made to the taxation. Then he has got to state his reasons. He must have them at the time, and he must state them then. That he has done.

It appears to me the true conclusion, therefore, is this: That the master has not gone wrong on the principle, but that he has done that which he is entitled to do and ought to do. That being the case, it is unnecessary to discuss any particular item. I will merely refer to item forty-three, on which Sir Horace Davey made a point, and on which some attendance is struck out. It illustrates no principle, and therefore I do not care to discuss it. I do not know whether the master was right or wrong. We do not go into such matters as that. We sit here simply to see whether he has taxed the bill upon the right principle. I do not know anything about item forty-three. It does not illustrate a principle. I think, therefore, the appeal must be dismissed, and dismissed with costs in the usual way.

LOPES, L.J.—Whether an attendance is to be placed on the one side or on the other side of an "ordinary" case, that is, by being more simple or more difficult than an "ordinary" case, is a question for the discretion of the master, and I am of opinion that if he exercises that discretion properly without violating any principle his decision is final and cannot be reviewed by this court. He has to consider the particular circumstances of each case and to exercise his judgment thereon. Now, it is said by Sir Horace Davey—and if he could have made it out no doubt he would have been entitled to succeed upon this application—that the master has acted on a wrong principle, namely, that in defiance of this schedule, and that part of it which relates to attendances and which says that in ordinary cases 10s. is to be charged, he has taken 6s. 8d. as the proper charge for an ordinary case. In my opinion he has not acted upon that principle. The learned judge in the court below so thought, and we have reason also to think that the master has not acted on that principle in any respect. Then it is provided that the taxing master may increase or diminish the above charge if for any special reasons he shall think fit. Now, it is said that he ought to have stated his special reason for either increasing or diminishing the charge, and, as I understand it, that he ought to have stated it at the time. But I cannot read that in the rule, nor do I think it can be so. It is quite enough, in my opinion, if, when the objection is taken, he states his special reason in his answer.

With regard generally to these attendances, one can quite imagine that attendances may be charged by certain people where no attendance was at all necessary, where, for instance, a letter or a message would have answered all the purpose of an attendance, and in such a case the master, I take it, would be quite right in striking out the charge for that attendance from the bill of costs altogether. I think that this appeal should be dismissed.

KAY, L.J.—I agree.

Appeal dismissed.

Solicitors, *Hyde, Tandy, Mahon, & Sayer; Hicks, Arnold, & Mozley.*

From Chan. Div. (Lindley, Bowen, and A. L. Smith, L.JJ.) — Dec. 12.

In re OTTOS KOPJE DIAMOND MINES (LIMITED). (a.)

Company — Shares — Transfer — Refusal to register — Certificate issued under forged transfer — Warranty — Estoppel — Measure of damages — Jurisdiction to order inquiry as to damages under the Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 35.

On the 6th of April, 1892, *G. bought shares in a company, and received from vendor a transfer and a certificate under the seal of the company signed by two directors and the secretary, certifying that the vendor was the proprietor of the shares. On the same day G. sent the transfer executed by himself, and accompanied by the certificate, to the company's office for registration. The company's clerk refused to accept the documents, saying that he had orders not to do so. G. and his solicitor again tendered the transfer and certificate, which the company's solicitor took, but stated that the company did not undertake to register G. as the owner of the shares. It appeared that the former secretary of the company had made fraudulent transfers, and had, by means of fraud, induced two of the directors to affix the seal of the com-*

(a.) Reported by W. A. G. WOODS, Esq., Barrister-at-Law.

pay to the certificate in question, and that, in consequence of the discovery of the fraud on the 5th of April, the registration of G. had been refused. At a board meeting on the 13th of April, 1892, the consideration of the transfer was ordered to stand for further consideration, and the transfer and certificate were returned to G. On the 31st of May, 1892, G. moved, under section 35 of the Companies Act, 1862, that the register of members of the company might be rectified by inserting his name as the holder of the shares, and that the company might be ordered to pay him the damages occasioned by their refusal to register him as such holder. Between the 6th and the 13th of April the shares went down in value.

Stirling, J., made no order as to rectification, but directed an inquiry as to damages. The chief clerk certified that the amount of damages was the amount G. had paid for the shares on the 6th of April. The company moved to vary the certificate by decreasing the amount to the value of the shares on the 13th of April. Stirling, J., held that the company had refused the transfer on the 6th of April, and that the chief clerk was right in his assessment of the damages. The company appealed.

On the hearing of the appeal the court doubted whether Stirling, J., had jurisdiction to direct an inquiry as to damages under section 35 of the Companies Act, 1862, where there was no order for rectification, but, with the consent of the parties, agreed to treat the case as within that section.

Held, that the cause of action was not the representation contained in the certificate, but the refusal of the company to register, and that the date of such refusal was the 6th of April.

In re Bahia and San Francisco Railway Co., 16 *W. R.* 862, *L. R.* 3 *Q. B.* 584, *considered.*

This was an appeal from a decision of Stirling, J., on the 8th of November, 1892, refusing to vary the chief clerk's certificate by decreasing the amount of Goode's claim.

Goode, a member of the London Stock Exchange, on the 6th of April, 1892, purchased from Gardner, a jobber, 4,300 shares in the Ottos Kopje Diamond Mines (Limited), at 2s. 6d. a share, the shares being £1 shares with 19s. paid. Gardner handed him a transfer and a certificate sealed with the seal of the company and signed by two of the directors and the secretary, from which it appeared that Gardner was the proprietor of the shares, and Goode paid his purchase-money, £537 10s. He on the same day executed the transfer and sent it by his clerk together with the certificate to the company's office for registration, but the registrar of the company, who was acting temporarily as secretary, refused to accept them, saying that he had received orders not to do so. Goode on the same day went and tendered them personally, but they were again refused. On the 8th of August, 1892, Goode went with his solicitor, Mr. Solomon, to the company's office and again tendered the transfer and certificate with the transfer fee, but the clerk stated that he had instructions not to accept them, and referred Goode and his solicitor to the chairman of the company. They then had an interview with the chairman and two of the other directors and the solicitor of the company. Mr. Solomon tendered the transfer and certificate. The company's solicitor took them on behalf of the company, stating that the company did not undertake to register the applicant as owner of the shares. It appeared that the former secretary of the company had made fraudulent transfers of shares in the company and had falsified the share register, and had by means of fraud induced two of the directors of the company to affix the seal of the company to the certificate upon the faith of which Goode had paid his money. The fraud was discovered by the chairman of the company on the 5th of April, 1892, and in consequence of such discovery the transfer and certificate tendered by Goode were not taken in. On the 13th of April, 1892, a board meeting was held and the consideration of the transfer to Goode was ordered to stand for further investigation as to the frauds in connection with the certificate. The transfer and certificate were then demanded back and the transfer fee withdrawn.

The articles of the company provided:—(Article 17) The directors may refuse to register the transfer of any share not fully paid up in any of the following cases: If the transfer is made by a member who is indebted to the company; if the directors are not satisfied with the responsibility of the transferee; if the transferee shall fail to comply with the request made in pursuance of next article. (Article 18) Before approving or registering any instrument of transfer of any share, the directors may, if they think fit, require the transferee to produce to, and leave at the office of the company for examination the certificate of shares proposed to be transferred. (Article 23) All instruments of transfer shall be deposited with the company, and, if required, reasonable evidence shall be given to prove the title of the transferee, and thereupon the secretary shall register such transferee as a member.

On the 31st of May, 1892, a motion on behalf of Goode was made before Stirling, J., under section 35 of the Companies Act, 1862, that the register of members of the company might be rectified by inserting the name of the applicant therein as the holder of 4,300 shares, and that the company might be ordered to pay the applicant the damages suffered by him through the refusal of the company to insert his name as shareholder for the shares in question, or in the alternative that the company might be ordered to pay to the applicant the highest market value of the shares since the 6th of April, 1892. Upon the hearing of the motion Stirling, J., made no order as to rectification, but decided that Goode had brought himself within the decision in *In re the Bahia and San Francisco Railway Co.*, 16 W. R. 862, L. R. 3 Q. B. 584, inasmuch as the certificate purported to be a certificate that Gardner was the owner of the specified 4,300 shares, the distinctive numbers of which were given; and he directed an inquiry as to what damages had been sustained by the applicant by reason of the inability of the company to register him as the transferee of the said shares, and ordered that the company should, within fourteen days after the filing of the chief clerk's certificate to be made pursuant to the order, pay to the applicant what should be certified to be the amount of such damages. The chief clerk by his certificate, dated the 22nd of July, 1892, certified that the amount of the damages sustained by Goode was £537 10s., the amount paid by him for the shares, together with £8 13s. 8d., interest thereon at five per cent. from the 6th of April, 1892, to the time of payment. The company took out a summons to vary the chief clerk's certificate by decreasing the sum of £537 10d. and disallowing the interest.

The question between the parties was whether the damages should be assessed according to the value of the shares on the 6th of April, 1892, when they stood at 2s. 6d., or according to the value on the 13th, when they stood at 2s.

Stirling, J., held that the company had refused to receive the transfer on the 6th of April, and had never gone back from that refusal; that the result was that from that day Goode was unable to sell the shares, which then stood at 2s. 6d., and had lost the money he had paid as from that time; and that the chief clerk was right in assessing the damages according to the value of

the shares on that day. He directed that the interest should be computed at 4 per cent. instead of 5 per cent., but in other respects he dismissed the summons with costs.

The company appealed.

Butcher, for the appellants.—The cause of action was the refusal of the company to register Goode. The directors had under their articles and also by the general law a reasonable time to consider whether or not they would register him, and they were not bound to give an immediate decision: *Société Générale de Paris* v. *Walker*, 34 W. R. 665, 11 App. Cas. 20, 41. His transfer was only handed in on the 6th, and the time allowed for consideration cannot be taken to have expired before the 13th of April, when the board met, and the damages ought, therefore, to have been assessed according to the value of the shares on that date.

Buckmaster, for the respondent.—The measure of damages is the value of the shares on the 6th of April. Section 35 of the Companies Act, 1862, says nothing as to the refusal of the company to register. The concluding words of that section do not apply, as Goode could never have been put on the register. [LINDLEY, L.J.—This is in the nature of an action for damages. Can such a remedy be obtained under section 35 of the Act of 1862 without a previous rectification of the register?] The order of Stirling, J., was made on that footing, and it has not been appealed against. The court has a discretionary power under section 35 as to the damages: *In re Railway Time Tables Publishing Co., Sandy's case*, 37 W. R. 531, 42 Ch. D. 98, and *In re Addlestone Linoleum Co.*, 36 W. R. 227, 37 Ch. D. 191. [LINDLEY, L.J.—I never heard of damages being given under that section apart from rectification, but we shall not decide the case upon that point.] We are willing to waive any remedy at common law. [LINDLEY, L.J.—Very well. We can treat the matter as an action at common law if the parties consent. *Butcher* consented.] Goode bought the shares on the faith of the certificate which the company issued to Gardner, and the company thereupon became liable to him upon the warranty implied by such certificate: *In re The Bahia and San Francisco Railway Co.* The measure of the damages is the difference between the price Goode paid for the shares on the faith of the certificate and the actual value of what he purchased, which was nothing at all. The market price of the shares on the day he purchased is, therefore, the measure of damages. The refusal to register was on the 6th of April. We tendered the transfer then and it was refused, and has never been accepted. The directors can only refuse to register a transferee in the cases mentioned in the articles, and within none of them does the present case come. Registration is a purely ministerial act: *In re Cawley & Co., Ex parte Hallett*, 37 W. R. 692, 42 Ch. D. 209. The directors never exercised or attempted to exercise any discretion.

Butcher, in reply.—The action was not founded on any warranty. This was an innocent misrepresentation. The certificate was not a warranty of title; it merely estops the company from denying Gardner's title to the shares, and consequently Goode's title to be registered as his transferee: *Tomkinson* v. *Balkis Consolidated Co.*, 39 W. R. 693, [1891] 2 Q. B. 614; *Bishop* v. *Balkis Consolidated Co.*, 39 W. R. 99, 25 Q. B. D. 512. That was the ground upon which *In re The Bahia and San Francisco Railway Co.* was decided, and also *Hart* v. *The Frontino and Bolivia Gold Mining Co.*, L. R. 5 Ex. 111, 18 W. R. C. L. Dig. 57, which followed that case. The cause of action was not breach of warranty or estoppel, but the refusal to register. The transfer and certificate were not refused on the 6th of April. On the 8th, when Goode and his solicitor handed them in, they were accepted subject to what the directors might think fit to do, and they were not really refused until the 13th.

He also referred to *Low* v. *Bouverie*, 40 W. R. 50, [1891] 3 Ch. 82, in which the question of warranty was fully dealt with.

LINDLEY, L.J.—We have got at the facts of this case now. It comes before the court in a peculiar way by reason of an order of Stirling, J., which was not appealed from, dated the 31st of May, 1892, directing an inquiry as to what damages had been sustained by the applicants by reason of the inability of the company to register him as the transferee of 4,300 shares in the company. All I will say about that order is that I doubt whether there was jurisdiction to make it, as it appears to me that the only case where damages can be given under section 35 of the Companies Act, 1862, is where rectification is ordered. I only make that remark to guard against its being supposed that damages can be obtained by a summons under section 35 of the Act of 1862 instead of by an action at law. I pass that by, as no one wants the question raised, and the parties have agreed that the court should treat the case on the wider question, namely, what damages the company ought to pay.

The first contention put forward by Mr. Buckmaster was grounded upon the supposed authority of *In re The Bahia and San Francisco Railway Co.* He said that at the time when Gardner the transferor sold the shares, Gardner was the registered holder of them in the books of the company, and when the plaintiff was induced to buy the shares from Gardner on the faith of the certificates which he produced, the company came under an obligation by way of warranty to indemnify him against any loss he has incurred by buying the shares. I doubt that. I do not think that there is any case which goes to that length. I do not think that an action could be maintained upon the footing of warranty of the truth of the certificate by the company. It seems to me that the case of *In re The Bahia and San Francisco Railway Co.* was decided upon the footing that a company is bound by what is given under its common seal, and is estopped by reason of the certificate from denying the validity of the shares, but in order to give a person who has dealt on the faith of the certificate a right of action against the company there must be a breach of duty towards him by the company—that is to say, a purchaser is entitled to come to the company and show the certificate and transfer, and say, Register me as the holder of the shares, and if the transfer were in order and the company were estopped from denying the validity of the shares, they would be failing in their duty towards him if they did not register him. That is all that that case comes to. That would answer the purpose in the present case from one point of view, but not from another. Supposing that I am right, and that Goode's cause of of action was the improper refusal of the company to register him, the company cannot say in answer to that, that the transferor, Gardner, was wrongly on the register and had no right to transfer. Goode would be in a position to say to the company, "You are estopped from raising that, and you must register me," and if the company refused there would be a breach of duty on their part which would be actionable, and in respect of which they would have to pay damages. That is the ground upon which Goode would succeed in an action at law in recovering damages from the company.

Then comes the question, what damages ought he to recover. They must be ascertained in refer-

ence to the time of the refusal to register. When was that? When did the company refuse to take the transfer and to register it? Upon that there are two different views. Mr. Butcher argued that there was no definite refusal until the 13th of April, the date of the first board meeting after the transfer was presented. Mr. Buckmaster, on the other hand, said that the transfer was refused on the 6th, when the transfer was presented, and that what took place afterwards was only an endeavour to persuade the directors to reconsider their decision and accept the transfer. The 6th was fixed upon as the date upon the ground which I will proceed to explain. It is obvious that on the 5th of April the directors had found out that there was something wrong in the books, and they suspected that there was something wrong in the certificate given by the secretary of the company to Gardner, and I think it is plain that, acting upon that suspicion, they gave the person who was acting temporarily as secretary orders not to take in the transfer from Gardner to Goode or any one else, and on the 6th, when Goode took the certificate and transfer to the office of the company, they were twice rejected in the sense that the clerk would not look at them. He said in effect, "I am not going to lay them before the directors, they don't want them," and they were thus rejected, not because the directors wanted time to consider what they would do, but because they had already made up their minds to reject them. I take it that what Mr. Butcher urged upon us is well founded, both in law and good sense, that the directors were entitled to take time to consider the documents presented, however regular they might appear, but they did not want time when they had already made up their minds to reject the transfer. That is really what took place on the 6th, and it appears to be consistent with what took place on the 8th and afterwards. On the 8th Goode and his solicitor went to the directors to try to persuade them to reconsider the matter. They did not then refuse, they never did refuse, but after some consideration the matter was deferred to the 13th, and on the 13th they did not undo what they had already done. I come to the conclusion, therefore, that the 6th was the real date on which the transfer was refused. Was it refused with sufficient cause? There is nothing to bring the case within section 35 of this Act The directors did not act under articles 17, 18, and 23. There was no pretence that Gardner was indebted to the company, or that Goode was not a sufficiently responsible person, and the directors did not reject him on that ground. They had already made up their minds that they would not accept him, and on this view, which was the one taken by the learned judge in the court below, I think the finding of the chief clerk was right, and that the appeal must be dismissed, with costs.

BOWEN, L.J.—I am of the same opinion, and I think it is doubtful whether the application was really a proper one to make under section 35 of the Act of 1862, as the question is not really one of rectification, but of liability for damages apart from rectification; but as the parties have consented that it shall be treated as a settlement of the questions between them, we have to consider broadly whether the plaintiff is, as against the company, entitled to damages such as the law recognizes. I decline to admit the theory that a court of law or of equity has a discretion, when an injury has been done, to assess legal damages as an indemnity. The damages which can be recovered are only those which arise from some breach of duty or of contract: an act of commission or of omission which results in damage. What is the cause of action here? Mr. Buckmaster has said that the cause of action was the representation contained in the certificate, which, when it reached the hands of a transferor, amounted to a warranty to the transferee that the certificate was correct, and that thereupon an action upon an implied warrantry arose against the company, or that in some other way the giving of a certificate or promise by the company involved them in some liability to the person who received it from the transferor. It seems to me that the first step we have to make clear is that the giving of the certificate, although a representation to a possible transferee, does not, as between the company and the transferee, amount to more than a representation by the company to such transferee, which was intended to be shown to him at the time of sale. As between the company and the transferee the mere representation would not, unless it were fraudulent, give rise to a cause of action at common law unless there were either a duty on the part of the company towards the transferee at common law, or a contract at common law, express or implied, to make the representation good. That was the decision in *Derry* v. *Peek*, 38 W. R. 33, 14 App. Cas. 337. If the transferee had a right of action upon the certificate, it could only be because there was an implied warranty between the company and him upon which an action for breach of contract could be brought against the company. There was no privity at all between the company and the transferee; neither was there any implied warranty.

It was said that the case of *In re The Bahia and San Francisco Railway Co.* shows that there was a cause of action in the nature either of an implied warranty upon the certificate, or an implied warranty arising out of the estoppel. A certificate is not, like a promissory note, a negotiable investment; it does not transfer a *chose in action*, it is only a representation of an implied contract. The case of *In re The Bahia and San Francisco Railway Co.* was in truth an attempt, which was successful, to make the company liable in the absence of fraud upon the estoppel created by the certificate, and the way in which the court made the company liable was this:—They said that if the certificate had been intended to have been acted upon, it became a document the truth of which the company could not deny as against the person to whom it was intended to be shown, and, therefore, it precluded them, as against such transferee, from denying the truth of what it contained, and they could not be in any better position than if the statement were true; but that only obliged the company to act towards the transferee as they would have been obliged to act towards him if his title were good. Until, therefore, the company did something which ought not to be done, or omitted to do something which ought to have been done, as between them and the true owner of the shares no cause of action would arise. Estoppel works in this way, that when, in addition to the other facts of the case, you have the incapacity of the company to deny the truth of the statement in the certificate, you must look to all the circumstances and consider whether, assuming the truth of the statements contained in the certificate, an action would not lie against the company. Estoppel works in such a case, but does not create in itself a cause of action.

That is the true view of the case of *In re The Bahia and San Francisco Railway Co.*, and, seeing that no cause of action arises upon the estoppel, the court must look for the cause of action upon the assumption that the company could not dispute the facts stated in the certificate. There must be a refusal by the company to do something that it was bound to do, or a refusal by an officer of the company to do what

that officer was bound to do. The refusal relied on by Mr. Buckmaster was the refusal by the acting secretary on the 6th of April to take in or consider the transfer. Did he or did he not then refuse to do that which he ought to have done? I fully agree with what Lindley, L.J., has said, that the company must, as a matter of business, be entitled to some time, if they want it, to consider the documents which are brought to them. I know of no case where it has been held that a man is bound to act upon a document at the moment that it is presented to him, without being allowed time to consider if he wants to do so. I do not think it was intended in *In re Cawley & Co.* to decide that a company was not entitled to have time to consider a transfer; and in *Société Générale de Paris* v. *Walker* Lord Blackburn held that they were so entitled. It does not, however, follow that the directors were entitled to exercise the discretion given them by articles 17, 18, and 23. In a case which fell within those articles it would be hard to deny them an opportunity, before determining what they would do, of seeing the documents, of which they knew nothing; but in the present case the directors were not in that position. They had considered the case the day before, and when the secretary had the documents presented to him on the 6th they did not want time. They had made up their minds already, so that the refusal of the secretary to take the documents was not because the directors wanted time to consider them, but because they had made up their minds not to accept them. It was only on the 8th that the directors really considered the case at all. They ought, if they wanted time, to have accepted the documents on the 6th and then considered them. The cause of action therefore arose on the 6th. It is not a case in which it has turned out that the directors had any right on their side. All they can say is that they were entitled to time to perform what is in one sense a ministerial act—namely, registration—though I should not myself call it a ministerial act, and they only wanted reasonable time. They had considered the matter, and, therefore, did not require time, so that they cannot justify their defence to the claim of the transferee on that ground.

A. L. SMITH, L.J.—I have nothing to add. It seems to me that the case when worked out rests on a question of fact. It is admitted that the company did refuse, and the question lies between the 6th and the 13th. Did the company refuse on the 6th or the 13th of April? They certainly did not refuse on the 13th. It seems to me that the true inference to be drawn from the facts is, as has been pointed out, that the directors had made up their minds that something was wrong in the certificate granted to Gardner, and that they would refuse to transfer the shares standing in his name, whoever the transferee might be, so that when the transfer came from Mr. Goode the directors had made up their minds not to take it in, and they refused it twice on the same day. They refused to do what I should have thought they ought to have done on the 6th.

Appeal dismissed.

Solicitors, *Foss & Ledsam; J. & M. Solomon.*

From Q. B. Div. (Lord Esher, M.R., and Lindley and A. L. Smith, L.JJ.) — Jan. 17.

CORN AND ANOTHER (*Appellants*) v. MATTHEWS AND ANOTHER (*Respondents*). (*a.*)

Master and servant—Apprentice—Infant—Stipulation in apprenticeship deed not for benefit of infant—Validity—Employers and Workmen Act, 1875 (38 & 39 *Vict. c.* 90), *s.* 6.

An apprenticeship deed contained a stipulation that the master should not be liable to pay any wages to the apprentice, an infant, so long as his business should be interrupted or impeded by or in consequence of any turn out; and that the apprentice might employ himself in any other manner or with any other person for his own benefit during any such turn out, and for such reasonable time thereafter as might be necessary to enable him to determine such employment.

Held, that this stipulation was unfair to the infant, and rendered the contract as a whole unfair as against him; and that, therefore, the apprenticeship deed was invalid.

Meakin *v.* Morris, 32 *W. R.* 661, 12 *Q. B. D.* 352, *followed.*

Appeal from the judgment of the Queen's Bench Division upon a case stated by a stipendiary magistrate under 20 & 21 Vict. c. 43.

The material facts were as follow:—The appellants were manufacturers of earthenware in Staffordshire; the respondent, Herbert Matthews, was an infant apprentice in the service of the appellants, and the other respondent was his father. The apprentice having absented himself from work, the appellants applied to the magistrate under 38 & 39 Vict. c. 90 for an order that the respondents should perform the conditions and agreements contained in the apprenticeship deed.

By the apprenticeship deed, Herbert Matthews, an infant of the age of nineteen years, bound himself apprentice to the appellants to learn that branch of a potter's art or business called potter's printing, and to serve them as an apprentice for five years, excepting the usual holidays and days on which that branch of the business of the appellants should be at a standstill through accident beyond the appellants' control, and subject also to the provision hereinafter contained, and the masters covenanted to teach the apprentice, and to find him fair and reasonable work and to pay him as wages 7s. 3½d. per score dozens of printer's counts. The deed contained the following clause: "Provided always that the said masters shall not be liable or called upon to pay any wages to the said apprentice so long as their business shall or may be interrupted or impeded by or in consequence of any turn out, and the said apprentice is hereby expressly authorized and allowed during any such turn out, and for such reasonable time thereafter as may be necessary to enable him to determine such employment as hereinafter mentioned, to employ himself in any other manner or with any other person for his own benefit, and in case the said apprentice shall elect so to employ himself, the said masters shall not, during the time he so employs himself, be bound to teach and instruct the said apprentice or cause him to be taught and instructed as aforesaid." The father also covenanted that the apprentice should during the term serve the appellants and perform the conditions and agreements contained in the deed.

The magistrate held, upon the authority of *Meakin*

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

v. *Morris*, 32 W. R. 661, 12 Q. B. D. 352, that the clause above set out was to the detriment of the infant apprentice and rendered the deed void.

The Divisional Court (Wright and Bruce, JJ.) dismissed the appeal upon the ground that the case was governed by *Meakin* v. *Morris*.

Boddam, for the appellants.—The deed must be looked at as a whole to see if it is for the benefit of the infant. There may be one or two stipulations in it not for the benefit of the infant, but if the deed as a whole is for his benefit it is good: *Leslie* v. *Fitzpatrick*, 3 Q. B. D. 229, 26 W. R. Dig. 139; *De Francesco* v. *Barnum*, 39 W. R. 5, 45 Ch. D. 430. The stipulation here in question is necessary to protect the masters in case of a turn out, as they could not carry on their business in such an event; but the apprentice is still to be taught, and he has the opportunity of getting work elsewhere. An apprenticeship deed is good though there is no covenant to pay the apprentice any wages at all. In *Reg.* v. *Lord*, 12 Q. B. 757, there was a clause giving the master power to stop paying wages in case the engine broke down, and also a power to forfeit all wages due but unpaid if the apprentice were guilty of misconduct. That practically imposed a penalty on the apprentice. The decision in *Meakin* v. *Morris*, where the apprenticeship deed contained a clause very similar to the one in this case, which the court held invalidated the deed, was wrongly decided and ought to be overruled.

He also referred to *Cooper* v. *Simmons*, 10 W. R. 270, 7 H. & N. 707.

Stampa Lambert, for the respondents.—This stipulation makes the deed as a whole unfair towards the infant. Under it the masters may lock out their workmen for any length of time they please, and may compel the apprentice to serve them without paying him any wages. The permission to seek work elsewhere is wholly illusory, as upon the termination of the lock out the apprentice must return to the service. *Meakin* v. *Morris* is directly in point, and ought to be followed.

Boddam replied.

Lord ESHER, M.R.—It seems to me that the proposition of law laid down by Fry, L.J., in *De Francesco* v. *Barnum* is the true test for deciding these cases. He states the proposition a little larger, perhaps, than it had been necessary to enunciate it in the previous cases, but still it leaves the previous cases untouched as coming within that proposition. The Lord Justice in effect said that the mere fact of some stipulations in an apprenticeship deed being against the infant's benefit does not make the deed void. It is impossible to frame a deed which does not contain some stipulations for the benefit of one contracting party and some for the benefit of the other. But if there is a stipulation in the deed of such a kind as to make the contract, taken as a whole, an unfair one to the infant, then that particular stipulation makes the whole contract void. The stipulation must be so unfair as to make the whole contract as between the infant apprentice and the master unfair to the infant. That brings us to consider whether, when the stipulation complained of relates to the payment of wages, it is so unfair to the infant as to affect the whole contract.

It was held over forty years ago in *Reg.* v. *Lord* that where a master had agreed to pay wages to an infant apprentice, but reserved to himself the right under certain circumstances, independent of any act of the infant, to compel the infant to serve without wages, the stipulation was so unfair as to render the whole contract void. So also where a master has agreed to pay wages, but stipulates that when the apprentice absents himself from work all wages due and unpaid shall be forfeited, the stipulation is so unfair as to vitiate the whole contract. We must now consider whether the stipulation in the present case does not make the whole contract unfair to the infant within the rule laid down by Fry, L.J. It having been held nearly nine years ago in *Meakin* v. *Morris* that a stipulation similar to the one in the present case rendered the whole contract unfair to the infant, can we say that that decision was wrong? Considering that deeds have been framed upon the faith of that decision, we must be absolutely convinced that the decision was wrong before we ought to overrule it. I cannot help thinking that I should have arrived at the same conclusion. The apprentice does not, as in old days, live with his master, but instead thereof the master agrees to pay him wages. The master then inserts a stipulation in the deed which enables him, if the other workmen offend him, though the apprentice may have had nothing to do with it, to cease paying the apprentice wages, while at the same time holding him to his service and compelling him to work, unless indeed the apprentice can get temporary employment elsewhere until the turn out is at an end, an equivalent of a rather illusory nature. To my mind that seems so unfair a stipulation towards the infant and so much in favour of the masters as to make the whole contract void. The appeal must therefore be dismissed.

LINDLEY, L.J.—I am of the same opinion. We cannot decide this case in favour of the appellants without overruling the decision of *Meakin* v. *Morris*. I am not prepared to overrule that decision. I attach great importance to the fact that the expression "turn out" includes a lock out by the masters. The masters are thus enabled by their own act to bring the stipulation into force. If the expression only included a strike of workmen, the case would not be so strong.

A. L. SMITH, L.J.—I agree. It has been the law for a great number of years that if there is a stipulation in a contract so much to the detriment of the infant as to render it unfair that the infant should be bound by it, that contract cannot be enforced again the infant. The great distinction between *Leslie* v. *Fitzpatrick* and the other cases is that in the former case the contract of service was to be put an end to by the masters upon notice, whereas in the other cases the contract of service was to continue. Bearing that in mind, we find in this case that the apprentice is not to reside with the masters, but is to live at home, and the masters are to pay him wages. Then comes a stipulation that if the masters choose to turn out their men for any length of time they please, the apprentice is bound to go on serving the masters without any wages, unless—and this seems to me a most illusory provision—he can find employment somewhere else. That stipulation seems to me unfair to the infant, and the deed cannot be enforced against him.

Appeal dismissed.

Solicitors for the appellants, *Cronin, Orgill, & Cronin*, for *Llewellyn & Ackrill*, Tunstall.

Solicitors for the respondents, *Mear & Fowler*, for *E. Hollinshead*, Tunstall.

High Court of Justice.

Chan. Div.
Romer, J.

Nov. 11, 12, 14, 19, 29.

JOBSON v. PALMER. (a.)

Trustee—Part of trust property stolen by his servant—Liability — Case of trustee remunerated for his services.

A trustee, remunerated for his services, employed a servant for the purposes of the trust, carefully selected and with a good character from his last employer, and properly intrusted to him the custody of the trust property, there being no negligence on the part of the trustee. The servant stole part of the property.

Held, that the trustee was not liable for the loss thereby occasioned to the trust estate.

Semble, *the fact that a trustee is remunerated for his services does not add to his liability as trustee.*

Trial of action.

By a deed of assignment for the benefit of creditors, dated the 22nd of July, 1889, William Jobson, a watchmaker and jeweller, assigned to Augustus Cufande Palmer, a chartered accountant, as trustee for creditors, his real and personal estate upon trust for sale, and to hold the proceeds of such sale in trust, after payment of the costs, charges, and expenses therein mentioned, and of any sums or allowances which would be entitled to be paid in full in case of bankruptcy, to divide the residue among the scheduled creditors rateably according to the amount of the respective debts owed to them by Jobson. It was not expressly provided by the deed that Palmer should get remuneration as trustee; but the judge held that under the circumstances, and on the construction of the deed, he was entitled to remuneration for his services.

At a meeting of the creditors on the 31st of July, 1889, a resolution was passed directing Palmer to resell the property to Jobson or his friends for a sum sufficient, after payment of costs, &c., and preferential claims, to pay a composition of 15s. in the pound. Palmer accordingly proceeded to sell, and paid the costs, &c., and preferential claims and composition, and handed over to Jobson or accounted for, the greater part of the property, but, under the circumstances mentioned below, not all of it. The circumstances were, as shown by the evidence, that Palmer had for a time, in the exercise of his duty, carried on Jobson's business, that he had done so in the same manner as Jobson himself had done, that he had employed a man named Lewis in the business, and that the employment of an assistant was necessary for the effectual conduct of it, that Palmer had exercised proper precautions in engaging and employing Lewis, who had a good character from his former employer, and that Jobson was himself present at the shop during the period of Lewis's employment, with only occasional absences, and never expressed himself dissatisfied either with the employment of Lewis or with the way in which the business was being conducted. It was afterwards ascertained, however, that Lewis had parted with a watch, part of the property, for sixteen guineas for which he never accounted, and that he had stolen other articles.

In January, 1891, Jobson commenced this action against Palmer, claiming a declaration that Palmer was a trustee for him of the property assigned by the deed, an account of the property and of Palmer's dealings therewith, and that Palmer might be ordered to transfer to him all the property other than that which Palmer had disposed of under the trusts of the deed, or had returned to Jobson, or to pay to Jobson the value thereof.

The principal question argued at the trial, and which calls for a report, was whether the defendant, as a remunerated trustee or bailee, was liable to the plaintiff for the value of the articles stolen by Lewis.

Arthur Powell, for the plaintiff.

Neville, Q.C., and *Swinfen Eady*, for the defendant.—A trustee who keeps goods as he would if they were his own is not liable if they are stolen: *Job* v. *Job*, 26 W. R. 206, 6 Ch. D. 562; and it does not add to his liability if he is paid for his services: *Coggs* v. *Bernard*, 1 Sm. L. C., 9th ed., pp. 201, 216. The provisional assignee of a bankrupt is not liable for the fraud of an agent if appointed with proper care: *Raw* v. *Cutten*, 9 Bing. 96. [As to the case of a director's liability for his agent's fraudulent statements they referred to *Weir* v. *Bell*, 26 W. R. 746, 3 Ex. D. 238.] In the absence of negligence a bailee is not liable for goods stolen by his servant: *Coupé Co.* v. *Maddick*, [1891] 2 Q. B. 413. But the *onus* is on the bailee of proving that he exercised due care: *Mackenzie* v. *Cox*, 9 Car. & P. 632; *Reeve* v. *Palmer*, 5 C. B. N. S. 84, 7 W. R. C. L. Dig. 8. If the defendant is not to be treated as a bailee, but as a trustee, then he is not liable as a trustee for the dishonesty of persons properly employed by him in the ordinary course of business, where he has acted with prudence: *Speight* v. *Gaunt*, 32 W. R. 435, 9 App. Cas. 1; and his being paid for his services does not increase his liability.

Arthur Powell, in reply.—Defendant has not discharged the *onus* of showing that he was not guilty of negligence. A watchmaker must secure his stock against his servants: *Clarke* v. *Earnshaw*, Gow. 30. As a bailee for reward defendant has been guilty of gross negligence: *Johnston's claim*, 19 W. R. 457, L. R. 6 Ch. 212, 217. As a trustee he is liable for the fraudulent act of his agent, though chosen with due care: *Bostock* v. *Floyer*, 14 W. R. 120, L. R. 1 Eq. 26. In *Speight* v. *Gaunt* the trustee received no remuneration.

ROMER, J.—[After dealing with the other points of the case, which do not call for a report, proceeded as follows:—] As to the sixteen guineas for the watch received by Lewis, which clearly cannot now be recovered, that, in my opinion, obviously was fraudulently appropriated by Lewis to his own use, and the other items are all articles pawned, given away, or otherwise improperly dealt with by Lewis, in fact, clearly stolen by him. The question which arises with regard to these items is whether the defendant is liable for the criminal acts of his servant. On his behalf it is said that the principle laid down (though not for the first time) in *Speight* v. *Gaunt* applies, and that he is not liable. But the present case differs from that, in the fact that the defendant was paid for his services. In other respects the cases are similar, for I find as a fact that under the circumstances, and having regard to the nature of the plaintiff's business, which had temporarily to be carried on by the defendant, he, the defendant, was entitled and bound to employ a man to do the work that Lewis was employed for. I find no negligence in the selection of Lewis for the work. He had a good character when employed, and I am satisfied on the evidence that the defendant had no real ground for supposing that Lewis was not in every way qualified to perform or did not in fact properly perform his duties at the plaintiff's shop. Under these circum-

(a.) Reported by C. HERBERT BROWN, Esq., Barrister-at-Law.

stances, does the fact that the defendant was paid by the plaintiff for his services prevent the application of the principle of *Speight* v. *Gaunt*, and make the defendant liable for the criminal acts of his servant? I think not. The position of the defendant may, I think, be well likened to that of a bailee for reward who has to take care of or do something with the article handed to him—of course, I am speaking of a common bailee for reward, and not of the special cases of an innkeeper and a carrier. Now, such a common bailee is clearly not liable for the tortious acts of his servants causing a loss of the articles, unless there has been negligence on his part. And in the present case, as I have said, the defendant has, in my judgment, discharged the *onus* of proving that there was no negligence on his part. It is true that Lewis had access to the plaintiff's goods; but that was inevitable, having regard to the nature of the business and to the fact that the goods had to be shown to customers and handed over to them if they bought. I think that the business was being conducted by the defendant in the same manner in which the plaintiff himself conducted it, and that Lewis was employed in the same way in which a servant would ordinarily be employed by the plaintiff himself in his business. It is important also to remember that the plaintiff himself was present at the shop throughout the time of Lewis's services (with only an occasional absence), and I am satisfied that no complaint of any kind was made by him during that time that the business was not being properly conducted, and, moreover, that the business was in fact then carried on in the usual and proper manner, and to his satisfaction. These facts render the case before me quite distinct from the cases of *Clarke* v. *Earnshaw* and *Johnston's claim*, where negligence was found. Moreover, if I regard the defendant, not as a bailee for reward, but as a trustee, I see no sufficient reason for confining the principle laid down in *Speight* v. *Gaunt* to the case of an unpaid trustee, though, no doubt, some of the judges who decided *Speight* v. *Gaunt* did in their judgments refer to the fact that there the trustee was not paid for his services. I think the principle ought to be applied, in a proper case, even where the trustee is remunerated; and I think the present is such a case. And, indeed, this view is, to a certain extent, supported by authority; for in *Raw* v. *Cutten* the court had to consider the liability for his agent's defaults of a provisional assignee who was entitled to be paid for his services, and was in other respects very much in the same position as the defendant here. I may add that that case was clearly decided on general principle, and not on the special circumstance that the provisional assignee was an officer of the court.

Solicitors, *Hudson-Miller & Vernon; Smith, Fawdon, & Low*, for *Wright, Williams, & Wright*, Leicester.

Chan. Div.
Vaughan Williams, J. } Jan. 11, 21.

In re WEST CUMBERLAND STEEL AND IRON CO. (LIMITED). (a.)

Company—Winding up—Procedure—Secured creditor—Debt—Scotch process—Pending action—Attachment of assets of company in Scotland—Arrestment on the dependence — Arrestment jurisdictionis fundandæ causa—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 87, 151.

Alleged creditors of an English company, which was being wound up subject to supervision, took proceedings against the company in the Scotch courts prior to the liquidation, which proceedings had, according to Scotch law, put them in the position of secured creditors, subject only to their obtaining a decree in Scotch courts establishing their debt.

Held, that in these circumstances, the creditors not being able to enforce their security in the winding up, the proceedings in the Scotch court ought to be allowed to continue.

Motion.

Two motions were made in the matter of the above-named company, which was being wound up subject to supervision. On the 29th of February, 1892, letters of arrestment were obtained by Messrs. Hope and by the pursuers in proceedings pending in the Court of Session against the company to attach all moneys and goods in Scotland belonging to the company, in order to ground jurisdiction, upon which letters of arrestment were duly executed on the 18th and 19th of March, 1892; and a summons was obtained by the pursuers against the company containing a warrant to arrest on the dependence of the action, upon which warrant arrestments were again executed upon the 19th and 21st of March, 1892. A sum of £1,104 belonging to the company in the Royal Bank of Scotland was arrested by Hope & Co. Except the last-named sum the company had not, at the date of sealing the letters of arrestment, nor had the company acquired since that date, any property in Scotland. A resolution for voluntary winding up was passed on the 21st of May, 1892. The order for continuing the winding up under supervision of the High Court was made on the 25th of June, 1892.

The liquidator now moved to restrain Hope & Co. from continuing the Scotch proceedings and from attaching or arresting the moneys of the company in the Royal Bank of Scotland. The other motion was by Hope & Co. for leave to continue the Scotch proceedings against the company notwithstanding the winding up.

O. Leigh Clare and *Alexander Young*, for the liquidator.—The company is an English company, and the contracts now in dispute are English contracts to be performed and completed in England. The question is whether Hope & Co. should be allowed to get priority by reason of the Scotch proceedings. We say that they have no priority, they not having obtained a decree in a Scotch court: *Liquidators of Benhar Coal Co.* v. *Turnbull*, 10 Ct. of Sess. Cas., 4th ser., 558.

Haldane, Q.C., and *Gatey*, for Hope & Co., contended that the letters of arrestment had put them in the position of secured creditors, and that they had obtained a priority: *Mitchell* v. *Scott*, 8 Ct. of Sess. Cass., 4th ser., 875.

Clare replied.

VAUGHAN WILLIAMS, J.—The question in this case arises on two motions, the one by J. A. Hope & Co., of Whitehaven, Cumberland, for an order that they, notwithstanding the winding up of the company, may be at liberty to continue and prosecute an action or summons now depending in the Court of Session in Scotland, wherein they are the pursuers and the company the defenders, and that in the event of their being successful they may be at liberty to enforce the attachments or arrestments obtained by them of moneys of the company in the hands of the Royal Bank of Scotland; the other a motion on behalf of the liquidator that Hope & Co. may be restrained from further prosecuting the said action and arrestments. The question, to my mind, which arises on these motions is really a question whether

(a.) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

Messrs. Hope & Co., by virtue of the proceedings in Scotland, have become secured creditors, for, if the effect of those proceedings has been to make Messrs. Hope & Co. secured creditors, they are, in my opinion, entitled to go on with their action in Scotland, in so far as it is necessary to give effect to the security which they have obtained. It seems to me that the question whether Messrs. Hope & Co. have obtained by their proceedings in Scotland a valid security is a question of Scotch law, while the question whether Messrs. Hope & Co. ought to be allowed to continue this action and arrestment is a question for me to determine under the Companies Act, 1862.

Now, there has been laid before me evidence by distinguished Scotch lawyers as to the Scotch law. In his affidavit Mr. Asher, Q.C., says (par. 4 and 5):—"According to the law of Scotland the latter arrestments operate as attachment in security. In the event of Messrs. J. A. Hope & Co. obtaining a decree in their said action for a sum of money the decree would draw back, in my opinion, to the dates of the arrestment on the dependence, and Messrs. J. A. Hope & Co. would, in my opinion, on obtaining the said decree, have an absolute preference over the funds arrested to the extent of the sum to which they might be found entitled in the action." "I am of opinion that had the winding up of the above-named company been proceeding in Scotland the court would have granted leave to Messrs. J. A. Hope & Co. to continue their said action, so as to afford them an opportunity of establishing that there was a sum due to them for which they had secured a preference by their arrestments": *Liquidators of Benhar Coal Co.* v. *Turnbull*. This opinion seems to me to be based on undisputed facts which are set forth in the earlier portion of the affidavit. On the other hand there is an affidavit on behalf of the liquidator by Mr. Robert Campbell, a practising member of the Scotch bar of thirty years' standing, and a member, also, of the English bar. Mr. Campbell states that it is within the power of the Scotch courts to recall and in effect annul arrestments such as those obtained by Messrs. Hope & Co. That this is so is not in dispute. Mr. Campbell goes on to suggest that the warrant for the original arrestment *ad fundandam jurisdictionem* was obtained on a misstatement of facts—viz., that the defenders had effects in Scotland, and (paragraph 5) that a person not domiciled in Scotland is not liable to the diligence or process of the Scotch courts unless he has either property in Scotland or comes personally into the country; he impeaches the validity of the warrant for arrestments on the dependence on the same grounds. Now, assuming all this to be true in fact and law, it seems to me that it only affords a ground for the recall of the Scotch process by the Scotch courts, but that unless such process is recalled I am bound to deal with it as validly issued. Mr. Campbell goes on to deal with the case of *Liquidators of Benhar Coal Co.* v. *Turnbull* and to distinguish that case, which seems to be an authority against the contention of the liquidator, on the ground that in that case there was no question as to the competency of the action, and on the grounds that in that case a decree or forthcoming had been actually obtained by the creditor. The question of competency, in my opinion, is a question, as I have said, for the Scotch courts and not for me. As for the absence of a decree, I am of opinion from the judgments of the Lords of Session in the case of *Liquidators of Benhar Coal Co.* v. *Turnbull*, cited before me in argument, that the obtaining of a decree before the winding up was not essential to the validity of the security of the creditor according to the Scotch law. The Lord President, at the conclusion of his judgment, says:—"I am therefore of opinion that there is nothing in the Act of 1862, or in any of the other companies statutes, which can operate in the way of excluding Mr. Turnbull from the benefits which he has secured by the use of these arrestments, and that the parties here are in the same position in which they would have been in an ordinary sequestration where diligence had been done more than sixty days before its commencement. But it has been further urged that a diligence of this kind must be timeously followed up. It appears to me that it was so in this case. If the creditor had been compelled to proceed with his action in order to obtain a decree, the court, in the exercise of its discretion, would have authorized him so to do, for this is a matter clearly within the discretion of the court, and one which, in the circumstances, the interests of justice between the parties would have demanded. On the whole matter, then, I have come to the conclusion that this diligence has given Mr. Turnbull a good preference." So also, Lord Shand, at the conclusion of his judgment, says:—"In this case the creditor has laid a *nexus* on the funds of the company, and to determine the validity of that *nexus* I think that he would have been entitled to have proceeded with his action and to have obtained a decree in order to make available any preference which the use of his diligence might have secured to him, and that the court would have granted leave accordingly. It seems to me that the parties here are in the same position as the parties were in the case of *Mitchell* v. *Scott*, already referred to, which I think must be held to rule the present case. I therefore agree with your lordship in thinking that Mr. Vair Turnbull is entitled to be ranked preferably on the assets of this company." The head-note in *Mitchell* v. *Scott* is as follows:—"Arrestments used on the dependence of an action confer a preference, although the defender be sequestrated before decree is obtained in the action, provided they be followed up without undue delay."

It seems to me from these cases that, according to the Scotch law, an alleged creditor can, by means of the process used by Messrs. Hope, obtain security for a debt which he has not established by the judgment of the court, and that it is open to him to proceed with an action to establish the debt, provided that he does so without undue delay; and that when he has done so the judgment or decree will draw back to the date of the arrestments on the dependence, and that the security obtained by the arrestments will apply to the debt subsequently established. The arrestments in the present case seem to have been executed on the 19th and 21st of March, 1892. The date of the petition is the 23rd of May, 1892, and the date of the resolution for voluntary liquidation the 21st of May, 1892. It seems to me, therefore, that Messrs. Hope are, subject to their obtaining a decree in the Scotch courts establishing their debt, secured creditors. I further think that Messrs. Hope could not enforce their security by proceedings in the winding up, and that, therefore, I ought to allow the action and arrestment in the Scotch court to continue; and I therefore accede to the motion of Messrs. Hope and dismiss the motion of the liquidator, in each case with costs.

Solicitors, *Blunt, Lawford, & Co.*, for *Brockbank, Helder, & Co.*, Whitehaven; *Harrison & Powell*, for *T. Brown*, Whitehaven.

Q. B. Div. (Lord Coleridge, C.J., and Cave, J.) — Jan. 18.

JACKSON v. MARGRETT. (a.)

Practice—Appeal from county court—Notice of appeal, service of—Service on London agent of country solicitor—R. S. C., 1883, *ord.* 59, *r.* 12.

In appeals from county courts to divisional courts, where the solicitor for the respondent carries on business in the country, it is not sufficient that the notice of appeal should be served by the appellant, within the proper time, upon the London agent of the respondent's country solicitor. Such notice must be served within the proper time upon the respondent's country solicitor.

Powell *v.* Thomas, 39 *W. R.* 224, [1891] 1 *Q. B.* 97, *followed.*

Appeal by the defendant from a judgment of the learned judge of Cheltenham County Court.

The amount of the judgment being under £20, leave was given to the defendant to appeal, on the condition that he served his notice of appeal within fourteen days.

The preliminary objection was now taken on behalf of the plaintiff, the respondent, that there was no proper notice of appeal served as required by ord. 59, r. 12, which provides—with regard to appeals from county courts or other inferior courts of record of civil jurisdiction to divisional courts—"the notice of motion shall be served and the appeal entered within twenty-one days from the date of the judgment, order, or finding complained of."

In this case notice of appeal had been served within the proper time—that is, within the fourteen days—upon the London agent of the solicitor for the respondent, but such London agent had not sent on the notice to the country solicitor until it was one day too late. That is, no notice of appeal was served either upon the respondent himself or upon his country solicitor until too late, but a proper notice of appeal was served upon the town agent of the country solicitor for the respondent.

Daniel Lee, for the respondent.—The appeal cannot be heard, according to the decision of the court in *Powell* v. *Thomas*, 39 W. R. 224, [1891] 1 Q. B. 97, where the court expressed an opinion that in the case of an appeal from a county court, where the solicitor for the respondent carries on business in the country—as in this case—service of the notice of motion on the solicitor's London agent is not sufficient service to satisfy ord. 59, r. 12.

Gwynne James, for the appellant.

THE COURT (Lord COLERIDGE, C.J., and CAVE, J.) allowed the objection, upon the ground that in such cases service of the notice of appeal upon the London agent of the country solicitor for the respondent is not a sufficient service within the rule, and they dismissed the appeal on that ground, but without costs.

Objection allowed, and appeal dismissed, without costs.

Solicitors for the appellant, *Field, Roscoe, & Co.*, for *F. S. Gale*, Cheltenham.

Solicitors for the respondent, *Shearman & Rayner*, for *L. James*, Cardiff.

(a.) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

Q. B. Div. (Pollock, B., and Hawkins, J.) — Nov. 2, 11.

APOTHECARIES' COMPANY v. JONES. (a.)

Apothecaries Act, 1815 (55 *Geo.* 3, *c.* 194), *s.* 20—*Unqualified person—"Act or practise"—"Every such offence whether more than one"—Penalty.*

The words "act or practise" in the 20th section of the Apothecaries Act, 1815, *which provides that, if any person "shall act or practise as an apothecary" without having obtained the certificate required by a previous section, "every person so offending shall for every such offence forfeit £20," contemplate an habitual course of conduct on the part of the defendant, and not an isolated act.*

Where, therefore, a defendant had given advice and had prescribed and supplied medicine to three separate persons on different occasions on the same day, without a certificate, and was sued for three separate penalties,

Held (affirming the county court judge), that only one offence had been committed in law, and that only one penalty was therefore recoverable.

Appeal from a decision of his Honour Judge Digby, Judge of the Derby County Court.

Three separate actions were brought by the appellants at the instance of the Medical Defence Union against the respondent to recover, under the 20th section of the Apothecaries Act (55 Geo. 3, c. 194), three separate penalties of £20, by reason, as was alleged, that he had thrice on the 6th of May, 1892, acted and practised as an apothecary by giving advice and medicine to three persons, respectively named Newman, Eaton, and Page, on separate occasions, without having obtained a proper certificate as required by the Act.

In the first case the learned county court judge gave judgment for the full penalty of £20, but he gave judgment for the defendant in the other two cases, upon the ground that although either cases might have been relied upon to support an action, and all these cases might in either case have been proved as evidence of an infringement of the 20th section by the defendant, nevertheless that the three cases together formed but one offence in law within the true meaning of that section. The plaintiffs appealed.

By section 14 of the Apothecaries Act it is enacted that it shall not be lawful for any person or persons to practise as an apothecary without having obtained a certificate as therein provided.

Section 20 provides that if any person, &c., "shall act or practise as an apothecary in any part of England or Wales without having obtained such certificate as apothecary, every person so offending shall for every such offence forfeit and pay the sum of twenty pounds," and the section also provides that a penalty of £5 shall be imposed upon any person who acts as an assistant to an apothecary in compounding or dispensing medicine without having obtained such certificate.

Houghton, for the appellants.—The county court judge here has failed to give due effect to the word "act," and has dealt with it as equivalent to "practising." It was intended by the insertion of the word "act" as well as "practise" to meet the case which has arisen here, and to impose penalties in respect of individual acts which are separate injuries to the public. If this contention is incorrect the effect will be that persons who systematically evade the Act will be enabled to do so

(a.) Reported by JOHN P. MELLOR, Esq., Barrister-at-Law.

with practical impunity, since if the penalty is not imposed in respect of each "act" it is difficult to see where the line can be drawn between one and more offences. Could it be said, moreover, that when advice and medicine had been given to one person, and therefore a complete offence committed, that there was a consequent immunity in respect of a second? The cases of *Crepps* v. *Durden*, 1 Sm. Lead. Cas. 692, where only one penalty was held to be recoverable for trading on the Lord's-day, and *Marriott* v. *Shaw*, Com. 274, and *In re Mathews*, 10 Mod. 26, where it was decided, under 5 Anne, c. 14, s. 4, that only one penalty could be recovered for killing several hares, are distinguishable because the acts were comprehensive acts. In the Sunday trading case the offence is necessarily limited by the day; here there is no reason for drawing the line at a day. In *R.* v. *Hartley*, 31 L. J. M. C. 232, it was held by Mellor, J., that distinct sales of meat on the same day were separate offences; and in *Gordon* v. *Williamson*, 40 W. R. 496, [1892] 1 Q. B. 616, where the word "act" was used without "practise," five penalties were imposed for acting as a vestryman on five separate occasions.

The learned counsel, the respondent being unrepresented, also drew attention to the following cases:—*Apothecaries' Co.* v. *Bentley*, 1 Car. & P. 538; *Milnes* v. *Bale*, 23 W. R. 660, L. R. 10 C. P. 591; *Brooke* v. *Millikin*, T. R. 509; *Apothecaries' Co.* v. *Burt*, 1 L. M. & P. 405, 5 Ex. 363; *Apothecaries' Co.* v. *Nottingham*, 34 L. T. 76, 24 W. R. Dig. 8; *Apothecaries' Co.* v. *Warburton*, 3 B. & Ald. 40.

Nov. 11.—The following judgments were delivered:

POLLOCK, B.—This is an appeal from the judge of the Derby County Court, and the appellants sued the respondent, an uncertificated person, in three actions to recover three penalties for three offences, the seeing three different patients contrary to section 20 of the Apothecaries Act. [The learned judge read the section, and continued:—] In the first case it was proved that the respondent gave Newman medicine and pills, and similar evidence was given in the other two cases. The county court judge held that only one offence had been committed under the statute and imposed one penalty of £20, giving judgment for the defendant in those two latter cases. He dealt very fully with the law of the case, and said that the question before him was whether prescribing for the three persons constituted three separate offences or only one. He was of opinion that the words of the statute pointed rather to a continued course of conduct as constituting the offence than an individual act. He found that the three acts proved constituted such continued course of conduct and proved the offence. I should have been content to say nothing more than that I agreed with the judge below but for the number of cases cited in the argument. The remarks in the well-known case *Crepps* v. *Durden* might afford good ground for amending the Apothecaries Act, but as it stands it is really identical with the Sunday Trading Act of 29 Car. 2. That being so, it appears to me to be clear that both statutes contemplate habitual conduct, not individual acts, as constituting the offence, and I am of opinion, therefore, that this appeal should be dismissed.

HAWKINS, J.—I also am of opinion that the county court judge was right in the view he took in holding that the advising and prescribing proved against the respondent constituted in law but one offence, for which one penalty only was recoverable, and that consequently the respondent is entitled to our judgment. [The learned judge stated the facts and referred to the sections of the Act, and continued:]

Were there no authorities to assist in forming a judgment upon the case I can hardly suppose that had the penalty been imposed merely for practising as an apothecary it would have been seriously contended that a person could have been convicted of more than one offence, even though in the course of the same day a hundred patients had been prescribed for. It could never have been in the contemplation of the Legislature that each day during which a person illegally practised should be divided into hours or minutes, during each of which the heavy penalty of £20 would be incurred, nor could it have been the intention of the Legislature that each individual act of prescribing should be deemed such separate offence. To practise a calling does not mean to exercise it upon an isolated occasion, but to exercise it frequently, customarily, or habitually, and though it is true each individual act would afford cumulative evidence of practising, yet bare proof of one individual act would not of itself amount to practising. The words of the section, however, are "act or practise." It becomes, therefore, necessary to ascertain the meaning of the word "act" as there used. During the argument I was disposed to think the words "act" and "practise" were used synonymously, and I am not sure that that is not the correct view. Be that as it may, another interpretation may be given to the word equally favourable to the defendant. It may be the word "act" was used in addition to "practise" to meet the case of persons who, without practising habitually as apothecaries, might, nevertheless, occasionally act as such. But here again the Legislature could not have intended, and the language of the section does not force one to such a conclusion, that, whilst a person habitually practising without a certificate could only incur one penalty each day he so practised, a person who did not habitually practise, and therefore was not so grave an offender, should nevertheless be liable to a separate penalty for every act of prescribing, without limit as to number—in other words, that twenty acts of practise in one day would, in the case of a person habitually practising, only constitute one offence, whereas against a much less persistent offender each act might be visited as a separate offence and visited with a separate penalty.

Applying the same considerations to the case of an assistant, it seems impossible to suppose that every act of assistance, the making of every pill or mixture, could be visited with a separate penalty of £5. Good sense revolts at the idea of such a construction of the section. Very few cases are to be found in the books directly touching the point under discussion, and in neither of them is the point actually decided.

In *Apothecaries' Co.* v. *Bentley* Lord Tenterden expressed his doubts "whether a fresh penalty attached for every acting as an apothecary towards each different patient, and whether more than one penalty attached for a continual practising as an apothecary, though that party attended different persons or patients." In *Apothecaries' Co.* v. *Burt* the question was again mooted, but it was not thought necessary for the court to express any opinion upon it. I must, however, observe as a significant fact that in no reported case since those doubts were expressed has more than one penalty been recovered; probably for the reason that it has been felt that Lord Tenterden's doubts were well founded. The case of *Crepps* v. *Durden* is a valuable authority for the respondent. It is true that case was determined upon the authority of another statute, but the grounds of the decision are applicable to the case before us. In *Crepps*

v. *Durden* the plaintiff had been convicted in four separate convictions for unlawfully exercising his ordinary calling of a baker by selling rolls on Sunday, the 10th of November, 1776, contrary to the statute 29 Car. 2, c. 7, the words of that statute being "that no tradesman or other person shall do or exercise any worldly labour, business, or work of their ordinary calling on the Lord's-day." It was assumed that there were several sales by the defendant of rolls on the Sunday mentioned in the convictions, but it was argued that the nature of the offence was such that it could only be committed once on the same day, and that if the plaintiff had continued baking from morning till night it would still be but one offence. The court held that this was so, and in giving judgment Lord Mansfield stated, as the ground for it, that "the offence is exercising his ordinary trade on the Lord's-day; and that without any fractions of a day, hours, or minutes. It is but one entire offence, whether longer or shorter in point of duration: so, whether it consist of one or a number of particular acts, the penalty incurred by this offence is five shillings. There is no idea conveyed by the Act itself that if a tailor sews on the Lord's-day every stitch he takes is a separate offence, or if a shoemaker or carpenter work for different customers at different times on the same day that there are so many separate and distinct offences. There can be but one entire offence on one and the same day." Suppose for a moment the 20th section had stated in so many words that which is clearly the meaning of it, "if any person shall on any day in the week" act or practise, &c., it would have required some ingenuity to distinguish the present case from *Crepps* v. *Durden*.

The same reason which guided the court in *Crepps* v. *Durden*, viz., that the offence created by the statute can alone be made the subject of conviction, the overt acts done in the commission of that offence are but so many pieces of evidence, had already been acted upon in the cases of *Marriott* v. *Shaw* and *Reg.* v. *Matthews* in proceedings to recover penalties under the statute 5 Anne, c. 14, s. 4, which forbade the keeping by unqualified persons of dogs and engines for the destruction of game. It was sought to recover a separate penalty for each hare killed, but it was decided that, the offence being the keeping and using of the dogs for the forbidden purpose, only one offence could be committed on the same day, and that the number of hares killed was immaterial. It was said by the court in that case: "If a man not qualified go a-hunting, and kill ever so many hares upon the same day, he would forfeit but one five pounds, for it is but one offence."

This may be further illustrated by taking the case of two men charged each with using a gun to kill game without a licence: if they shot through a whole day from morning to night, each would be guilty of one offence only, and each separate use of the gun by firing a shot would not constitute a separate offence. If it were otherwise, a man who fired ten shots would incur penalties amounting to £100, whilst one who for want of opportunity only fired one shot would only subject himself to a penalty of £5. None of the cases cited required comment beyond that which I have already made.

I do not wish it to be understood that in cases arising under the Act now under consideration the act that an uncertificated person on two separate days prescribed and made up medicine for different persons would necessarily justify a conviction for a separate offence on each day, for it is not difficult to imagine cases in which acts of prescribing and making up medicine on several closely following days might, taken together, afford abundant evidence of practising. No such conclusion could fairly be drawn if the acts of each day had stood alone. Again, even though a patient be attended by a person clearly practising as an apothecary, it does not follow that, because the attendance, prescription for, and supply of medicine to such patient had extended over two whole days or parts of two days, two offences must necessarily have been committed. Take the case of a patient to whom, in a case of urgency, an unqualified person had attended continuously from 10 p.m. on one day to 10 a.m. on the following, under such circumstances I should think one offence only would be committed, for all would be one continuous action.

This view might be further illustrated by supposing a case of night poaching where the offender commenced his offence at 11 p.m. and continued it till 2 or 3 a.m. the next day. It is idle to attempt to lay down a golden rule upon the subject, each case must depend upon the particular circumstances attending it. In the present case I have already said I think one offence only was committed, and I agree in the very sensible and sound judgment of the county court judge. The result is, I think this appeal should be dismissed, with costs.

Appeal dismissed.

Solicitors, *Upton, Atkey, & Upton*, for *Johnson & Co.*, Birmingham.

Prob. Div. & Adm. Div. }
Divsnl. Court (Probate). } Dec. 5.

COPELAND *v.* SINISTER. (*a.*)

Probate—Administration—Wife's estate—Lapse of time—Grant to next of kin—Concealment—Right of husband to revocation of grant—County court—Appeal—Court of Probate Act, 1857 (20 & 21 *Vict. c.* 77), *ss.* 54-58—*Court of Probate Act,* 1858 (21 & 22 *Vict. c.* 95), *ss.* 10, 11—*County Courts Act,* 1888 (51 & 52 *Vict. c.* 43), *s.* 100.

A husband and wife separated in 1863. *The wife died in* 1881, *and the executors of her father's will took out letters of administration of her estate in her maiden name, describing her as a spinster, without notice to the husband, although they knew of the marriage, and that the husband was alive. In* 1888 *the husband first heard of his wife's death, and, after inquiries, brought an action in the county court for revocation of the grant, and regrant to himself.*

The county court judge held that, in the absence of fraud, he was not justified in revoking the grant after so long a lapse of time.

Held, on appeal (Jeune, P., *and* Barnes, J.), *that it was not necessary to show fraud, and that the grant must be revoked and a grant made to the husband.*

Semble, *that the appeal was not under the County Courts Act,* 1888, *but under the Court of Probate Acts,* 1857 *and* 1858, *and that, although section* 11 *of the Act of* 1858 *repeals section* 54 *of the* 1857 *Act, which confers the jurisdiction on the county courts, and the Act of* 1858, *whilst giving jurisdiction to the county court, contains no reference to appeals, yet the Acts of* 1857 *and* 1858 *must be read together, and the appellate jurisdiction under section* 58 *of the* 1857 *Act remains.*

Held, that, even if the appeal were not under the Court of Probate Acts, the question of law was sufficiently raised to comply with the requirements of section 120 *of the County Courts Act,* 1888.

Appeal from the decision of his Honour Judge Hughes, Q.C., at Congleton, on October 11, dismiss-

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

ing the plaintiff's action for revocation of a grant of letters of administration.

Gad Copeland, the plaintiff and appellant, claimed to have the letters of administration of the goods of Eunice Turnock, deceased, wife of himself, granted to the defendants on the 14th of December, 1881, revoked, and asked for a regrant to himself.

The plaintiff was married to the deceased, Eunice Turnock (a sister of the defendant Joseph Turnock) on August 14, 1858. The parties lived together at Harriseahead until 1863, when, owing to differences, the wife went home to her mother, and did not return to the plaintiff again. There was no issue of the marriage. From 1863 to 1888, the plaintiff resided at Stockport. On the 29th of March, 1881, Mrs. Copeland died, and on December 14, 1881, letters of administration were granted to the two defendants, who were executors of the will of her father, who had died a few months previously. In the affidavit filed by the administrators, and also in the bond, Mrs. Copeland was described by defendants as "Eunice Turnock, a spinster," and she was also buried in her maiden name. It was proved that the defendant Turnock knew of the marriage, and that the plaintiff was living at the death of his wife. The plaintiff did not hear of his wife's death till 1888.

On proof of these facts by the plaintiff the learned county court judge held that, whilst he had jurisdiction to comply with the plaintiff's claim, and the husband had technically the right to the letters of administration, he ought not, in the absence of fraud and under all the circumstances, especially the long separation, to grant the claim, and he dismissed the plaintiff's action without calling on the defendants to give evidence.

At the hearing objection was taken that the court had no jurisdiction, inasmuch as the proceedings were entitled "In the Probate Act, 1857." The judge allowed the title to be amended if necessary by referring to the Act of 1858.

Deane, for the plaintiff, in support of the appeal.—The county court judge was wrong in thinking it was necessary for the plaintiff to show fraud. The plaintiff is entitled to the administration to his wife's estate, and is not affected by the acts of other parties without notice. His decision was on a point of law, and section 58 of the Court of Probate Act, 1857, gives this court jurisdiction to hear it: *Zealley* v. *Veryard*, 14 W. R. 970, L. R. 1 P. & D. 195.

Leslie Probyn, for the respondents.—The court has no jurisdiction to hear the appeal; the judge was not asked to take a note of any question of law in accordance with the provision of the County Court Act, 1888, s. 120, which is the only Act which gives an appeal. There is no appeal under the Court of Probate Act, 1857, because section 54 of that Act, which confers jurisdiction on the county court, was repealed by section 11 of the Court of Probate Act, 1858, and the provisions relating to appeal in the 1857 Act cannot apply to a new jurisdiction conferred on the county courts by the Act of 1858. The judge dealt with a question of fact—fraud or no fraud; his attention was never drawn to the point now raised.

Deane, in reply.—The question of law was raised by the plaint, Was the husband entitled to the grant or not?

JEUNE, P.—I think this is a case which may properly be disposed of at once. It is not necessary in deciding it to say more than that the judge below appears to have held that he was not justified in revoking the grant of administration unless fraud was shown. In my opinion that is not the law, and therefore his decision ought to be reversed. One or two points were raised in the course of the case on which it is not necessary to give a decision.

It has been said that as section 54 of the Court of Probate Act, 1857, was repealed by section 11 of the Court of Probate Act, 1858, and that the later Act contains no reference to appeals, therefore the jurisdiction of appeal disappeared. It appears to me, however, more reasonable to suggest that the two Acts of 1857 and 1858 must be read together. The only reason for making this point is that if it were correct, then the appeal must have been under the County Courts Act, 1888, section 120 of which requires that a note shall be taken of the question of law raised at the trial; but though I am not sure that this appeal is not under the Probate Acts, I am satisfied, in any event, that the point was sufficiently taken in the court below to comply with the requirements of the County Courts Act, 1888; and, being satisfied that the judge below was wrong, it remains to decide what ought to be done. No valid ground of defence to this action was suggested in the defence or in the cross-examination of the witnesses, or even by counsel now; it would therefore be a waste of time and money to send the case down for rehearing. In my opinion the judgment in the court below must be reversed, the letters of administration revoked, and a grant made to the husband.

As to the costs, the only ground suggested for depriving the plaintiff of them is the husband's delay for four years. If there had been any administration during these four years that might have been some ground; but the grant was made in 1881, and the administration must have been completed long before the husband knew of his wife's death. Therefore there is no ground for depriving the plaintiff of his costs.

BARNES, J.—I am of the same opinion.

Appeal allowed, with costs of appeal and in the court below.

Solicitors for the appellant, *Burton & Stanley.*

Solicitors for the respondents, *Prior, Church, & Adams.*

House of Lords.

From C. A. (England). May 31, 1892.

GRESHAM LIFE ASSURANCE SOCIETY v. STYLES. (a.)

Inland revenue—Income tax—Life assurance—Profits or gains—Deductions for annuities paid—Income Tax Act (5 & 6 *Vict. c.* 35), *s.* 100, *Schedule D, Case* 1, *r.* 4; *s.* 102.

One branch of a life assurance society's business consisted in the sale of annuities to the public. A lump sum was paid down in the case of an immediate annuity, and for a deferred or contingent annuity either a lump sum or a series of periodical payments. In making up the balance-sheet for three years for the purpose of ascertaining the profits and gains on which income tax was to be assessed under Schedule D of the Income Tax Acts, the society deducted from its gross income the sum paid in discharge of its annuity contracts. The assessment was for the year 1885-6.*

* By the Customs and Inland Revenue Act, 1888, s. 34 (3), other provisions are made for cases similar to the above.

(a.) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

Held, that the society was not liable to be assessed for the amount paid by it for these annuities.

Alexandria Water Co. *v.* Musgrave, 11 *Q. B. D.* 174, 31 *W. R. Dig.* 90, *distinguished.*

Decision of the Court of Appeal (38 *W. R.* 696, 25 *Q. B. D.* 351) *reversed.*

This was an appeal from an order of the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.), 38 W. R. 696, 25 Q. B. D. 351, affirming a decision of the Queen's Bench Division, reported 38 W. R. 480, 24 Q. B. D. 500, upon a case stated by the Commissioners of Income Tax under 43 & 44 Vict. c. 19, s. 59.

The facts are fully stated in the report of the case in the court of first instance, and shortly in some of their lordships' judgments, where the arguments used, sufficiently appear.

Sir H. Davey, Q.C., and *Lumley Smith, Q.C.* (*W. Fooks* with them), for the appellants.

Sir E. Clarke, S.G., and *Danckwerts* (*Sir R. E. Webster, A.G.*, with them), for the respondent.

Alexandria Water Co. v. *Musgrave*, 11 Q. B. D. 174, 31 W. R. Dig. 90; *Last* v. *London Assurance Corporation*, 34 W. R. 233, 10 App. Cas. 438; *Mersey Loan and Discount Co.* v. *Wootton*, 2 Tax Cases, 316; *Trustees of Psalms and Hymns* v. *Whitwell*, 3 Tax Cases, 7, were referred to.

The House took time for consideration.

May 31.—Lord HALSBURY, L.C.—The commercial concern in respect of which the question arises here, consists of a business which is carried on by receiving a sum of money as the purchase-money for the granting of annual sums. The sum so granted is certainly an annuity and an annual payment, and I believe it is the fortuitous use of those words under circumstances that I shall presently discuss which has given rise to what seems to me an erroneous construction of the statute.

The question arises under the Income Tax Acts, and the Act itself, like all the Acts of the same class, purports to be "an Act for granting to her Majesty duties on profits arising from property, profession, trades, and offices."

Now, I leave out for the moment the question of land, and, the object being to tax profits, certain rules have been inserted in the statute which have become and are made, in truth, parts of the Act itself. But the rules are, as they themselves import, rules for ascertaining the duties. "The amount of the profits and gains" was the expression all through the earlier legislation on the subject down to the Act of 1805. In that year the expression was altered, as is pointed out by Mr. Dowell in his valuable book on the Income Tax Acts (p. 114), and the observation appears to be well founded that the alteration of the language pointed rather to a more careful return or statement of income, an account in a debtor and creditor form, and intended to prevent deductions, which possibly had been up to that time claimed, being permitted to reduce the amount of the profit which the debtor and creditor account ought to show. But, except as indicating the form rather than the substance of what should be shown in the return as the balance of profits and gains, I am in the condition of Lord Blackburn, who said, in the case of *Coltness Iron Co.* v. *Black*, 29 W. R. 717, 6 App. Cas. 134, that he had been unable to discover any difference in the meaning of the two phrases.

Now if I understood the contention before your lordships aright, it rested on the fourth rule relating to assessment under Schedule D, which prohibited any deduction being made on account of any annual interest or any annuity or any other annual payment, and as those sums were annuities or annual payments it was said that they were not to be deducted in estimating the amount of the profits and gains arising as aforesaid. And if the rule had stopped at the point up to which I have quoted I should have concurred with the contention of the surveyor. But the rule does not stop there. In order to be a prohibited reduction it must be sought to be made on an annuity or other annual payment payable "out of such profits or gains."

Now to my mind it is very clear what is the *intuitus* both of the enactment and of the rules under which the duties are to be ascertained. The thing to be taxed is the amount of profits and gains. The word "profits," I think, is to be understood in its natural and proper sense—in a sense which no commercial man would misunderstand. But when once an individual or a company has in that proper sense ascertained what are the profits of his business or his trade, the destination of those profits, or the charge which has been made on those profits by previous agreement or otherwise, is perfectly immaterial. The tax is payable upon the profits realized, and the meaning, to my mind, is rendered plain by the words "payable out of profits."

It would be an extraordinary thing to suggest that where a business consists of granting annuities it is to be taxed upon a different principle from any other commercial concern, and no one, I suppose, could doubt that in any other commercial concern the cost of the thing sold to the trader is one of the expenses incident to the carrying on of the trade.

If an annuity seller is to be treated differently from a seller of any ordinary article of commerce—coals or corn or the like—one would have expected to find some words in the statute rendering him obnoxious to a different system of taxation and enforcing a different mode of ascertaining profit, whereas it seems to me that the application of the general words "profits and gains" or "balance of profits and gains" are equally applicable whatever the commercial concern carried on may be.

I think one gets a very fair notion of what was in the mind of the Legislature by a variety of cases put in the course of the argument which it is not necessary to repeat here.

The Court of Appeal seems to have been impressed by the decision in the *Alexandria Water Co.* (*Limited*) v. *Musgrave*. With the decision in that case I am not disposed to disagree, though I am not quite certain I am able to adopt the reasoning, which to some extent appears to depend upon a distinction between the words "gains" and "profits," a distinction which I cannot assent to; but upon the facts I think I should have come to the same conclusion, since, to put it very plainly, in that case it was a claim to deduct the company's debts for borrowed capital and diminish the amount of the profits of the trading.

The whole point seems to me to depend upon the words "out of profits and gains." Profits and gains must be ascertained on ordinary principles of commercial trading, and I cannot think that the framers of the Act could be guilty of such confusion of thought as to assume that the cost of the article sold to the trader, which he in turn makes his profit by selling, was not to be taken into account before you arrived at what was intended to be the taxable profit.

As I have said, the confusion has arisen from the use of the words "annuity or annual sums payable," without considering that this particular commercial adventure consists in selling annuities, and that which they pay, therefore, is to them the cost of the article supplied. You can no more refuse to take that cost

into your consideration when ascertaining the balance of profits and gains, than you could the cost of the coals or the corn to the coal merchant and to the corn merchant, in ascertaining what are the profits from his trade.

I am therefore of opinion that the judgment appealed from ought to be reversed.

Lord WATSON.—The business carried on by the appellant society is that of life insurance, and one branch of it consists in the sale of annuities to the public. The consideration for an immediate annuity is a lump sum instantly paid, and, for a deferred or contingent annuity, may either be a lump sum or a series of periodical payments. The question raised for decision in this appeal relates to an assessment, under Schedule D, in respect of the annual profits and gains arising from the appellants' business for the fiscal year ending April 5th, 1886.

In accordance with the provisions of section 100, Case First, rule 1, of the Act of 1842 (5 & 6 Vict. c. 35), the amount upon which the appellants became liable to pay income tax for the year in question was one-third of the assessable profits or gains which had accrued to them during the three years immediately preceding the 30th of June, 1885, the date at which their books were last balanced. The appellants had, in the course of these three years, paid upwards of £250,000 in discharge of their contract obligations to their annuitants. The respondent, in estimating the triennial average, included all these payments in the balance of assessable profits or gains, disregarding the contention of the appellants that they ought to be treated as items of debit, for the purpose of ascertaining the balance. On appeal, the Commissioners for General Purposes of the Income Tax Acts for the City of London confirmed the assessment, and stated a special case, in terms of 43 & 44 Vict. c. 19, s. 59. The decision of the commissioners has been upheld by a divisional court and also by the Court of Appeal.

Rule 1 of section 100, Case First, prescribes that the duty to be charged shall be computed on a sum not less than "the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern." It plainly contemplates the preparation of a balance-sheet, in which proper trading disbursements and liabilities are to be set against trade assets, so that the surplus of the latter, if any, will represent the assessable profits or gains of the concern. All the other rules applicable to Schedule D. are framed upon the same footing. Rule 3 of Case First specifies various items which a trader might naturally enough, for his own private purposes, insert on the debit side of the sheet; and enacts that these shall not be allowed as deductions in estimating his profits for the purposes of the income tax. Rule 4 of Case First provides that "in estimating the amount of the profits and gains arising as aforesaid, no deduction shall be made on account of any annual interest, or any annuity or other annual payment, payable out of such profits or gains."

The first of the rules applicable to Cases 1 and 2 of section 100 provides that, in estimating the balance of the profits or gains to be charged according to either case, no sum shall be set against or deducted from such profits or gains for "any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade, manufacture, adventure, or concern." It seems tolerably clear, and it was hardly disputed by the respondent, that all payments made by the appellants on account of the annuities which they have contracted to pay are, in the strictest sense of the words, disbursements made wholly and exclusively for the purposes of their business. The appellants trade in annuities, and these disbursements are the consideration, or part of the consideration, which they are bound to give in return for the annuitants' purchase-money already received by them and carried to their credit in the balance-sheet. Unless the statute forbids it, the appellants must have the same right to deduct such payments, in estimating their assessable profits, as a grocer has to deduct the price paid by him for the tea or sugar which he retails. If there be one point free from obscurity in the Act of 1842, it is this, that the Legislature intended all traders, whether in groceries, annuities, or other articles of commerce, to be assessed upon the same footing.

The learned counsel for the respondent were constrained to admit that, were it not for the terms of rule 4 of Case First, the appellants would be entitled to the deductions which they claim. But they argued that the expression "profits and gains," which occurs twice in that rule, in each instance signifies the gross receipts of the trader, or, in other words, the whole items standing on the credit side of the balance-sheet. Upon that construction of the rule, no deduction could be allowed, in estimating profits, of "any annual interest, or any annuity or annual payment"; and one of many startling results would be that the yearly rent and taxes paid by a trader for his business premises, and yearly wages paid to his servants, would not be dealt with as payments out of trading capital, but would be included in the profits upon which he pays income duty.

Although it appears to have been accepted by both courts below, I cannot assent to the construction put upon rule 4 by the respondent, which is, in my opinion, at variance with its context. The rule begins thus: "In estimating the amount of the profits and gains arising as aforesaid." Does that mean: "In estimating the amount of the trader's assets?" I venture to think not. I think the words refer, not to total assets, but to the balance of profits and gains, to be ascertained by virtue of the preceding rules for the purpose of being charged with income duty. The rule then goes on to prescribe that there shall be no deduction made on account of any annual interest, or any annuity, or other annual payment "payable out of such profits or gains." These last words refer back to profits and gains as described in the commencement of the rule, and must, therefore, be taken to mean, not gross receipts, but profits and gains, the amount of which is to be estimated for the purposes of the Act. Had it been the intention of the Legislature to enact that no annual interest, annuity, or other annual payment should be inserted on the debit side of the balance-sheet, it appears to me that rule 4 would have been expressed in very different terms. The rule, as it stands, merely enacts that no annual payment which falls to be paid out of profits shall be deducted from profits in assessing for income tax.

The respondent relied in argument upon section 102, which directly charges with duty all annuities, yearly interest of money, or other annual payments, whether such payments shall be payable within or out of Great Britain. That enactment is qualified by the proviso that no charge shall be made upon the person entitled to such payments, in the case where the same shall be "payable out of profits or gains brought into charge by this Act." In that case the trader must pay upon the whole profits or gains brought into charge, but is authorized to deduct income tax in settling with the person entitled. These provisions do not appear to me to throw any light upon the question, because, in order to ascertain what profits or gains are brought into charge by the Act, it is necessary to go back to the rules of Case First of section 100.

Section 40 of the Act of 1853 (16 & 17 Vict. c. 34), which was also referred to in the course of the argument, has really no bearing upon the present question. It empowers persons who are liable to the payment of any rent, or any yearly interest of money, or any annuity or other annual payment, on making such payment, to deduct and retain thereout the amount of the rate of income duty payable at the time; but it has no application to annual payments payable out of profits or gains. Section 24 (3) of the Customs and Inland Revenue Act, 1888, for the first time made it compulsory upon the persons liable in payment to retain income tax, upon their making payment out of the capital which they employ in trade, of any interest of money or annuities charged with the tax under Schedule D, and not payable or wholly payable out of profits brought into charge to such tax. Had that enactment been in force in the year 1885-6 the present controversy would never have arisen.

The only point which remains for consideration is this, whether the annuities paid by the appellants are payable, within the meaning of rule 4, out of profits and gains? In order to bring annuities or other annual payments within the scope of the rule they must, in my opinion, either be directly charged upon profits or be in themselves of such a character that they form a proper charge upon profits. Now I cannot understand in what sense the annuities in question can be said to be properly chargeable to profits. An annuity to the widow of a deceased partner, interest on capital advanced by a partner, or upon money borrowed for the purposes of the business, are truly payable out of profits earned, and, therefore, ought not to be deducted in estimating the income yielded by the business. On that ground I agree with the decision of the Court of Appeal in *The Alexandria Water Co.* v. *Musgrave*, although I am unable to concur in all the reasons which were assigned for it. But the business of the appellants consists in employing their trading capital to pay annuities, as the counterpart of the consideration given by the annuitant, and the annuities are payable out of stock, and not out of business profits. On these grounds I concur in the judgment which has been moved by the Lord Chancellor.

Lord HERSCHELL.—The appellant society, as part of the business which it carries on, sells or grants annuities in consideration of a premium or lump sum paid down in the case of an immediate annuity, and of a similar payment or of periodical premiums in the case of a deferred or contingent annuity. In making up the balance-sheet, showing the amount of its profits and gains for three years, the society put on the one side of the account the consideration money received for annuities granted, on the other side was put the sum paid in discharge of its annuity contracts. The surveyor of taxes contended that the latter sum ought not to have entered into the account for the purpose of ascertaining the profits and gains on which income tax was to be assessed under Schedule D of the Income Tax Acts.

This contention was based upon the fourth rule relating to assessment under Schedule D, which is in the following terms:—"In estimating the amount of the profits and gains arising as aforesaid no deduction shall be made on account of any annual interest, or any annuity or other annual payment, payable out of such profits and gains." It was said that this expressly prohibited any deduction in respect of the annuities paid by the society; that the income tax must be paid upon the basis that the entire sum received by the society as the consideration for its undertaking to pay annuities was to be assessed as profits and gains, and that the society would have a right to deduct income tax when paying the annuities to those who had purchased them. The contention of the surveyor of taxes has been sustained by the Divisional Court and the Court of Appeal. The learned judges in the Court of Appeal founded their judgment mainly upon a prior decision of that court in the case of *The Alexandria Waterworks Co.* v. *Musgrave*, which I shall have to consider presently.

It cannot, of course, be denied that, as a matter of business, profits are ascertained by setting against the income earned the cost of earning it, nor that, as a general rule, for the purpose of assessment to the income tax, profits are to be ascertained in the same way. "Money wholly and exclusively laid out or expended for the purpose of a trade, manufacture, adventure, or concern," may, by the first of the "rules applying to both the preceding cases," be taken into account in estimating the balance of profits and gains to be charged. It seems to me beyond question that the payments made by the society to its annuitants are within these words. And those carrying on the business of selling annuities would be assessed on quite a different principle to those carrying on other businesses if their gross receipts were to be treated as profits, without regard to the payments to which, in consideration of those receipts, they had bound themselves.

But it is said, and truly, that the Income Tax Acts have laid down certain rules to be applied in determining how the tax is to be assessed; and that, even if the result should be to tax as profits and gains what cannot properly be so called, the requirements of the Acts must nevertheless be complied with. The controversy mainly turns upon the construction to be put upon the fourth rule, which I have already quoted, but the 102nd section of the Act must be read in connection with it. That section, after enacting that income tax, shall be charged upon all annuities, yearly interest of money, or other annual payment, provides that "in every case where the same shall be payable out of profits or gains brought into charge by virtue of this Act no assessment shall be made upon the person entitled to such annuity, interest, or other annual payment, but the whole of such profits or gains shall be charged with duty on the person liable to such annual payment without distinguishing such annual payment, and the person so liable to make such annual payment out of the profits or gains charged with duty" shall be entitled to deduct the income tax from the annual payment, and the person to whom payment is made is to allow such deduction. It was admitted that, reading this enactment in conjunction with the fourth rule, the prohibition contained in that rule only applied when the annuity was payable out of profits and gains brought into charge by virtue of the Act. What is the meaning of "profits and gains," as found in the concluding words of the fourth rule? Unless the context requires a different meaning, or the words appear to be used throughout the Act in another sense, I think they must be construed according to their ordinary signification. When we speak of the profits or gains of a trader we mean that which he has made by his trading. Whether there be such a thing as profit or gain can only be ascertained by setting against the receipts the expenditure or obligations to which they have given rise.

In the taxing provision of the Income Tax Acts the tax is imposed in respect of the annual profits or gains arising or accruing to any person from any trade, "to be charged for every twenty shillings of the annual amount of such profits or gains." Here it cannot be doubted, I think, the words "profits or

gains" are used in the sense I have indicated. There is nothing in any part of the Act to show the contrary. Indeed, when the rules are considered they confirm the view that this meaning is to be attributed to the words. Their general purpose is to prohibit certain matters being taken into account which ought not to be set against the receipts when profits are being ascertained. But the scheme of the Act obviously is to tax not receipts but profits properly so called.

The 100th section prescribes that the duties under Schedule D. shall be assessed and charged under certain rules. The first of these is, that the duty shall be computed on a sum not less than the full amount of the balance of the profits or gains of the trade, &c., upon a fair and just average of three years. The expression "balance of the profits or gains" is not a happy one, but the meaning obviously is, the balance arrived at by setting against the receipts the expenditure necessary to earn them.

When we come to the third rule, and the first of the rules "applying to both the preceding cases," it must be admitted that the words "profits or gains" are not always used in their proper or ordinary sense. The third rule, for example, provides that, in estimating the balance of profits and gains chargeable under Schedule D, "no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains," on account of any sum expended for the repairs of trade purposes, or for the supply, repairs, or alterations of trade implements beyond the sum usually expended for such purposes on an average of three years. Here it is obvious that the "profits or gains," against which the cost of repairs is not to be set, or from which it is not to be deducted, cannot be the profits or gains of the business, properly so called. The subject-matter necessitates the conclusion that language is being employed loosely and inaccurately. The rule contemplates the making up of a balance-sheet, and deals with what may be put on the debit side of it. And the first rule "applying to both the preceding cases," which commences with the same words as the rule I have just referred to, evidently requires a similar construction.

But in the fourth rule, which your lordships have specially to construe, the language employed is very different. I can find nothing to show that the words "profits and gains" were intended to be understood otherwise than in their proper sense. The rule prescribes that, in estimating the amount of the profits and gains "arising as aforesaid," no deduction shall be made, &c. This seems to refer back to the charging provision which I have quoted, and I have already pointed out the meaning which must be there attributed to "profits and gains." And when read in connection with section 102, the rule clearly relates only to annuities payable out of profits and gains "brought into charge" by virtue of the Act, and to cases in which the trader is liable to make the annual payment out of the profits or gains charged with duty.

I have pointed out that in the charging provision it is the profits and gains properly so called, not the gross receipts, which are brought into charge. If these do not exceed the expenses, nothing is payable by way of income tax. In the fourth rule there is no mention of a balance, nor is it said, as in the other rules, that no sum shall be set against the profits "on account of any sum expended" in the payment of annuities. I can see no reason why, if the intention was that contended for by the Crown, these words should not have been inserted in the third rule, instead of a fourth rule, with altered language being added. The expression in this rule is altogether changed; the deduction prohibited is confined to annuities "payable out of" the profits and gains. This implies that the profits and gains out of which the annuity is payable are already ascertained. In the other rule there is no reference to the fund out of which the moneys expended are payable; the only thing regarded is the fact of the expenditure and the purpose for which it has been incurred. It would be a strange use of language to speak of the annuities as "payable out of" the gross receipts of a trader merely because he is under liability to provide for them.

I think the fourth rule was primarily designed to meet such a case as that in which a trader had contracted to make an annual payment out of his profits; as, for example, when he had agreed to make such a payment to a former partner, or to a person who had made a loan on the terms of receiving such payment. But for the rule it might plausibly have been contended that in such a case a trader was only to return as his profits what remained after making such payment. It is unnecessary to define the limits within which the rule applies, but I am unable to agree with the court below that it is applicable to the present case. The annuities are not, in my opinion, payable out of the profits and gains of the society; until the payments which they necessitate have been taken into account it cannot be ascertained whether there are any profits and gains or not.

I do not think this view conflicts with the decision in the case of *Alexandria Waterworks* v. *Musgrave*. The payments of interest to the debenture-holders were made out of the profits. These were ascertained by deducting from the moneys earned the expenses incurred in earning them, and of these expenses the payments to the debenture-holders formed no part. A portion of the capital was raised by shares, and another portion by debentures. There was no more reason why interest on the debenture capital should be deducted from the profits than interest on the share capital. Supposing the whole capital had been raised by shares, there would have been no pretence for making any such deduction, and the profits earned by the adventure could not be different, according as the capital was raised wholly by shares, or partly by shares and partly by debentures. It is by no means clear that the case was not within the prohibition of the third rule.

Although it does not appear to me that the view of the present case which I have placed before your lordships is inconsistent with the decision in *Alexandria Waterworks Co.* v. *Musgrave*, I think it is in conflict with *Mersey Loan Co.* v. *Wootton*, but the reasoning which has led me to my present conclusion applies equally to the facts of that case.

Lord FIELD.—I have been asked by my noble and learned friend Lord Morris to express his entire concurrence in the judgment which has been moved, and I have no difficulty whatever in adding my own.

Order appealed from reversed, with costs here and below; cause remitted to the Queen's Bench Division.

Solicitor for the appellants, *R. L. Devonshire.*

Solicitor for the respondent, *Sir W. H. Melvill, Solicitor of Inland Revenue.*

Court of Appeal.

From Q. B. Div.
(Lord Esher, M.R., and Bowen and A. L. Smith, L.JJ.)
[and Q. B. Div.]
(Day and Collins, JJ.)

Feb. 6.

COBB v. GREAT WESTERN RAILWAY CO. (a.)

Railway company—Negligence—Breach of duty to passenger — Theft by fellow-passenger — Liability of company.

The plaintiff, by his statement of claim, alleged that he had suffered damage through being robbed while a passenger on the defendants' railway, and through the refusal of the defendants' servants to afford him facilities for arresting the persons who had robbed him, and for recovering the stolen property.

Held, that the statement of claim disclosed no cause of action.

Question of law raised on the plaintiff's statement of claim.

The plaintiff by his writ claimed damages for loss sustained by him while a passenger on the defendants' railway by the negligence of the defendants' servants.

The statement of claim alleged that on the 6th of May, 1892, the plaintiff travelled on the defendants' railway from Shrewsbury to Birmingham; that the train in the course of the journey stopped at Wellington, and that the plaintiff was there, while in the defendants' railway carriage, robbed by a gang of sixteen men of the sum of £89 1s. which the plaintiff was then carrying in his pocket; that the plaintiff forthwith complained to the defendants' stationmaster; that the stationmaster refused to detain the train to permit the plaintiff to give the said men into custody and have them searched; that the stationmaster, immediately on the plaintiff's complaint being made to him, negligently, and in breach of the duty owed by the defendants to the plaintiff as a passenger on their line, to protect him in person and property, and to oppose no obstacle to his recovering the property whereof he had while on the defendants' line been wrongfully deprived, gave the signal for the said train to leave, and it left accordingly, and that the plaintiff was thereby prevented from having the said men searched, and his property, which was still in the carriage, recovered; that there was in and about the said station at the time of the robbery, as the stationmaster well knew, a large force of police ready and willing to effect the said arrest for the plaintiff and to search those arrested, but they were prevented from doing so by the action of the defendant company's servant in immediately starting the said train; that the defendants negligently permitted the carriage to be overcrowded, and so facilitated the hustling and robbing of the plaintiff; that the plaintiff had, by reason of the negligence of the defendants, lost £89 1s., and the plaintiff claimed that sum as damages.

The master ordered the question whether the statement of claim disclosed any cause of action to be disposed of before the trial of the action.

R. W. Harper, for the plaintiff, contended that the allegations in the statement of claim disclosed a cause of action—namely, a breach of duty by the defendants through the negligence of their servant.

He cited *Pounder* v. *North-Eastern Railway Co.*, 40 W. R. 189, [1892] 1 Q. B. 385; *Great Western Railway Co.* v. *Bunch*, 36 W. R. 785, 13 App. Cas. 31; *Bergheim* v. *South-Eastern Railway Co.*, 26 W. R. 301, 3 C. P. D. 221.

Lyttelton, for the defendants, was not called upon.

THE COURT (DAY and COLLINS, JJ.) held that the statement of claim disclosed no cause of action; that there was no connection between the overcrowding of the carriage and the robbing of the plaintiff, and that there was no duty on the defendant company to give facilities for the arrest of the thief.

The plaintiff appealed.

R. W. Harper, for the appellant.—The stationmaster ought to have detained the train in order to have the passengers in the same carriage as the plaintiff arrested and searched, as the company was bound to reasonably protect both person and property. The fact that the compartment was overcrowded facilitated the pocket-picking.

He cited, in addition to the authorities in the court below, *New Orleans, St. Louis, and Chicago Railroad Co.* v. *Burke*, Law Magazine and Review, Nov., 1892, p. 72; 24 Amer. Rep. 689.

Lyttelton, for the defendant company, was not called upon.

Lord ESHER, M.R.—The judgment must be affirmed on the ground that under neither head is there any obligation thrown on the company. Whilst the plaintiff was a passenger on the railway he was robbed. It is not alleged in that part of the case that it was by reason of any negligence of the company at all. The claim says that the plaintiff arrived at a railway station when the alleged robbers were in the train. A body of police happened to be at the station. The statement of claim then alleges that the plaintiff asked the stationmaster to detain the train whilst the persons who took the property were searched. Under what head of law can that claim be brought? The railway company undertook to carry the plaintiff safely, so that his safety should not be affected by any negligence of theirs. They did that. They carried him without any negligence on their part. As to the carrying of him, it is not alleged that he was being ill-used, and that his being ill-used was made known to the servants of the company. The robbery was done and over. There was nothing that the railway company could do to prevent the robbery. The stationmaster was not asked even to search the carriage. He was asked to detain the train and all the other passengers whilst the complaint of the plaintiff was being inquired into by the police. Is that any part of the contract? It has nothing to do with the duty of carriage, therefore there was no duty imposed on the stationmaster as servant of the company, and therefore no duty on the company. Therefore, if there is no duty which they broke, there cannot be a cause of action. Therefore, as to the first part of the case, there is no cause of action.

As to the second part, there was a breach of duty; but of itself that was no cause of action. There must be damage resulting from it. When it is alleged that damage is the result of the breach of duty, it must be shown that the damage is the ordinary result of the breach of duty. It cannot be said that the natural result of the overcrowding is, that some of the other passengers should be thieves; therefore that damage is too remote; therefore there is no cause of action. This is equivalent to a demurrer. Therefore the opinion of the court upon this statement of claim, as it is written, is that it is bad.

BOWEN, L.J.—I am of the same opinion. Two points have been argued. First, it is said that what

(a.) Reported by J. E. ALDOUS and F. O. ROBINSON, Esqrs., Barristers-at-Law.

happened after the robbery showed a neglect of duty on the part of the railway company. The statement of claim is rather vague. There is a mere allegation that "the stationmaster refused to detain the train to permit the plaintiff to give the said men into custody and have them searched." This means that he refused to detain the train in order to let the plaintiff have the opportunity of applying to the police. There is no such obligation on the part of a railway company. They may do it if they like, but they are not bound to stop the train. The statement of claim does not contain a specific allegation that the plaintiff was prevented by the action of the stationmaster from giving the men into custody. As to the second point, it is said that the overcrowding conduced to the robbery. According to English law the damage must flow from the breach of duty in the usual course of things. You cannot get damages except such as are immediately and usually caused. It is impossible to hold that the robbery was in the usual course of things caused by the overcrowding.

A. L. SMITH, L.J.—I am of the same opinion. I do not want to add anything on the first point. As to the second point, the damage is too remote. One thing in no way results from the other. The picking pockets is not the natural result of the overcrowding.

Appeal dismissed.

Solicitors for the plaintiff, *Steadman, Van Praagh, & Sims*, for *Welmshurst*, Huddersfield.

Solicitor for the defendants, *R. R. Nelson.*

From Q. B. Div. (Lord Esher, M.R., and A. L. Smith, L.J.) — Jan. 20.

In re POLLITT.
Ex parte MINOR. (*a.*)

Bankruptcy—Solicitor—Costs—Payment by debtor to solicitor for future services in preparing balance-sheet and calling meeting of creditors—Execution of deed of assignment by debtor—Services rendered after act of bankruptcy—Right of trustee in bankruptcy to repayment—Set-off—Mutual credit.

The debtor, who was then indebted to his solicitor in the sum of £40, consulted his solicitor as to his position, with the result that it was resolved that a balance-sheet should be prepared and a meeting of creditors called. The solicitor declined to act for the debtor on credit, and a sum of £15 was accordingly paid by the debtor to the solicitor to secure his services in the matter. After services to the amount of about £3 had been rendered, the debtor committed an act of bankruptcy by executing a deed of assignment for the benefit of his creditors, and, on the application of the official receiver as trustee in the bankruptcy, the county court judge refused to allow the solicitor to retain the balance of £12 in respect of services rendered after such act of bankruptcy, and directed him to hand it over to the trustee.

Held (*affirming the decision of the* Divisional Court, ante, *p.* 89), *that, the title of the trustee under the bankruptcy relating back to the act of bankruptcy, whereby the solicitor's authority to act for the debtor, and consequently the specific purpose for which the £15 was paid, was determined, the balance of that sum appropriated to costs incurred after the act of bankruptcy was repayable to the trustee; that there was no such necessity for the employment of the solicitor after the act of bankruptcy as brought the case within the principle of* In re Sinclair, Ex parte Payne, 15 *Q. B. D.* 616, 34 *W. R. Dig.* 19, *which must not be extended; and, further, that the solicitor was not entitled to set off the balance in respect of the outstanding debt of £40.*

Appeal from a judgment of the Divisional Court in Bankruptcy, reported *ante*, p. 89.

The appellant, Mr. P. S. Minor, a solicitor in practice at Manchester, had acted in that capacity for the debtor, Pollitt, for some time previous to December, 1891; Pollitt being at that time was indebted to him in a sum of over £40 for costs. On the 11th of December the appellant was consulted by the debtor with reference to the state of his affairs, and it was arranged that a balance-sheet should be prepared and a meeting of his creditors called. The appellant, however, declined to act unless a sum to cover his costs in the matter was secured to him, and a sum of £15 was accordingly handed to him by the debtor on the 12th of December for that purpose. On that day the debtor executed a deed of assignment in favour of his creditors, which had been prepared by the appellant, which was the act of bankruptcy alleged against him. In the consequent bankruptcy proceedings, on the application of the official receiver, the county court judge directed the appellant to pay over the sum of £12 3s. 4d., the amount of his costs incurred since the act of bankruptcy. That decision was affirmed by the Divisional Court (Vaughan Williams and Wright, JJ.), and the solicitor appealed to the Court of Appeal.

Herbert Reed, Q.C., and *Montague Shearman*, for the appellant.—There are two grounds for this appeal. First, the circumstances of the case rendered it necessary that the debtor should have assistance in arranging his affairs and in calling his creditors together. It would be a very great hardship if a man, finding himself in difficulties, was unable to obtain professional advice and assistance. Here, at any rate, the principles of humanity ought to apply to the services rendered in calling the creditors together, for although that was after the act of bankruptcy, the object of it was, if possible, to prevent bankruptcy. We ask the court, if necessary, to disagree with the opinions expressed by the Master of the Rolls and Cave, J., in the case of *In re Sinclair, Ex parte Payne*, 15 Q. B. D. 616, 34 W. R. Dig. 19, 2 Morrell's Bankruptcy Cases, 255. The costs here were almost entirely incurred in calling the meeting of creditors, and that having taken place after the act of bankruptcy, they would not be provable under the bankruptcy, and the result, therefore, would be, if the appeal failed, that the solicitor would receive nothing. Secondly, the appellant is entitled to a set-off on account of the debt of £40 for past services which was owing to him. The bankruptcy, if a revocation of his authority as solicitor, entitled the appellant to apply the money in his hands to that debt. And a set-off against the bankrupt would apply equally as against the trustee. The business between them was really conducted upon mutual credit.

They cited *Hill* v. *Smith*, 12 M. & W. 618; *Stamore* v. *Campbell*, 40 W. R. 101, [1892] 1 Q. B. 314.

Sir C. Russell, A.G., and *Muir Mackenzie*, for the respondent, were not called upon.

Lord ESHER, M.R.—In this case the bankrupt, before he committed the act of bankruptcy, had requested a solicitor to do some work for him. The solicitor had previously been employed by the bankrupt, but had not been paid for his services. He therefore declined to do any further work unless a sum of £15 was paid to him to cover his costs. That amount was then handed to him for that special purpose.

(*a.*) Reported by JOHN P. MELLOR, Esq., Barrister-at-Law.

The solicitor then acted for the bankrupt, and prepared a deed of assignment, and up to that point he was perfectly entitled to pay himself out of the £15. But then the deed was executed, and that, as the solicitor of course, must know, was an act of bankruptcy, and when it was afterwards followed by the bankruptcy, the bankruptcy related back to the execution of the deed of assignment, and we have, therefore, to treat the debtor as bankrupt as from that moment. All his money from that time, and all that was owing to him, became distributable amongst his creditors. But some of his money was left in the hands of the solicitor; but, as the act of bankruptcy put an end to the authority of the solicitor to do work for him, what is the result? Why, money which was paid to the solicitor for a specific purpose, which was legally and properly put an end to, must clearly be paid over to the trustee in bankruptcy. There was clearly no option in the matter, he was bound to refund it.

But it was said that the advice for which the money was given him was to prevent the debtor becoming bankrupt. But anything that the solicitor did after the bankruptcy, which, as I have said, began by relation back after the execution of the deed of assignment, could not be to prevent his becoming bankrupt, neither can it be put upon the trustee.

This case is not within *In re Sinclair, Ex parte Payne*, and I quite agree that that case must not be extended beyond what is really necessary and humane. With regard to the contention that there was here a mutual credit, and that the solicitor was entitled to a set-off in respect of his work previous to the bankruptcy; this money was given for a specific purpose, and the principle of set-off does not apply; moreover, the one sum was due by the bankrupt to the solicitor, while the other was due by the solicitor to the trustee.

LINDLEY, L.J.—This is a rather hard case upon the solicitor, and I was in hopes that I could have seen my way to assist him. But if Mr. Shearman could not convince us in a question of bankruptcy law, I am afraid that the case is too strong against him.

A. L. SMITH, L.J.—I agree.

Appeal dismissed.

Solicitors for the appellant, *Nicholson & Crouch*, for *P. S. Minor*, Manchester.

Solicitor for the official receiver, *The Solicitor to the Board of Trade.*

From L.JJ. in Lunacy. (Lord Halsbury, Lord Esher, M.R., and Lopes and A. L. Smith, L.JJ.) — Nov. 22-26, 28; Dec. 13.

In re CATHCART. (*a.*)

Lunacy—Inquiry—Verdict of sanity—Costs—Discretion of judge in lunacy—Appeal—Order charging costs on stock belonging to alleged lunatic—Power to order sale or transfer of stock—Lunacy Act, 1890 (53 *Vict. c.* 5), *s.* 109—*Ord.* 46, *r.* 1—*Judicature Act*, 1873, *ss.* 18 (5), 49—*Judicature Act*, 1884 (47 & 48 *Vict. c.* 61), *s.* 14.

Where the result of a lunacy inquiry is that the person who was alleged to be a lunatic is found to be of sound mind, the judge in lunacy, in exercising his discretion over the costs of the inquiry under section 109 *of the Lunacy Act*, 1890, *may, if the application for the inquiry seems to him to have been prompted by a desire to protect the person and property of the alleged lunatic, and to have been made on reasonable grounds and in a reasonable manner, order the costs of the applicant to be paid by the person who was alleged to be a lunatic.*

If an order made under this section charges the amount of such costs on stock standing in the name of the alleged lunatic, this does not constitute a charging order within the meaning of ord. 46, *r.* 1; *and therefore the procedure laid down in* 1 & 2 *Vict. c.* 110 *is not applicable. Such order may further direct the alleged lunatic to transfer an amount of such stock sufficient to satisfy the said costs. If the alleged lunatic fails to comply with this direction, an order may be made, under section* 14 *of the Judicature Act*, 1884, *directing the official solicitor to make the necessary transfer.*

An appeal lies to the Court of Appeal from an order of the Lords Justices dealing with the costs of a lunacy inquiry under section 109 *of the Lunacy Act*, 1890.

Judgment of Lindley, Bowen, *and* Kay, L.JJ. (40 *W. R.* 257), *affirmed.*

Appeal from an order made by Lindley, Bowen, and Kay, L.JJ., and two further orders made by Lindley, L.J., dealing with the costs of lunacy proceedings instituted by Mr. J. T. Cathcart against his wife, Mrs. Cathcart.

Mrs. Cathcart was in 1887 an unmarried lady over forty years of age living with her mother, Mrs. Unwin, her father being dead. She was possessed of considerable property, including a mansion and estate at Wootton, in Staffordshire, another estate at Stourbridge, in Worcestershire, and certain personal property. Her net income was stated to be about £4,000 a year.

Mr. Cathcart was about twelve years younger than Miss Unwin, and his means consisted of an annual allowance of £300, and a reversionary interest in certain lands in Scotland expectant on the death of his father. He was a distant cousin of Miss Unwin's, and at the beginning of 1887 he applied for and obtained the position of agent to her estate at a salary of £200 a year.

Shortly afterwards Mr. Cathcart proposed to Miss Unwin that she should marry him, and they became engaged, notwithstanding the strong opposition of Mrs. Unwin. After the engagement Mr. Cathcart wrote letters to Miss Unwin in which he expressed a very hostile feeling towards her mother. The marriage took place on the 22nd of July, 1887. Miss Unwin's real and personal property were settled upon her by two deeds.

Shortly after the marriage Mrs. Cathcart suspected her husband of infidelity, and on the 23rd of September, 1887, she left him of her own accord, and had not since cohabited with him.

Mr. Cathcart, in his evidence, stated that until after his wife had left him he had not the slightest idea that she was not perfectly *compos mentis*. After leaving him she travelled about to various places, and consulted, among other doctors, Dr. Dale, of Scarborough, who wrote to her uncle a letter, which was shown to her husband, in which he stated that she was suffering from nervous excitement and hallucinations, and ought to be for six months under medical care. In July, 1888, she received a letter from her husband's solicitors announcing his intention to commence an action for restitution of conjugal rights. When she received her bill of costs in respect of the marriage settlements, her attention was called to certains powers which had been thereby given to her husband over the property. She was very indignant at learning this, and after writing angry letters to the trustees of the settlement, one of whom was her uncle, she applied to two magistrates at Skipton for a war-

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

rant against the trustees for fraud. The magistrates thought her insane, and one of them wrote to her friends suggesting that she should be put under control. This letter was seen by her husband.

During the same year, 1888, she commenced to make serious accusations against Mr. Henry Matthews, who was then Home Secretary, and who had some years before been counsel for her in a case tried at Stafford Assizes. She accused Mr. Matthews not only of having neglected her interests, but also of having employed persons to poison her. These accusations were contained chiefly in a long series of letters written by her to the secretary of the Derby Liberal Association. This correspondence, however, was not known to her husband till after he had presented his petition into her state of mind. She also accused her mother of having attempted to poison her and other atrocious acts.

In August, 1888, Mr. Cathcart saw her at an hotel and in lodgings in London, and endeavoured to induce her to put herself under medical care, which she refused. On the 13th of August he wrote to her saying that the last thing he should wish would be to have her shut up in a lunatic asylum, and begging her to join him at Wootton. This letter never reached her, as she was on a visit in Devonshire. On the 15th of August she wrote a letter to the gardener at Wootton, in which she referred to alleged attempts to poison her. In the meantime her husband prepared to received her by engaging a male attendant from a private asylum to act as butler, and two nurses. On the 21st of August she drove up to Wootton, but on finding that her husband was there she immediately drove away again to Ashbourne, where she put up at an inn and retired to bed at about eleven o'clock. Her husband, with a nurse and the lunatic attendant, followed her, and compelled her to get up at midnight and dress, and drove her back to Wootton, where he induced her to sign orders (which, however, she countermanded) to her bankers and tenants to enable him to deal with her banking account and receive her rents. He then went away to Scotland for a few days, leaving her at Wootton with the attendant and nurses. On his return he was told by a medical man, who had seen her during his absence, that restraint was unnecessary for her. He thereupon dismissed the attendant and nurses, and himself went away, leaving Mrs. Cathcart free and uncontrolled. On the 14th of September, 1888, she commenced an action for divorce, but this was dismissed at the hearing on the 5th of June, 1889. On the 23rd of June, 1889, Mr. Cathcart commenced an action in the Chancery Division to restrain his wife from dealing with a sum of £10,000, which had been left out of settlement, and in which he claimed to have an interest under Scotch law. On the 29th of May, 1890, his solicitors wrote a letter to Mrs. Cathcart proposing that the settlements should be modified by arrangement. To this letter she did not give any answer. During this time she was living at various hotels in London, often changing from one to another, and continually complaining that attempts were being made to poison her. She issued and distributed a large number of placards, in which she complained that certain witnesses had been got out of the way. For doing this her husband gave her notice that an application would be made to commit her for contempt of court.

On the 24th of February, 1891, as Mrs. Cathcart was engaged in some litigation in the Royal Courts of Justice, a medical man, Dr. Bond, who had never before seen her, sat down by her side and entered into conversation with her, and after about twenty minutes left her and signed a certificate to accompany an urgency order under section 11 of the Lunacy Act, 1890. Such an order having been made, she was on the same day seized as she was leaving the Law Courts and conveyed to the Priory, a private asylum at Roehampton. A reception order was made subsequently. At the asylum she was seen by several doctors who considered her to be of unsound mind.

Upon the petition of Mr. Cathcart the usual order was made for an inquiry into Mrs. Cathcart's state of mind. In the course of the proceedings he made a proposal in writing that if she were found lunatic she should be placed under his care at Wootton, and that she should be allowed an income out of her property to make a home for her there, and also £2,000 of her money for the repair and furnishing of the house.

The inquiry took place before Master Bulwer and a special jury of seventeen persons; and after a hearing lasting seventeen days Mrs. Cathcart was found by a large majority of the jury to be of sound mind.

On the 16th of December, 1891, Lindley, Bowen, and Kay, L.JJ., sitting in lunacy, made an order on the application of Mr. Cathcart, under section 109 of the Lunacy Act, 1890, directing that two-thirds of his costs of the petition, and of the inquiry, and of that application, should be paid out of a capital sum of £10,000 Consols standing in Mrs. Cathcart's name: 40 W. R. 259, [1892] 1 Ch. 549.

On the 3rd of August, 1892, Lindley, L.J., made an order declaring the above costs to be a charge on the £10,000 Consols, and directing payment thereout, and further directing Mrs. Cathcart to transfer a sufficient amount thereof to satisfy such costs.

On the 31st of October, 1892, Lindley, L.J., made a further order, under section 14 of the Judicature Act, 1884, directing the official solicitor to execute a transfer of a sufficient amount of the Consols to satisfy the above costs and the costs of the various applications.

From these three orders Mrs. Cathcart appealed.

A preliminary objection was taken on behalf of Mr. Cathcart that no appeal lay, the orders of the Lords Justices being as to costs only.

The court decided not to determine this point until the appeal had been heard.

R. O. B. Lane, Q.C., and *R. F. Norton* (*J. W. Manning* with them), for the appellant.—The Judicature Act, 1873, by section 18, sub-section 5, allows an appeal to the Court of Appeal from any order in lunacy. Such an order is not an order of the High Court, and is not governed by section 49, which disallows an appeal from an order of the High Court as to costs where costs are discretionary. Neither is that section rendered applicable by the last words of section 109 of the Lunacy Act, 1890, "and every such order shall have the effect of an order of the High Court." The finality of an order is not part of its effect. The Lords Justices had no jurisdiction to make the order directing Mrs. Cathcart to pay Mr. Cathcart's costs. Section 109 of the Lunacy Act, 1890, cannot be construed to mean that where a petition is instituted for the purpose of ascertaining whether a person is a lunatic, and he is found to be of sound mind, he can then be ordered to pay the costs of the petitioner. The section empowers the judge in lunacy to order the costs to be paid "by the lunatic or alleged lunatic." That cannot apply to a person who at the time when the order is made, has been found to be of sound mind. Even if such an order could in any case be made, the Lords Justices exercised their discretion wrongly in this particular case. Mr. Cathcart's conduct has been such that he is not entitled to be allowed his costs. In a sense, no doubt, he believed his wife was insane. But his behaviour towards her must have had the effect of fostering and increasing the delusions from which she suffered. The treatment she received at Ashbourne

and Wootton was such that she naturally suspected an intention on his part to place her in an asylum, and this would inevitably have a harmful effect on her. It is clear that he did not believe her to be a lunatic within the meaning of the lunacy law, that is, "of unsound mind and incapable of managing herself and her affairs": section 90 of the Lunacy Act. His procuring orders from her as to the disposition of her property, his application for her committal for contempt, his negotiations with her as to reforming the settlements, all show that he believed her to be responsible for her actions. The court below did not give sufficient consideration to the question whether Mr. Cathcart's conduct had contributed to his wife's delusions, or to the question whether, at the time of the making of the urgency order, he had reasonable ground for believing that she was incapable of managing herself and her affairs. There is no evidence that at that time he knew anything of the letters she had written to Derby, or of her wandering about from hotel to hotel. As to the order of the 3rd of August, there is no power to order the sale of stock or shares comprised in a charging order except in a separate action instituted for that purpose: *Leggott* v. *Western*, 12 Q. B. D. 287. The machinery provided by 1 & 2 Vict. c. 110, ss. 14, 15, must be adopted in every case where an order is made charging stock or shares: see ord. 46, r. 1. The Court of Chancery never exercised the power of sale except in an action which claimed it. The words in section 109 of the Lunacy Act, "and every such order shall have the effect of an order of the High Court," involve that the practice of the Court of Chancery and the procedure laid down by ord. 46, r. 1, shall be followed. They met the difficulty suggested by James, L.J., in the case of *In re C——*, 23 W. R. 377, L. R. 10 Ch. App. 75. Moreover, a charge on these Consols might have been given previously by Mrs. Cathcart to some third party; and in such case questions would arise as to the rights of that third party, which could only be settled in a fresh action. As to the order of the 31st of October, no doubt if Lindley, L.J., had jurisdiction to order Mrs. Cathcart to make a transfer he had also jurisdiction to make an order, under section 14 of the Judicature Act, 1884, directing the official solicitor to make the transfer. But this particular order was bad for including costs, the amount of which had not been ascertained: *Widgery* v. *Tepper*, 25 W. R. 872, 6 Ch. D. 364.

Sir Henry James, Q.C., English Harrison, and *P. S Stokes*, for the respondent.—The order of the Lords Justices being an order as to costs only, there is no appeal. The words at the end of section 109 of the Lunacy Act mean that an order made under that section is to be treated as an order of the High Court, and therefore section 49 of the Judicature Act applies. Even if that is not so, there is nothing in section 109 to show an intention on the part of the Legislature to limit the discretionary power over costs which was possessed by the judge in lunacy. As to the exercise of discretion, there is no evidence that Mr. Cathcart acted otherwise than *bonâ fide*. He never wished to put his wife into an asylum. His only object was to put her under medical restraint and proper care. What he did at Wootton was for the purpose of preventing her being sent to an asylum. It was only when he was advised that the only way of getting her to submit to medical examination was to put her under restraint that he assented to the making of an urgency order, so that when she found herself under restraint she might voluntarily submit to be medically examined. He wished to remove her from her fugitive life to a position in which she could receive proper treatment. Moreover, the evidence showed sufficient insanity to justify an inquiry quite apart from anything which might possibly be attributed to the fear of being placed in an asylum. The proper questions for the judges in lunacy to consider when they are exercising their discretion as to costs under section 109 of the Lunacy Act are whether the petitioner had reasonable and probable cause for instituting the inquiry, and whether the inquiry was for the benefit of the alleged lunatic. Any misconduct on the part of the petitioner prior to the lunacy proceedings ought not to be taken into consideration at all, though, no doubt, misconduct in the course of the proceedings might be a proper matter for consideration. The section is intended to be a provision in the interest of the alleged lunatic. Suppose, to take an extreme instance—a husband had by his brutal conduct produced his wife's insanity: if he knew that such conduct would prevent his getting his costs out of his wife's estate, the result would probably be that he would sit still and do nothing. And that would be contrary to the interest of the lunatic. Wherever a person manifests such delusions as to cause a reasonable suspicion that he is insane, and incapable of managing himself and his affairs, and refuses to submit to medical care, it is to his interest that the lunacy law should be put into operation and an inquiry held into the state of his mind, rather than that he should be left to his own resources: *In re Windham*, 10 W. R. 499, 4 De G. F. & J. 56; *In re F——*, 2 De G. J. & S. 89, 12 W. R. Ch. Dig. 59. The section is not intended to be punitive against the petitioner. But if it is said, You would have had your costs if you not treated your wife badly, but you shall not have them because you did so treat her, surely that is punitive. The discretion of the Lords Justices ought not to be overruled on a question of costs unless there has been some manifest disregard of principle or misapprehension of facts: *In re Gilbert*, 33 W. R. 832, 28 Ch. D. 549. As to the order of the 3rd of August, Lindley, L.J., clearly had jurisdiction. Section 109 of the Lunacy Act is a positive enactment giving power to the judge in lunacy to make such an order. The last words of the section cannot have been intended to limit the power so given by reference to ord. 46, r. 1, which merely deals with execution. The order of Lindley, L.J., was not a charging order under 1 & 2 Vict. c. 110, but an order made in the exercise of the jurisdiction given by the Lunacy Act, 1890. It follows that the Lord Justice also had jurisdiction to make the order of the 31st of October, and both orders were rightly made.

December 13.—The judgment of the COURT (Lord HALSBURY, Lord ESHER, M.R., and LOPES and A. L. SMITH, L.JJ.) was read by

Lord HALSBURY.—This is an appeal from an order made by Lindley, Bowen, and Kay, L.JJ., sitting as judges in lunacy, and the first question raised is whether the order is subject to an appeal to the Court of Appeal.

By section 18, sub-section 5, of the Judicature Act, 1873, "all jurisdiction vested in or capable of being exercised by her Majesty in Council or the Judicial Committee of her Majesty's Privy Council upon appeal (*inter alia*) from any order in lunacy made by the Lord Chancellor or any other person having jurisdiction in lunacy," is given to the Court of Appeal. That there was an appeal from an order of the Lord Chancellor exercising jurisdiction in lunacy is certain. On the 14th of February, 1726, it was determined by the House of Lords after debate, and partly in view of the statute 17 Edw. 2, *De prerogativa Regis*, that no appeal from such an order lay to the

House of Lords, because the appeal must be made to the Crown itself in Council. In consequence of this resolution of the Lords the appeal then in question was brought before the King in Council, the jurisdiction was debated and affirmed on the 15th of May, 1728, and the matter of the appeal determined: 3 Peere Williams, 107 n. That determination was repeatedly recognized afterwards as a governing authority, and it was hardly questioned here that, unless a rule made under the rule-making power created by the Judicature Act has taken away the appeal, the right of appeal still exists.

But it is said that the nature of this order is such that it is not subject to appeal. That question depends on the true construction of section 109 of the Lunacy Act, 1890, as affected by section 49 of the Judicature Act, 1873. The words, so far as they are material to the present question, are, that the order for costs "shall have the effect of an order of the High Court." The section does not make it an order of the High Court. It does not enact that it shall be deemed an order of the High Court, or use any equivalent phrase which would invest the order when made with all the incidents and qualities of an order of the High Court. The effect of the order is, I think, its operative power as an order, and if it had been intended to attach to an order made under section 109 all the provisions which are made with reference to orders made by the High Court, I cannot but think that something more than one compendious phrase (which, however, as I have said, will not, in my opinion, bear that meaning), would have been used when the Legislature were dealing with the very peculiar jurisdiction exercised over the person and property of a lunatic.

It may well be, as was said by Lord Selborne in the House of Lords in *Metropolitan Asylum District Board* v. *Hill*, 28 W. R. 663, 5 App. Cas. 582, that "when the merits of a question have been determined, and when a court has thought fit to give or refuse costs, in the exercise of its discretion, and in the absence of any settled principle on the subject, the Courts of Appeal must give so much credit to the exercise of that discretion as not to allow the merits, when they are no longer in controversy, to be again gone over with great expenditure, not only of money, but also of judicial time, for the mere purpose of reviewing that discretion." It would, however, be, in my view, a total misapprehension of the phrase "the merits of the question" to apply it to the inquiries directed on behalf of a person alleged to be a lunatic. A question such as the present must be treated rather as a question in some respects as to the proper expenditure of money on behalf of the lunatic; the merits do not depend on the result of the inquiry at all. Sir Henry James very truly said that the question of the propriety or impropriety of the inquiry and facts relevant to that question might be wholly irrelevant to the issue which the jury were called upon to determine. I think there is no true analogy between proceedings of the character now in question, and proceedings between hostile litigants or even claims against an estate or a fund wherein claimants in their own interest are endeavouring by legal process to get something for themselves.

The theory upon which proceedings in lunacy are taken is that the proceedings are for the benefit and protection of the persons who are believed to be incapable by reason of mental infirmity of protecting themselves and their property. The principle, therefore, applicable to a litigant who has failed in his litigation is not even *primâ facie* applicable to a petitioner who asks for the protection of the law in favour of one requiring the law's protection. Turner, L.J. (in *In re Windham*), replying to the argument that the jury had found the alleged lunatic to be of sound mind, and that, therefore, the costs ought to be paid by the persons originating the inquiry, said that upon that ground alone he would not give the costs or any part of them. "The Crown," he said, "has the care and custody of the persons and estates of lunatics as *parens patriæ*. It exercises its parental powers at the instance of the relations or friends of the alleged lunatics who apply to it on their behalf, and nothing, in my opinion, could be more prejudicial to the welfare of the unfortunate persons on whose behalf such applications are made than to give any countenance to the notion that the applications will of necessity subject the persons by whom they are made to the payment, not merely of their own costs, but of all the costs which may be incurred, if in the result the verdict of a jury should establish that the applications cannot be supported. To lay down any such doctrine would, in many cases at least, go far to paralyze the power of the Crown and to deprive those who may unhappily be visited with mental disease of the care and protection which by virtue of that power is thrown around them in the exercise of the jurisdiction in lunacy." *In re Windham* the Lords Justices were doubtless there dealing with an application by the alleged lunatic that the persons engaged in asking for the inquiry should be ordered to pay all the costs of the proceedings, but the principles upon which the learned judge founds his judgment have a wider application than the circumstances of the particular case.

It seems to me that if the demand for an inquiry is really prompted by a desire to protect the person and property of the alleged lunatic, and is presented on reasonable grounds and in a reasonable manner, the expense of such a proceeding ought not to fall upon the person so invoking the aid of the law to protect those in need of protection. It is significant that in the case just quoted the doubt was expressed whether in the then state of the law it was competent in the court to order the costs of the lunatic or alleged lunatic to be paid by the petitioner. Section 109 appears to have been framed in the widest possible terms to give complete jurisdiction to the court to award the costs in accordance with what may appear to be right.

In saying what I have said as to the apparent policy of the law I have to some extent anticipated what I have to say with respect to the principle which should guide the court in deciding this particular appeal. I am reluctant to indicate any difference of opinion from that given by Lindley, L.J., in his most valuable analysis of the considerations by which a court should be guided in exercising the discretion as to costs given by the statute, and certainly as to the first four heads I am heartily in agreement; but I fear I cannot concur in considering the means of the respective parties as a topic that ought to enter into the question, though as to the latter part of the fifth head of the learned judge's analysis I entirely concur. It is quite true that either party may by his conduct render an inquiry much more expensive than it might otherwise have been, and, undoubtedly, had there in this case been a cross appeal that consideration might have been a very serious one indeed.

It is necessary very shortly to glance at the facts. Now whatever may have been the real state of Mrs. Cathcart's mind in September, 1887, she certainly by her conduct gave rise to a reasonable suspicion that she was not completely of sound mind. No explanation has ever been given of her accusations against her husband, admitted now by everyone to be unjust, but recurred to over and over again with persistent pertinacity, and acted upon by Mrs. Cathcart, so that within a short time of her marriage she separated

from her husband, and never willingly associated with him again.

Again, she had, or supposed she had, some complaint to make as to settlements. I will assume, in favour of her sanity, that her complaint was well founded, though it is only for the sake of argument I assume it. It is impossible to believe in a sound state of mind in a person who, upon the assumption I have made, accuses every person engaged in the arrangement of the settlement, of fraud and mixes up the supposed fraud with persons and things ridiculous in their absurd incongruity. Most unfortunately, as I think, the husband was badly advised. The letters of October, 1889, are not written as if by a considerate husband, conscious of his wife's mental weakness, but rather by a hostile litigant threatening proceedings, and, not for the only time in this narrative, giving rise to the accusation that the motive which actuated him was not conjugal tenderness, but involved some considerations of self-interest. The same may be said of the negotiations in the following March. They partake more of threat than persuasion, and they seem to have had the effect of arousing Mrs. Cathcart's suspicions that she was to be treated as a lunatic.

Then came the application to the Skipton magistrates, an application which showed an intention to treat everyone who had anything to do with the settlements as guilty of some criminal offence, and I must say that if the husband had proceeded after the receipt of Mr. Preston's letter and enclosure to apply to the court, I do not think anyone could have objected to the proceeding as hasty and uncalled for. Unfortunately Mr. Cathcart took the matter into his own hands. The letter written to his wife was, I fear, not a candid one. I cannot doubt that he did intend to get his wife into an asylum. In some parts of this case I am quite willing to make allowance for a layman to some extent in the hands of those who ought to have known better, when he took wrong forms of procedure; but I cannot think the proceedings at Ashbourne admit of any such palliation. It did not require a lawyer to inform him that it was neither kind nor considerate to force himself into his wife's room where she was quietly asleep and take her by force after twelve o'clock at night, probably much later, and drive away with her a distance of seven or eight miles. I do not believe that there was no intention to place Mrs. Cathcart in an asylum. The two nurses, the attendant from the Stafford Asylum, the midnight visit to the doctor at Ashbourne, form such a combination of facts that I come to the conclusion very firmly that, notwithstanding the not very creditable letter written by Mr. Cathcart, his object was to place her in an asylum; and if the costs now in question were applicable to any part of this transaction, I should certainly not be a party to relieving Mr. Cathcart from the payment of them. The procuring of Mrs. Cathcart's signature to the authority to deal with the local banking account and the rent of Wootton forms part apparently of the same scheme, and appears to me as part of the same scheme to be equally indefensible.

But the costs now in question have no relation to the transactions I have been describing. The costs are applicable to the inquiry requested by a petition dated the 8th of April, 1891, praying for an inquiry into the alleged lunacy of Mrs. Mary Cathcart, and if they were only such costs as were rendered a necessary expenditure by the petition in question, I do not think that under the circumstances of Mrs. Cathcart's then mental condition, and her uncontrollable disposition, the question could have been plausibly argued. Unfortunately for Mr. Cathcart, he was here again, as it seems to me, very badly advised; but what I have said before about his proceedings at Ashbourne is no longer applicable. He might, I think, without any personal default, be under the impression that he was justified in proceeding under an urgency order because he was so advised. I cannot myself too earnestly deprecate such an application of the power given under the statute. An urgency order is what its very name indicates. The safeguards for personal freedom which the Legislature had provided were obviously considered inappropriate to cases where instant intervention was required, either for the sake of the alleged lunatic or for the sake of the public, and, accordingly, exceptional provisions were made for such a contingency; but to suggest that they could be resorted to because there were no other means of getting evidence is so strange and perverse a view that I was much surprised to hear it gravely put forward. It is enough, however, at present to say that there is no foundation whatever for such a contention. In respect, however, of Mr. Cathcart's responsibility for such a course of procedure, it would be a very harsh judgment to attribute to him the grave error that, in my view, was committed, and which had the effect, not unnaturally, of raising prejudices against the husband which he has had to regret all through the litigation.

But the broad question before Mr. Cathcart was whether his wife required, and by some sort of procedure ought to receive, care and attention. To that question what answer can be reasonably given but one? She was under a constant belief that she was being poisoned. She was under a constant belief that judges and relatives, including her own mother, were in a conspiracy to poison her, that her mother had procured the murder of her father by bribing a groom to put a wrong bit in the mouth of a vicious horse, and that then a woman was employed to frighten the horse; that she was drugged within three months of her marriage to prevent her having an heir; that her husband was guilty of the grossest immorality with servants, and that her own mother was a party to unlawful operations upon the victims of his profligacy—and all this without a scintilla of fact to justify such atrocious accusations. If she was not mad in making them, she certainly could not be heard to complain that her own conduct and statements gave a not unreasonable belief in her insanity. These statements were brought to the knowledge of her husband's advisers long before the 8th of April, 1891. It is obvious to ask what was a husband to do under such circumstances. Was he to fold his hands in indifference to such a state of things? If he did act at all, it was most certainly the right course in such a case as his to invoke the protection of the lunacy laws, and those laws, if properly appealed to, involve neither oppression nor cruelty.

I do not desire to say anything of the verdict of the jury. It was a verdict of the majority, and they had the advantage of seeing and conversing with Mrs. Cathcart. It may be that, upon the issue with which they had to deal—namely, whether at the time of inquisition found, Mrs. Cathcart was capable of managing herself and her property—the jury were right, but that does not decide the question whether for months and years before that time her conduct and demeanour had been such as to lead to the reasonable belief that she required to be put under some restraint. I think it unquestionably was so, and I have no doubt, therefore, that the order under appeal should be affirmed and this appeal dismissed, with costs.

There remains the other appeal as to the form of the order ably and plausibly attacked by the learned counsel Mr. Norton, but I have come to the conclusion that the order is right.

It is true that the R. S. C., 1875, dealt with charging orders, and dealt with them in such a way that for such orders no other course of procedure was permitted than that pointed out, and it is clear that in this case that form of procedure has not been followed. But the argument fails, I think, in this, that the order now under appeal is not a charging order within the meaning of ord. 46, r. 1. It is true it may operate as a charging order, but it is obviously not the thing therein referred to. Section 14 of the Judicature Act, 1884, is quite wide in its terms, and I think it clear that the order originally made by the Lords Justices was within their jurisdiction to make, and equally clear that they had power to enforce it by the section in question, passed nine years after the rules and orders of 1875, which are relied on as restricting the power of enforcing anything which may operate as a charge. I think, therefore, this appeal also should be dismissed, with costs, and the other appeal which is brought as a separate appeal must share the same fate.

Appeals dismissed.

Solicitors for the appellant, *Hood, Barrs, & Co.*

Solicitors for the respondent, *Crawley, Arnold, & Co.*

High Court of Justice.

Chan. Div. } North, J. } Nov. 2.

In re GODDEN.
TRAGUE *v.* FOX. (*a.*)

Tenant for life and remainderman—Income and capital—Apportionment—Mortgage—Mortgagees in possession—Will—Conversion clause.

A testator at the date of his death was in possession of a colliery as mortgagee, and there were considerable sums owing to his estate under the mortgage. After his death a receiver was put to work the colliery by the trustees of his will, and the trustees finally foreclosed the mortgage. Under his will the testator had given his trustees power to postpone the conversion of any part of real and personal estate. Prior to the date of the foreclosure decree the receiver had paid into court to the credit of the foreclosure action considerable sums of money, representing the net profits of working the colliery, which sums had been increased by accumulations of interest. This fund had been transferred to the credit of an action for the administration of the testator's estate. The tenants for life claimed the whole fund as income.

Held, that the accumulations of interest were income, and belonged to the tenants for life; that until the date of foreclosure absolute the mine was not a part of the testator's estate affected by the conversion clause, but only a security for money advanced, and that the profits arising from the working of the mine previous to that date must be apportioned between the tenants for life and remaindermen, on the principle that the tenants for life were entitled to the difference between the sum transferred into court and the sum which, with interest at four per cent. from the date of the testator's death to the date of the transfer to the credit of this action, would amount to the sum transferred into court; and that the sum so calculated belonged to the estate as capital.

In re Earl of Chesterfield's Trusts, 32 *W. R.* 361, 24 *Ch. D.* 643, *followed.*

(*a.*) Reported by G. B. M. COORE, Esq., Barrister-at-Law.

W. E. Godden, at his decease, on the 6th of January, 1887, was mortgagee in possession of the Anan Hill Colliery, and there was due to his estate for principal and interest under the mortgage the sum of £13,515 6s. 2d. After his death the trustees of his will put in a receiver, and subsequently commenced a foreclosure action. The mortgage was foreclosed on the 18th of December, 1891, and subsequently the receiver was continued as receiver in an administration action—*In re Godden* (*deceased*). Large net profits were made from time to time in the working of the colliery and paid into court by the receiver in the mortgage action, which were subsequently transferred to the credit of the administration action. There was now in court a sum of £5,689 14s. New Consols, representing the profits derived from the colliery with accumulated interest down to the date of the foreclosure decree. Further sums had been paid into court subsequent to the foreclosure decree, but concerning these no question arose.

The tenants for life under the will of the testator, made subsequent to his entrance as mortgagee (which, so far as it concerns the point at issue, is set out in the judgment), claimed the whole sum as income, and one of them took out a summons for payment to them of the fund in equal shares.

At the date of the summons there was due to the testator's estate the sum of £16,233 0s. 1d. under the mortgage security for principal and interest.

S. Hall, Q.C., and *Stock*, for the plaintiff.—The testator has given his trustees power to postpone conversion of any part of his real and personal estate. The sums paid into court by the receiver are income, and must go to the tenants for life.

Badcock, Willis Bund, and *Vernon R. Smith*, for the other tenants for life.

Methold and *Clydesdale*, for the persons interested in remainder.—The fund must be apportioned between the tenants for life and the remaindermen, on the principle laid down in *In re Earl Chesterfield's Trusts*, 32 W. R. 361, 24 Ch. D. 643.

They also cited *In re Foster*, 39 W. R. 31, 45 Ch. D. 629; *In re Ancketill*, 27 L. R. Ir. 331, 39 W. R. Dig. 9; *Cox* v. *Cox*, 17 W. R. 790, L. R. 8 Eq. 343.

Ingle Joyce, for the trustees.

Hall, Q.C., in reply.—The cases cited differ from the present case. This testator's will gave no direction as to income, which must go, therefore, to the tenants for life. In this case, also, there was an ascertained loss between income and capital which it was necessary to make up. In this case, as the mine has not yet been realized, it cannot be said for certain whether there is any loss at all. The decision in *Re Chancellor*, 32 W. R. 465, 26 Ch. D. 42, is applicable here.

NORTH, J., after stating that as the different parties had taken the view that all other questions as to income were adjusted except as to the share of the tenants for life in this fund, and he was prepared on this footing to make an order in respect to it as if it were a separate fund, continued:—This is an application by the tenants for life to have the whole fund. This is what they ask, and nothing else. That seems out of the question. The facts are these: The testator, before the date of his will, became mortgagee in possession of a certain mining property. The mortgage had been made some time before, but he did not enter into possession till some months before the date of his will; he remained in possession till his death; and for some time after his death his trustees remained in possession until a time was

reached when they absolutely foreclosed the mortgagor, and from that time forward the mine itself became part of the testator's estate as distinguished from what had been part of his estate before, namely, the debt due from the mortgagor to the testator as mortgagee. Before the foreclosure decree, the trustees of the estate had a charge on the mine by way of security, but the fact of this charge on the mine existing, did not make the mine itself part of the testator's estate.

The question arises as to the money received by the receiver down to the time of absolute foreclosure, and does not include any money received by him in respect of proceeds or profits of working after that date. There are also some accumulations of interest on the sums paid in. The question is in what way these must be applied. The interest is to some extent in arrears, but the tenants for life say that under a clause in the testator's will they are entitled to have the whole of the profits arising from the working of the mine as part of the income of the testator's estate. In my opinion it is not so at all.

I will read the clause first. It is: "The trustees or trustee may postpone, during such period as they or he may deem expedient, the sale, collection, and conversion of all or any part of my real and personal estate, including any leasehold or other property of a perishable or terminable nature, or any policy of assurance or reversionary interest or shares in any mining or other company or adventure or partnership business." In my opinion he does not in any of these words refer to a sale of the mine or a postponement of the sale of the mine for this reason: He was mortgagee, and that to which he was entitled was the debt due from the mortgagor to whom the mine belonged, and the mine was merely held as security, and the thing to which the clause did apply was the debt due from the owners of the mine to him. It is express as to that. They might postpone the collection or conversion of any part of his personal estate; they might refrain from realizing the mortgage, and that they did; and it was only afterwards the foreclosure took place. The words are, "the income to arise from such part of my real or personal estate as shall for the time being remain unconverted," that is, under the power to leave it unconverted, "shall be applied and dealt with in manner hereinbefore directed with regard to the income of the moneys produced by such sale, collection and conversion." The debt due on the mortgage security did not produce any income, and they cannot, therefore, under that clause be entitled to anything in the shape of income. But, inasmuch as they are tenants for life of the testator's estate, and what was due on the mortgage forms part of the testator's estate, they are entitled to have some allowance in respect of interest at four per cent. on the calculated amount of what the testator's property is. I think, therefore, this clause does not help them in the least. But, there being this property which is realizable by the testator's executors, they are entitled to have the income upon it.

First of all, though it is really last of all in point of date, there have been certain sums in court arising from the income of the fund invested. These sums belong to the tenants for life. They are income arising from the accumulations in court of the sums paid into court. As to the rest of the fund, it must be divided between the tenants for life and the remaindermen on the principle laid down in the cases cited by Mr. Methold. It will be necessary to inquire what sum, with interest at four per cent. from the date of the testator's death to the date of the transfer to the credit of this action, would amount to the sum transferred, and the tenants for life will be entitled to the difference between the amount so paid into court and the amount so found, and this last amount will belong to the estate as capital. Mr. Hall attempts to distinguish these cases from the present case on the ground that they were cases in which the whole fund had been realized and was going to be distributed and there was a deficiency, whereas in the present case the mine has not yet been realized, and it is as yet impossible to say whether when realized it will turn out to be insufficient to satisfy all that is due in respect of it. I do not think that that criticism is accurate if applied to all the cases that have been cited; but even if it were accurate it makes no difference, because we have to deal with the fund now available, and that fund is admittedly insufficient to provide in full in respect of the claims of capital and income, and as it is insufficient to provide for the whole, all we can do is to divide it as far as it will go in the same way as the whole fund would now have been divided if it had been sufficient. If it turns out hereafter that there is sufficient to pay the parties in full there is no reason why the distribution of the present fund should be postponed. If there is not sufficient, the reason for postponing it is itself displaced.

Solicitors, *Coode, Kingdon, & Cotton*, for *Chilcott & Son*, Truro; *Crowder & Vizard; Rowcliffes, Rawle, & Co.*, for *A. H. Jenkyn*, Penrhyn; *W. E. Aldis; J. G. Fox & Co.*

(1893) 1 Ch. 548.

Chan. Div. Stirling, J. } Dec. 20; Jan. 12.

DAY v. LONGHURST. (a.)

Bill of exchange—Injunction to restrain negotiation—Bearer—Holder—Delivery without indorsement—Subsequent indorsement—Solicitor—Contempt of court—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 2, 31, *sub-sections* 1, 3, 4.

L. was, in July, 1892, *restrained by injunction from "negotiating, pledging, or disposing of" certain bills of exchange, which were payable to order. He had, previously to that date, deposited with his solicitor, Y., the bills in question to secure a debt, and in October*, 1892, *while the injunction was still in force, he, at the request of Y., indorsed one of the bills. On a motion to commit L. and Y. for contempt of court, on the ground that the bill had been negotiated contrary to the injunction,*

Held, that, by the indorsement in October, 1892, *Y., who up to that time had been merely the transferee of the bill, became the "holder" of it within the meaning of the Bills of Exchange Act, and the bill was for the first time "negotiated" within the meaning of section* 31, *sub-section* 1, *and that there had been a contempt of court.*

Motion.

This was a motion to commit the defendant Longhurst and his solicitor, Young, for contempt of court.

On the 1st of July, 1892, an order was made in this action restraining the defendant over the 8th of July from "negotiating, pledging, or disposing of" certain bills of exchange. This *interim* order was from time to time continued down to the 22nd of November, 1892. Previously to the commencement of the action the bills in question (which were payable to the defendant's order) had been deposited by him with Young by way of security for a debt, but had not been indorsed, and they had since continued in Young's possession. On the 5th of October, 1892, while the *interim* order was in force, the defendant, at the

(a.) Reported by W. A. G. WOODS, Esq., Barrister-at-Law.

request of Young, indorsed one of them; and the motion to commit the defendant and his solicitor for contempt of court was thereupon made.

The Bills of Exchange Act, 1882, provides, as follows:—

Section 2.—"Bearer" means the person in possession of a bill or note which is payable to bearer. "Holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.

Section 31 (1).—A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill. Sub-section (3).—A bill payable to order is negotiated by the indorsement of the holder completed by delivery. Sub-section (4).—Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee, in addition, acquires the right to have the indorsement of the transferor.

Hastings, Q.C., and *Swinfen Eady*, for the plaintiff.—The bill has been negotiated by the defendant. Until the bill was indorsed Young had no better title than the defendant. When, however, the indorsement was subsequently obtained, the transfer took effect as a negotiation from the time of such indorsement: Chalmers on Bills of Exchange, 4th ed., p. 104, note on Bills of Exchange Act, 1882, s. 31 (4), where he quotes from the judgment of Willes, J., in *Whistler* v. *Forster*, 11 W. R. 649, 14 C. B. N. S. 257-9. The defendant has consequently been guilty of contempt of court. Young also, as an officer of the court, has been guilty of breach of duty and gross contempt in acting as he has done: *Ex parte Hayward, In re Plant*, 45 L. T. N. S. 326, 30 W. R. Dig. 49.

Buckley, Q.C., and *Lewis Edmunds*, for the respondents.—There has been no contempt of court. Negotiation was complete as soon as the bill was delivered. Negotiation means the transfer of the interest so that some other person becomes the owner of the debt represented by the bill. The right to have the indorsement is not part of the negotiation. When the bill is transferred, section 31, sub-section 4, of the Act of 1882 gives a right to an indorsement, which is not a mere voluntary indorsement. Young therefore had a right to compel the defendant to indorse the bill.

Hastings, Q.C., replied.

STIRLING, J., after referring to the definition of "bearer" and "holder" in the Bills of Exchange Act, 1882, s. 2, continued:—Previously to the 5th of October, 1892, Young was neither "bearer" nor "holder" of the bills in question. The former term applies only to the person in possession of a bill or note payable to bearer, which this was not, and the latter to a payee or indorsee of a bill or note, which Young was not. [His lordship then read section 31, sub-sections 1 and 3, and said:—] Previously to the 5th of October, 1892, the bill had not been transferred to Young so as to constitute him the holder of the bill, for he was not "payee" or "indorsee," therefore the bill was not up to that date negotiated. On the 5th of October, 1892, the bill, being in the possession of Young, was for the first time indorsed by the defendant. Young, who up to that time had been merely the transferee of the bill, now for the first time became the "holder" of it within the meaning of the Bills of Exchange Act, and the bill was for the first time "negotiated" within the meaning of sub-section 1 of section 31; consequently the defendant by his act on the 5th of October, 1892, converted Young from a mere transferee into a holder of the bill, and, in my opinion, negotiated the bill, contrary to the *interim* order which had been made.

On behalf of the respondents reliance was placed on sub-section 4 of section 31. No doubt that sub-section shows that Young had, prior to the 5th of October, 1892, the right to have the indorsement of the defendant, and, consequently, to sue the defendant if he refused to indorse the bill. That, however, did not justify the defendant in violating the order of the court. If proceedings were taken or threatened by Young, the defendant ought to have applied either that the injunction might be removed, so as to enable him to give effect to Young's rights, or else to have Young made a party to the action. The latter alternative, however, the defendant actually declined, in the course of the hearing of the motion. In my opinion the defendant has violated the order of the court. I do not, however, regard the case as one of serious contempt, and as regards costs I think justice well be met if I order the defendant to pay those of the applicant and leave Young to pay his own.

Motion dismissed.

Solicitors for the applicant, *Satchell & Chapple.*

Solicitors for the respondents, *Coburn & Young.*

Q. B. Div. (Lord Coleridge, C.J., and Charles, J.) — Jan. 27.

HENNELL v. DAVIS AND AUSTIN. (a.)

County court—Practice—Payment into court without denial of liability—County Court Rules, 1889, *ord.* 9, *r.* 11 (1)—*Forms* 103, 104A.

The plaintiff brought an action in the High Court for work and labour as an engineer, and the particulars of his claim consisted of various items. The action having been remitted to the county court, the defendants paid £10 into the county court under the County Court Rules, 1889, *ord.* 9, *r.* 11 (1), *without denying liability, and without specifying any items as being those in respect of which the payment was made.*

Held, that, by the payment into the county court, a cause of action was admitted, but not that something was due on every item of the account.

Steavenson v. Corporation of Berwick, 1 *Q. B.* 154, *followed.*

This was an appeal by the defendants from a decision of C. E. Lloyd, Esq., deputy judge sitting at the County Court of Kent holden at Gravesend.

The plaintiff, Thomas Hennell, claimed £27 1s. for work done as a civil engineer, and the indorsement upon the writ which was issued in the High Court, was as follows:—

"STATEMENT OF CLAIM.

"The plaintiff's claim is £27 1s. for work done as a civil engineer.

"PARTICULARS.

"1891 "February "to March	"Making survey of tunnel, "roads, and property adjoining at Northfleet as "instructed	6	6	0
"1892	"Railway fare and expenses	0	16	0
	"To perusing, settling, and "swearing affidavit . .	1	1	0
	"Drawing plans of tunnels, "and preparing evidence "for use in court . . .	9	9	0

(a.) Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

"Two copies of drawings .	4	4	0
"Attending court two days	6	6	0
	£28	2	0
"Less amount received for "*subpœna*	1	1	0
	£27	1	0"

The action was remitted to the county court, and the defendants paid £10 into the county court under County Court Rules, 1889, ord. 9, r. 11 (1), without denying liability, and without specifying any items as being those in respect of which the payment was made.

The deputy county court judge held that this payment into court operated as an admission by the defendants, not merely of a cause of action, but also that something was due from them on each separate item of the claim; that the defendants, therefore, were not entitled to dispute their liability for something in respect of any item; and that the only question they could raise was whether each item respectively was reasonable in amount.

The defendants appealed.

Muir, for the appellants.—[CHARLES, J.—It does not follow because you pay money into court that you admit liability on every item.]

Garrett, for the respondent.—The question really was whether the defendants could deny the plaintiff's retainer as to some of the items. If the defendants had paid the £10 in under form 104A they would have been bound to specify the items in respect of which the payment was made; but they deliberately pay it in under form 103 in respect of the whole cause of action, so that when the plaintiff comes to trial he does not know what items the defendants dispute. Unless an allocation is made to the different items, the admission of liability comes to nothing; it merely says, "I admit you did some work for me." [CHARLES, J.—That is all it ever did.] [Lord COLERIDGE, C.J.—The payment admits that they owe you some amount on some contract. His lordship referred to *Steavenson* v. *Corporation of Berwick*, 1 Q. B. 154.]

Lord COLERIDGE, C.J.—This case must go back for a new trial. The point of law is against the respondent. The payment into court had not the effect the county court judge thought it had. There must be a new trial.

CHARLES, J.—There must be a new trial. The action was for work and labour. The defendants paid money into court. The county court judge held that that admitted that something was due on every item for work and labour. The case of *Steavenson* v. *Corporation of Berwick*, cited by my lord, shows that it is not so. By the payment into court a cause of action is admitted; but not every item of the account.

New trial ordered.

Solicitors for the appellants, *Sismey & Sismey*, for *Tolhurst, Lovell, & Clinch*, Gravesend.

Solicitors for the respondent, *Waller & Sons.*

Q. B. Div. (Day and Collins, JJ.) — Jan. 18.

DANDO v. BODEN. (a.)

Practice—Writ—Specially-indorsed writ—Claim for "bank charges"—Liquidated demand—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 57—*Ord.* 3, *r.* 6—*Ord.* 14, *r.* 1.

In an action on a bill of exchange the writ was specially indorsed under ord. 3, *r.* 6, *with a claim for the amount of the bill, and also* 2*s.* 9*d.* "*bank charges.*"

Held, that by the expression "bank charges" expenses of noting were referred to, and that as expenses of noting are made liquidated damages by section 57 *of the Bills of Exchange Act*, 1882, *this was a good special indorsement.*

Appeal of the plaintiff from an order of Kennedy, J., in chambers, setting aside a judgment.

The action was brought on a bill of exchange, and by the writ, which was specially indorsed, the sum of £25 2s. 9d. was claimed. The particulars on the writ showed that that sum was made up of £25, the amount of the bill, and 2s. 9d. for "bank charges."

The defendant failed to enter appearance and the plaintiff signed judgment. The defendant then applied to the district registrar to set aside the judgment, but failed in his application. He appealed to the judge in chambers, who set aside the judgment on the ground that the claim for "bank charges" was a claim for unliquidated damages, and that the indorsement on the writ was not a good special indorsement.

The plaintiff appealed.

A. T. Lawrence, for the plaintiff.—This is a good special indorsement. "Bank charges" is merely another term for "expenses of noting," which by section 57 of the Bills of Exchange Act, 1882, are liquidated damages, and can therefore be the subject of a specially-indorsed writ.

Jelf, Q.C., and *Lyttelton*, for the defendant.—It is incumbent on the plaintiff to show affirmatively on the face of the writ that "bank charges" mean nothing more than expenses of noting. He cannot do so, and therefore the judge in chambers was right in holding that he had no jurisdiction to order judgment for the plaintiff: *Gold Ores Reduction Co.* v. *Parr*, 40 W. R. 526, [1892] 2 Q. B. 14; *Sheba Gold Mining Co.* v. *Trubshawe*, 40 W. R. 381, [1892] 1 Q. B. 674; *Wilks* v. *Wood*, 40 W. R. 418, [1892] 1 Q. B. 684.

DAY, J.—I am of opinion that this is a frivolous objection. The Bills of Exchange Act enables a person to recover the expenses of noting. In this case the writ is indorsed with the amount of the bill and bank charges. It has been argued that bank charges cannot cover the expenses of noting, but it is quite clear that in this case they did, and it is not suggested that they covered anything more. The mere fact that the identical words of the Act have not been used is immaterial. The appeal will be allowed.

COLLINS, J.—I agree. It is said on behalf of the defendant that, owing to the nature of this indorsement, there is no jurisdiction to deal with this writ as a specially-indorsed writ. Although that is a purely technical objection, the defendant is perfectly entitled to take it, because the construction of order 14 is a very technical matter. In my opinion, however, the authorities dealing with order 14 do not oblige us, in this case, to depart from the canons of common

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

sense. The argument for the defendant would prevail if it could be shown that the claim for bank charges was a claim for damages which were not liquidated damages under the act; but if the claim is *primâ facie* a claim for something which has been made liquidated damages, then the argument fails. In my opinion the expression bankers' charges is a good way of describing expenses of noting, and is quite consistent with meaning nothing but expenses of noting.

Appeal allowed.

Solicitors for the plaintiff, *Field, Roscoe, & Co.*, for *Stokes & Hooper*, Dudley.

Solicitors for the defendant, *G. Warmington*, for *Plant*, Dudley.

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams, J.) — Feb. 9.

In re VANSITTART.
Ex parte BROWN. (*a*.)

Bankruptcy—Avoidance of voluntary settlement—Pledge of settled property by donee to third parties before settlement declared void—Title of trustee in bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47—*Construction of statute.*

The operation of section 47 *of the Bankruptcy Act*, 1883, *is confined to the person who claims under the voluntary settlement as donee, and does not extend to a purchaser for valuable consideration in good faith from such donee, at any rate where such purchaser had no notice of the settlement.*

Application by the trustee in the bankruptcy for an order against the respondents, Messrs. Hirsch & Co., to deliver up certain jewellery.

The case was consequent on the decision of the court in the case of *In re Vansittart, Ex parte Brown, ante*, p. 32, by which it was held that a present of diamond jewellery by the bankrupt to his wife within two years of the bankruptcy was a voluntary "settlement" within the meaning of section 47 of the Bankruptcy Act, 1883, and was void against the trustee.

It now appeared that previous to the receiving order being made a large portion of the jewellery in question had been deposited by Mrs. Vansittart with Messrs. Hirsch & Co., who were a firm of stockbrokers, in order to assist her husband by inducing them to withdraw a bankruptcy notice, and to forbear proceeding against him in respect of a judgment which they had obtained for £524.

The trustee now applied for an order against Messrs. Hirsch & Co. to deliver up the jewellery.

Witt, Q.C., and *Germaine*, for the trustee, referred to *Curtis* v. *Price*, 12 Ves., at p. 103; *Ex parte Bell*, 1 Gl. & J. 283; *In re Briggs & Spicer*, 39 W. R. 377, [1891] 2 Ch. 127.

Herbert Reed, Q.C., and *Abrahams*, for the respondents, referred to *George* v. *Milbanke*, 9 Ves. 190; May's Bankruptcy, 2nd ed., p. 315; *Daubeny* v. *Cockburn*, 1 Mer. 626; *Morewood* v. *South Yorkshire Railway*, 28 L. J. Ex. 114, 7 W. R. C. L. Dig. 14; *Hance* v. *Harding*, 36 W. R. 629, 20 Q. B. D. 732; *Halifax Banking Co.* v. *Gledhill*, 39 W. R. 104, [1891] 1 Ch. 31.

VAUGHAN WILLIAMS, J.—The question I have to decide is really the true construction of section 47 of the Bankruptcy Act, 1883. The facts which make it necessary for me to construe that section are shortly these: The bankrupt made a settlement on his wife of certain jewellery. I have held that that settlement is a void settlement by reason of the provisions of section 47. Before it was known or decided that that settlement was a void settlement, that is to say, before the bankruptcy occurred at all, and before, therefore, the settlement could be declared void, Mrs. Vansittart, the beneficiary under the settlement, pledged the jewellery, the subject-matter of the settlement, with the respondents, Messrs. Hirsch & Co., and the trustee in the bankruptcy comes now and says that inasmuch as it is provided by section 47 that such a settlement is void, and the word used is void and not voidable, it follows that the settlement is void altogether and for all purposes, and that, therefore, the persons who claim under Mrs. Vansittart, namely, Messrs. Hirsch & Co., the respondents, cannot set up any title as against the trustee under this void conveyance. Of course this question could not arise unless I was of opinion that Messrs. Hirsch & Co. were persons who were claiming under this settlement in good faith and for valuable consideration. But I am of opinion that Messrs. Hirsch & Co. are claiming in good faith and for valuble consideration. I have not here to take into consideration what their conduct was as between themselves and the bankrupt, or as between themselves and the creditors. In determining the question of *bona fides* under the section, I have merely to consider whether or not at the time when Messrs. Hirsch & Co. accepted from Mrs. Vansittart this pledge of the jewellery they honestly believed her to be entitled to the jewellery which she was pledging to them, and had no knowledge or reason to believe that she was claiming under a document which would be impeachable as against creditors. That is all I have to consider in determining whether Messrs. Hirsch & Co. took the deposit in good faith and for valuable consideration; and I am of opinion that Messrs. Hirsch & Co. did take the deposit in good faith and for valuable consideration.

In the course of Mr. Witt's argument I suggested to him that all that an order under section 47 does is to prevent anyone claiming under the settlement, and that the order did not establish any title necessarily in the trustee; and I suggested, further, that it might very well be that although Messrs. Hirsch & Co. might be debarred from claiming under the settlement, possibly they might have a good title *dehors* the settlement, because either the transaction might have to be considered as a transaction by the husband himself, or a transaction in which the husband would be estopped from denying the validity of the pledge. But although I am distinctly of opinion that the effect of the order is only what I have said—namely, is only to prevent Messrs. Hirsch & Co., or anyone claiming under the settlement, from relying on it as against the trustee; although it may be, under those circumstances, the trustee would have to make a title against Messrs. Hirsch & Co., yet I cannot say that I am satisfied myself that Messrs. Hirsch & Co. would have any answer, by reason either of the husband being principal in the transaction or being estopped, to the *primâ facie* title which would arise in favour of the trustee, immediately on the displacement of the settlement, by reason of the antecedent title of the grantor of the settlement.

Under those circumstances I do not propose to decide this case on that ground. It has been suggested that I might decide the case on another ground—namely, that the transaction falls within the terms of the protecting section—section 49 of the Bankruptcy Act, 1883—and the case of *Hance* v.

(*a*.) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

Harding was cited as an authority for that proposition. But I am afraid I cannot get any assistance from that case, because it is obvious that that was only a decision that a transaction, although it fell within section 47, might be a protected transaction by virtue of section 49. That means a protected transaction as between the original parties to it. There is nothing to suggest that the protection afforded is a protection which will enure for the protection of a transferee from the person who could not claim the protection of the section. The object of the protecting section is to save persons dealing with the bankrupt between the date of the act of bankruptcy and the receiving order from being too hardly pressed by the doctrine of relation. I doubt whether I could apply the section in favour of Messrs. Hirsch & Co., because they could only claim through Mrs. Vansittart, and, therefore, I do not think the protecting section was available for Messrs. Hirsch & Co. here.

Now before I state what my decision in this case is I want to dispose of one argument put forward by Mr. Witt. He said that I could not decide against the trustee unless I introduced into section 47 a saving proviso which is not there, and he pointed out that in section 48 there is a saving proviso, and he said that it would be a very strong thing to read in such a clause into section 47 when I must suppose that the Legislature had in their minds the necessity of such a clause because they put it into section 48. The answer to that is that in section 48 there is a reason for such a clause, and that is that the act of fraudulent preference by the bankrupt is an act of bankruptcy, and as it is an act of bankruptcy, unless you introduce a saving clause, the transferee from the person preferred might be very unjustly dealt with. The transaction in section 47 is not an act of bankruptcy at all, but a mere isolated transaction; and under those circumstances the Legislature might very well have thought that the necessity of introducing such a clause in section 48 did not apply to section 47.

Still I have now to construe this section and speaking for myself, I should for various reasons have very little hesitation in so construing the section as really to prevent its operation extending to *bonâ fide* purchasers for value under those who claim as beneficiaries under the settlement, because there are a multitude of reasons to lead one to such a construction. In the first place, speaking generically, it belongs to a class of legislation in favour of creditors and under those circumstances you should always apply the same reasoning to such legislation, and again and again it has been held that where consideration is given subsequently to the original settlement, that consideration enures to prevent the transaction being considered as a voluntary transaction so as to injuriously affect the person who has given the valuable consideration. Moreover, one cannot forget the history of the section, which is in substance the same as has appeared in successive Bankruptcy Acts down to 1869, when the words were slightly altered, and it was never contended that the section had any application to bind purchasers for value from those who claimed under the settlement. One must look carefully at the words of the Act of Parliament to see whether any alteration was intended to be made. I think that if the whole terms of the section are looked at it is only intended to bind those who claim under the settlement. Of course I know that a person who purchases from a person claiming under the settlement also claims under the settlement. But in construing this Act of Parliament I am not at all sure that the words require such a construction. I have already said that the inclination of my opinion would be that, notwithstanding the use of the word "void," the intention of the section is that it shall only operate on those who claim under the voluntary settlement as donees, and shall not bind purchasers for valuable consideration in good faith from those donees. The only difficulty I have in coming to this decision is caused by the decision of Stirling, J., in *In re Briggs & Spicer*. I feel impressed by that decision, and am somewhat doubtful whether I ought not to follow it, but on the whole I have come to the conclusion that the question Stirling, J., had to decide was a different question from that which I have to decide. He had to decide whether, under the Vendor and Purchaser Act, the purchaser could be compelled to accept a title, and he decided that he could not, because of this flaw. He points out that the purchaser had notice of the settlement, and that may make a difference. I do not understand here that Messrs. Hirsch & Co. had any notice of the settlement at all, or of the title of the wife. All that they knew was that she was dealing with the jewellery as her own jewellery, and the husband was standing by and seeing her do it. I have not to decide any question of notice, but whether the title of Messrs. Hirsch & Co., who only accepted the pledge from the wife without knowing her title, is defeated by the trustee by reason of the settlement now having been declared void. I think that the intention of the Act of Parliament was such that the trustee's title will not prevail against Messrs. Hirsch & Co., both because the section must be dealt with in the spirit applicable to this class of legislation, and the trustee having got a declaration that the settlement is void has not defeated the title of Messrs. Hirsch & Co. in respect of this jewellery given to them with the privity of the husband and without notice that Mrs. Vansittart was claiming under a voluntary settlement.

Application refused.

Solicitors for the trustee, *R. & E. Bastard.*

Solicitors for the respondents, *M. Abrahams, Son, & Co.*

Prob. Div. & Adm. Div. } Oct. 28.
Probate. }

COLLINS AND TUFFLEY *v.* ELSTONE. (*a.*)

Probate—Will—Effect of words of revocation—Previous wills—Erroneous explanation.

If a testator employs another to convey his meaning in technical language, and that other person makes a mistake in doing it, the mistake is the same as if the testator had employed the technical language himself.

A lady, after making a previous will and codicil, desired to make a special disposition of a small sum of money payable under a policy of life insurance. She asked the insurance agent to draw up a will carrying out her intentions. He procured a form beginning with the words "I hereby revoke all wills by me at any time heretofore made," and, on his reading out these words, the testatrix objected to them, on the ground that she did not wish to revoke her previous will and codicil, but he assured her that, as the will in question related only to the insurance money, these words would not have the effect of revoking the other instruments, and, if struck out, might invalidate this will, and he believed what he stated to her. She accordingly executed the will with these words in.

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

The plaintiffs, executors of all three documents, commenced an action asking for probate of all these testamentary papers, but with the words of revocation in the last omitted.

Held, that, on the authority of Guardhouse *v.* Blackburn, 14 *W. R.* 463, *L. R.* 1 *P. & D.* 109, *and* Morrell *v.* Morrell, 30 *W. R.* 491, 7 *P. D.* 68, *the testatrix, having had the will read over to her, must, in the absence of fraud, be held to have approved as well as known the contents thereof, and probate of the last will only, with the words of revocation, granted.*

Hearing of a probate action before the court without a jury.

The plaintiffs were the executors of a will dated the 12th of March, 1875, a codicil thereto dated the 21st of July, 1885, and a will dated the 17th of October, 1889, executed by Sarah Caroline Pinney, deceased, who died on the 9th of March, 1891. The defendant was Caroline Elstone, a first cousin of the deceased.

The plaintiffs, who were executors of all three testamentary papers, propounded them, but prayed that certain words revoking all previous wills contained in the last will might be omitted from the probate as having been inserted by mistake and without the knowledge and approval of the deceased.

The defendant, one of the next of kin, opposed the grant of probate of the first will and codicil as having been revoked by the last will, and asked for probate of the will of the 17th of October, 1889, as the true and last will of the testator.

It appeared from the evidence, and the facts were not disputed by the defendant, that the deceased and Miss Collins, one of the plaintiffs, were two maiden ladies of small means, who for thirty-one years lived together in a cottage at Belvedere, in the county of Kent. Many years before the deceased's death they had resolved to make mutual testamentary dispositions with the object of securing to the survivor of them substantially whatever both might possess at the time of the death of either. In pursuance of that arrangement Miss Pinney, the deceased, duly executed the will of March, 1875, and the codicil of July, 1885, disposing, in favour of Miss Collins, of an estate of under £300. A few months before her death it occurred to Miss Pinney that if she died before Miss Collins the latter might be in want of a little ready money for funeral expenses, and, in order to provide that, she insured her life for £50 in an office with which Mr. Tuffley, the other plaintiff, was connected as an out agent. Mr. Tuffley having acted for her in obtaining the policy, she asked him to draw a will by which she would make a testamentary disposition of the £50, in bequeathing £30 of it to Miss Collins, £10 to Mr. Tuffley's mother, and £10 to a clergyman. Mr. Tuffley procured a printed form of will with blanks for filling up. Almost the first words of it were—"I hereby revoke all wills by me at any time heretofore made." In his evidence to the court he said that he read the will with those words included in it to the testatrix, who at once objected to them, saying that she did not wish to revoke the will and codicil she had made; but he told her that, inasmuch as the will she was then making dealt only with the life insurance, and not with the estate dealt with in the previous will and its codicil, those words would not have the effect of revoking those two documents, and that the striking out of the words might vitiate the whole of the will of which they formed part. He swore that, in making the statement to the testatrix, he was stating what was his honest opinion. On hearing it the testatrix made no further objection, but executed the will with its revocatory clause.

B. Deane, for the plaintiffs.—The testator could not be said to have known and approved these revocatory words: *Guardhouse and others* v. *Blackburn*, 14 W. R. 463, L. R. 1 P. & D. 109; *Atter* v. *Atkinson*, L. R. 1 P. & D. 665, 17 W. R. Prob. Dig. 9; *Fulton* v. *Andrew*, 23 W. R. 566, L. R. 7 H. L. 448. Probate should be granted of the three papers without the revocatory words as constituting the last will and testament of the deceased. The court would be justified in holding that they were inserted by legal fraud, although Mr. Tuffley at the time had not the intention of deceiving the deceased. Legal fraud has not been accurately defined.

Bray, for the defendant.—Legal fraud is well understood; it cannot be alleged here. Where words appearing in a will have been read over to a testator the court must hold them to form part of the will: *Morrell* v. *Morrell*, 30 W. R. 491, L. R. 7 P. D. 68.

JEUNE, P.—I cannot help regretting, as I suppose anybody must regret, being compelled to come to a conclusion in which I am conscious that the result will be that the real intention of the testatrix is not carried out. Still, that is the conclusion I feel bound to come to upon the facts of the case. Upon the point raised it is quite clear. The will contains words which, I regret to say, in law, revoke the previous will. Those words were inserted, as I have no doubt, because the testatrix misunderstood their meaning; and I have no doubt how she came to misunderstand their meaning. It is clear on the evidence that the person who drew the will was ignorant—there is no fraud—as to the effect of putting in that clause, because he told her it would be inoperative, and he told her, further, if it was struck out it would affect or might vitiate the rest of the will; and, misinformed by this statement, she allowed the clause, which was in the printed form, to remain.

The question is, under these circumstances, can I strike it out consistently with the authorities? I am afraid I cannot. There are three cases which have been referred to. The first is the case of *Guardhouse* v. *Blackburn*, where, if you take Lord Penzance's words, they lay down a canon which no doubt completely covers this case, because Lord Penzance says that, subject to a question of fraud, the fact that a will has been duly read over to a capable testator on the occasion of its execution, or its contents brought to the testator's notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof.

Then there is the case of *Atter* v. *Atkinson*, to which I need not refer further because Lord Penzance's view of the law as expressed in the case of *Guardhouse* v. *Blackburn* is not there so fully laid down. The case of *Guardhouse* v. *Blackburn* is commented on in *Fulton* v. *Andrew* too, but I do not think any serious difference with it seems to be expressed. All that the Lord Chancellor seems to me to have pointed to is that, when that case was left to the jury, it was not clear that the jury did not believe then that there was some fraud with regard to the insertion of the particular clause, or that they were satisfied that it was read over so that it was fully before the mind of the testator. Therefore I do not think that on these cases I should strike out these words. Then Mr. Bray refers me to the case of *Morrell* v. *Morrell*, and I confess it seems to me that the words used in that case express the law, which is applicable to this case, and express what is some reason for it, because the view of Lord Hannen in that case clearly is this—that if a person employs another to convey his meaning in technical language, and that other person makes a mistake in doing it, the mistake is the

same as if the person had employed the technical language himself. Now that view appears to me exactly to meet the present case. This lady thought it right to employ this gentleman to make her will for her. She thought it right to trust to him; no doubt he was mistaken, but, according to the view of Lord Hannen, his mistake was her mistake. I confess at the moment I felt some doubt as to whether it might not be possible to extend the doctrine of fraud so as to include this mistake. But I am satisfied there is no authority to make such an extension. There is, of course, a distinction between fraud and anything else, and even taking the view of Lord Hannen, which I have just referred to, it seems to me where there is the interposition of fraud between the principal and agent it may be, to follow out Lord Hannen's view, that the agency is thereby rendered invalid and that the person is not bound by the act of the agent. Under those circumstances, I feel bound to say with regret that I am unable to strike these words out of the will, and probate must go of the will of the 17th of October, 1889, with these words in. The will of 1875 and the codicil of 1885 will not be admitted to probate. I think as this is a case arising out of the testatrix's own fault the costs of all parties ought to be paid out of the estate.

Solicitors for the plaintiffs, *West, King, Adams, & Co.*

Solicitors for the defendant, *Freshfields & Williams.*

Court of Appeal.

From Chan. Div. (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) — Jan. 18; Feb. 3.

In re SMITH.

HANDS *v.* ANDREWS. (*a.*)

Attachment—Trustee—Non-compliance with order to pay money into court—Bankruptcy of trustee—Jurisdiction—Exercise of discretion—Appeal—Debtors Act, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 4 (3)—*Debtors Act,* 1878 (41 *&* 42 *Vict. c.* 54), *s.* 1—*Bankruptcy Act,* 1883 (46 *&* 47 *Vict. c.* 52), *s.* 9.

The court has jurisdiction to order the attachment of a trustee who has made default in payment of a sum of money which he has been ordered to pay into court, notwithstanding that a receiving order in bankruptcy has been made against him.

Where a judge to whom an application for an attachment is made appears to the Court of Appeal to have exercised upon an erroneous ground the discretion conferred on the court by the Debtors Act, 1878, *they will review his decision.*

Appeal from an order of Kekewich, J., directing the issue of writs of attachment under section 4 (3) of the Debtors Act, 1869.

An action was commenced by a creditor for the administration of the estate of one Smith deceased, the defendants being Andrews and Hooton, the two executors and trustees of the will of the deceased. It appeared that Smith had carried on business as a turf commission agent, Hooton being his manager, and it was the intention of the testator, as expressed by his will, that Hooton should continue to carry on the business for the benefit of his children. The executors realized the estate, and various payments were made by them by cheque, but Andrews never actually had in his hands any part of the estate, except the sum of £29 which was due to him. Among the cheques which Andrews joined Hooton in signing was one made payable to Hooton himself. The intention of Andrews in signing this cheque was to enable Hooton to carry on the business in accordance with the testator's wishes. The sum of money which Hooton thus obtained was misapplied by him.

On the 6th of August, 1892, an order was made in the action on both the defendants to pay certain sums of money into court. They disobeyed the order, and a motion was made for their attachment. In the meantime a receiving order in bankruptcy had been made against Andrews. Kekewich, J., thought that, notwithstanding section 9 of the Bankruptcy Act, 1883, he had jurisdiction to entertain the application as against Andrews, and he exercised his discretion by ordering that writs of attachment should issue against both defendants.

The defendants appealed.

Renshaw, Q.C., and *Durandu,* for the appellants.

S. Hall, Q.C., and *Rowden,* for the respondent.

The following cases were cited in the argument, besides those referred to in the judgment:—*In re Wray,* 36 W. R. 67, 36 Ch. D. 138; *In re Simes,* 38 W. R. 570; *In re Edye,* 39 W. R. 198; *In re Grey, ante,* p. 3, [1892] 2 Q. B. 440; *Evans* v. *Bear,* 23 W. R. 67, L. R. 10 Ch. App. 76.

Cur. adv. vult.

Feb. 3.—LINDLEY, L.J., read the following judgment:—This is an appeal by two executors and trustees against an order directing a writ of attachment to issue against them under the authority conferred by the Debtors Act, 1869, s. 4 (3), as amended by the Debtors Act, 1878.

On the 6th of August, 1892, an order was made in an action for the administration of their testator's estate on both the appellants to pay into court £426 found due from them jointly; and an order was also made on the appellant Hooton to pay into court £90 found due from him separately. There was no summons to vary the chief clerk's certificate, and the liability of the defendants to pay these sums into court as ordered must be treated as indisputable.

On the 8th of September a receiving order in bankruptcy was made against Andrews. The moneys not being paid, notice of motion for an attachment against both appellants was served on the 19th of October. Before this motion came on to be heard—viz., on the 1st of November—Andrews was adjudicated bankrupt. On the 19th of November the order appealed from, for the issue of an attachment against both defendants, was made. No proceedings in bankruptcy have been taken against Hooton. It becomes necessary, therefore, to consider their cases separately.

It will be convenient to take Hooton's case first, as it is the simpler of the two. He was an executor and trustee; he was ordered to pay money by a judge of the High Court exercising the jurisdiction formerly exercised by courts of equity. The money which he was ordered to pay was the balance of moneys come to his hands and not accounted for by him. He had not got the money in his possession or under his control when the order for the payment of it into court was made, for he had misapplied the money which had come to his hands. But this circumstance did not excuse him from his liability to pay, nor prevent an order for attachment being made under the Debtors Act, 1869. Courts of equity refuse to allow a man to derive any benefit from his own

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

wrongful conduct, and treat a trustee as still having that which he once had and ought still to have although he may in fact have wrongfully parted with it. Acting on this principle it was decided by the Court of Appeal in Chancery as early as 1871 that an attachment might issue under section 4 (3) of the Debtors Act, 1869, against a trustee who made default in obeying an order to pay into court money which he had received as trustee, but had misapplied before the order for payment was made: *Middleton* v. *Chichester*, 19 W. R. 369, L. R. 6 Ch. App. 152; and this construction thus early put upon the Act has been followed ever since: see *Crowther* v. *Elgood*, 35 W. R. 369, 34 Ch. D. 691; *Preston* v. *Etherington*, 36 W. R. 49, 37 Ch. D. 104. It was pointed out in *Middleton* v. *Chichester* by Lord Hatherley that all the debts specified in section 4 of the Debtors Act, 1869, in respect of which imprisonment was not abolished, were different from ordinary debts, and were "debts the incurring of which was in some degree worthy of being visited with punishment. In every case there is something in the character of delinquency pointed out." In 1869, if an order for payment was made under section 4 and was disobeyed, an attachment against the debtor was issued as a matter of course. But this was altered by the Debtors Act, 1878, under which a judge applied to for an order for an attachment is intrusted with a discretion to grant or refuse the order. If, therefore, an order for attachment is made in a case falling within section 4 of the Debtors Act, 1869, this court will not interfere with the exercise of the discretion of the judge making the order unless it can be shown that he has not exercised his discretion in the particular case, or that he has manifestly proceeded on a wrong ground: see *Crowther* v. *Elgood*. Nothing of the kind is shown in Hooton's case, and his appeal, therefore, ought to be dismissed.

The same principles are applicable to Andrews' case save so far as they are affected by his bankruptcy. But the Bankruptcy Act of 1883 contains a section (section 9) which is as follows:—"On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the court and on such terms as the court may impose." This section is in substance the same as the corresponding section in the earlier Bankruptcy Act of 1869 (section 12). This last section was held by the Court of Appeal in *Cobham* v. *Dalton*, 23 W. R. 865, L. R. 10 Ch. App. 655, to prevent an arrest without the leave of the Court of Bankruptcy, even in cases falling within section 4 (3) of the Debtors Act, 1869. It becomes necessary, therefore, to examine this case, and to determine whether it can be regarded as an authority which still ought to be followed, regard being had to subsequent legislation, and to more recent decisions. The subsequent legislation, which is important, consists first of the Debtors Act, 1878, which has been already noticed, and, secondly, of the Bankruptcy Act, 1883, which has replaced the Bankruptcy Act, 1869. The operative words in section 9 (1) of the Bankruptcy Act, 1883, are the same as those in section 12 of the previous Act of 1869, and, although the two sections are not exactly the same, there is no difference in them material for the present purpose. Under both Acts money due from a trustee in respect of a breach of trust, whether fraudulent or not, is a debt provable against his estate in the event of his bankruptcy. But there is a very remarkable difference between the two Acts as regards the effect of an order of discharge; for whilst under section 49 of the Bankruptcy Act, 1869, an order of discharge did not release a bankrupt from any breach of trust, under section 30 of the Bankruptcy Act, 1883, an order of disharge does release a bankrupt from all breaches of trust, except fraudulent breaches of trust, to which he was a party.

Now, in *Cobham* v. *Dalton* a defaulting trustee had been ordered to pay money into court; and on the same day that the order was made he was adjudicated bankrupt. An order for his attachment was afterwards made *ex parte*, and he was arrested. He then applied in Chancery to be discharged. This application was refused. He appealed, and his appeal was allowed. The Court of Appeal treated section 12 of the Bankruptcy Act, 1869, as applicable to the case, and treated the money ordered to be paid into court as a provable debt, although it was not a debt due to the person who obtained the order to pay and the order for the attachment. The court further held that, the debt being a provable debt, the bankrupt was protected, until discharged, from arrest in respect of it; but that, as the Act then in force did not discharge him from the debt, he could be attached for it after his discharge. If the principle of this case is to be applied to the present case it will follow that Andrews ought not to be arrested pending his bankruptcy, nor after his discharge, unless his liability to pay the £426 arose from some fraudulent breach of trust to which he was a party, which is not the case. Although *Cobham* v. *Dalton* was decided in 1875 and *Middleton* v. *Chichester* was decided in 1871, and the Lords Justices who decided *Cobham* v. *Dalton* were members of the court which decided *Middleton* v. *Chichester*, the view then taken and expressed with reference to the punitive character of section 4 of the Debtors Act, 1869, seems to have been overlooked by them. James, L.J., does not allude to it; Mellish, L.J., said, "Now, arrest for debt is intended as a means of enforcing payment, not as a punishment, for if the party pays the debt he is entitled to be discharged." This observation was true of ordinary debts, but not of obligations to pay under orders made under section 4 (3) of the Debtors Act, 1869—*In re McWilliams*, 1 Sch. & Lef. 169; *Lees* v. *Newton*, 14 W. R. 938, L. R. 1 C. P. 658. The punitive character of section 4 of the Debtors Act, 1869. which was pointed out in *Middleton* v. *Chichester*, has been since so often recognized that it cannot now be questioned—see *Marris* v. *Ingram*, 28 W. R. 434, 13 Ch. D. 338; *In re Gent*, 37 W. R. 151, 40 Ch. D. 190; although the court has under the Act of 1878 a discretion to grant or refuse an attachment in cases falling within it, and in one of the latest cases, *Earl of Aylesford* v. *Earl Poulet*, 40 W. R. 424, [1892] 2 Ch. 60, an attachment against a defaulting trustee was refused. *In re Ryley*, 33 W. R 656, 15 Q. B. D. 329; *In re Manning*, 34 W. R. 111, 30 Ch. D. 480; *Preston* v. *Etherington*, and *Mitchell* v. *Simpson*, 38 W. R. 565, 25 Q. B. D. 183, were referred to in the course of the argument, but they are not decisions upon the effect of section 9 of the Bankruptcy Act, 1883, on commitments under section 4 of the Debtors Act, 1869. In these cases, however, the fact that a commitment under the section is not to be regarded simply as a form of civil process, but as punitive, is distinctly recognised. Having regard to the Debtors Act, 1878, and to the decisions to which I have referrred, it would be clearly wrong now to apply the observation of Mellish, L.J., in *Cobham* v. *Dalton*, above quoted to obligations to pay money in obedience to orders made under the Debtors Act, 1869, s. 4 (3). Kekewich, J., therefore had, in my opinion, jurisdiction under the

Debtors Act, 1869, to order an attachment against Andrews, notwithstanding his bankruptcy.

But in this case the learned judge exercised the discretion reposed in him by the Debtors Act, 1878, upon a ground which, in my opinion, was erroneous. Andrews trusted his co-trustee Hooton, and handed money to him, and this money was misapplied. Andrews is liable for it; but he was not himself guilty of any dishonesty or fraudulent breach of trust. Kekewich, J., ordered an attachment to issue against him on the broad ground that every trustee who trusts his co-trustee and remits trust money to him and does not look sharply after him is dishonest and fraudulent. I cannot agree in this view, and, consistently with the principles on which this court acts in reviewing discretionary orders, I have come to the conclusion that Andrews' appeal ought to be allowed. In doing so I am not acting contrary to *Ex parte Deere*, 23 W. R. 866, L. R. 10 Ch. App. 658. In that case a solicitor who had become bankrupt was attached by a baron of the Court of Exchequer under the 4th section of the Debtors Act, 1869, and he applied to the Court of Bankruptcy to release him, but the court refused. The Court of Bankruptcy had, under the Bankruptcy Act, 1869, which was then in force, a discretion in the matter, but it declined to interfere, and Mellish, L.J., said, "I think it is not right that this court should decide the question whether the attachment was issued for punishment or merely to enforce compliance with the order for payment of money. That question ought to be decided by the court which made the order." This decision and passage are not in point in the present case; for by "this court" was meant in *Ex parte Deere* the Court of Appeal sitting in Bankruptcy. That court was not entertaining, and had no jurisdiction to entertain, an appeal from the order for arrest. The present appeal is an appeal from the order for the attachment, and we have to rehear that order; and *Ex parte Deere*, therefore, is not really in point. The result, therefore, of the appeal is that it succeeds in Andrews' case, but not in Hooton's.

The order appealed from must therefore be discharged so far as it affects Andrews, but this is not a case for giving him any costs. As regards Hooton the order will stand, but nothing will be gained by making him pay the costs of the appeal, nor has he materially put his opponents to expense by joining Andrews in his appeal.

Lord ESHER, M.R., and LOPES, L.J., concurred.

Order varied.

Solicitors for the appellants, *Wynne, Holme, & Wynne*, for *W. F. Gorst*, Liverpool.

Solicitors for the respondent, *Nicholson & Pemberton*, Liverpool.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Kay, L.JJ.) — Dec. 5.

RODGER *v.* HARRISON AND OTHERS. (*a.*)

Registry Acts—"Assurance"—Contract for sale of land—Registration—Priority—Yorkshire Registries Act, 1884 (47 & 48 *Vict. c.* 54), *ss.* 3, 4, 14.

The owner of land in Yorkshire made an agreement in writing with the plaintiff, by which the former agreed, in consideration of £200 paid to him by the plaintiff, to complete certain buildings on the land, and the plaintiff agreed to purchase the buildings when completed for £750, less the £200 already paid. This agreement was registered under the Yorkshire Registries Act, 1884.

Held, that this agreement was not an "assurance" within the meaning of the Act so as to be entitled to be registered, and that, therefore, it had not priority over a prior mortgage to the defendants, registered subsequently.

Appeal from the judgment of the Queen's Bench Division upon a special case stated under ord. 34, rr. 1, 2, in an action claiming a declaration that the plaintiff was entitled to have the premises comprised in a contract dated the 7th of June, 1889, transferred to him, and the title deeds thereof delivered to him.

It appeared that Naylor, the owner of certain land near Leeds, mortgaged it to a building society to secure an advance, and subsequently, on the 11th of April, 1889, mortgaged the same land to the defendants to secure an advance of £240. By an agreement in writing dated the 7th of June, 1889, made between Naylor and the plaintiff, who had no notice of the defendant's mortgage, in consideration of £200 then paid by the plaintiff to Naylor, Naylor agreed to complete certain buildings upon the land, and the plaintiff agreed to purchase the buildings when completed for £750, less the £200 already paid The buildings were duly completed, but no conveyance of the property to the plaintiff was executed, and the plaintiff did not pay the balance of the purchase-money. Upon the 30th of August, 1889, the plaintiff registered this agreement under the Yorkshire Registries Act, 1884, and on the next day the defendants registered their mortgage. The mortgaged property was afterwards sold, and the balance of the purchase-money, after satisfying the building society's mortgage, amounted to £247.

The plaintiff claimed this sum on the ground that the prior registration of the agreement of the 7th of June gave him priority over the defendants' mortgage of the 11th of April. The defendants contended that the agreement of the 7th of June was not capable of registration under the Yorkshire Registries Act, 1884, and that, therefore, the registration of it was of no effect. The Divisional Court (Mathew and Bruce, JJ.) held that the agreement of the 7th of June was a "memorandum of charge," and that it was therefore entitled to be registered, and had priority over the defendants' prior mortgage, which was registered subsequently. The defendants appealed.

Section 3 of Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54): "The expression 'assurance' shall include (*inter alia*) any conveyance or memorandum of charge"; "the expression 'conveyance' includes any assignment, appointment, lease, or settlement made by deed on a sale, mortgage, demise, or settlement of any land"; "the expression 'memorandum of charge' shall include any memorandum of a lien or charge on any land which may be registered under the provisions of this Act."

Section 4: "All assurances . . . by which any lands within any of the three ridings are affected may be registered under this Act."

Section 14: "All assurances entitled to be registered under this Act shall have priority according to the date of registration thereof, and not according to the date of such assurances or of the execution thereof."

P. B. Abraham, for the defendants.

Lyon, for the plaintiff.

The following authorities were referred to:—*In re Wight's Mortgage Trust*, 21 W. R. 667, L. R. 16 Eq. 41; *Credland* v. *Potter*, 23 W. R. 36, L. R. 10 Ch.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

App. 8; *Wythes* v. *Lee*, 4 W. R. 184, 3 Drew. 396; *Rose* v. *Watson*, 12 W. R. 585, 10 H. L. Cas. 672; *Torrance* v. *Bolton*, 20 W. R. 718, 21 W. R. 134, L. R. 14 Eq. 124, L. R. 8 Ch. App. 118; *Lysaght* v. *Edwards*, 24 W. R. 778, at p. 779, 2 Ch. D. 499, at p. 506; *Kettlewell* v. *Watson*, 32 W. R. 865, 26 Ch. D. 501.

Lord ESHER, M.R.—The question in this case is whether the agreement of the 7th of June is entitled to be registered under the Yorkshire Registries Act, 1884. It is an agreement in writing, but not under seal. It is an agreement for the purchase and sale of certain land and buildings subject to a condition to be performed by the vendor—namely, the completion of the buildings. It is also subject to the usual condition that the vendor must make out a good title. It is, therefore, subject to two conditions being fulfilled before the purchaser can be called upon to accept a conveyance. Is that agreement an "assurance" within the meaning of the Act? If it is an assurance by which any lands within any of the three ridings are affected, section 4 says that it may be registered under the Act. By section 3 the expression "assurance" shall include (*inter alia*) any conveyance or memorandum of charge. Therefore, the expression has its ordinary meaning and an extended meaning. No one could possibly say that a conditional contract to buy land is an "assurance" in the ordinary sense as understood by conveyancers. Is it within the extended definition of assurance given in the Act? Is it a conveyance or memorandum of charge? Now, by section 3 the expression "conveyance" includes any assignment, appointment, lease, or settlement made by deed on a sale, mortgage, demise, or settlement of any land. Therefore "conveyance" is to have its ordinary meaning as understood by conveyancers, and an enlarged meaning including certain other documents, all of which must be in the form of a deed. This contract is clearly not within the ordinary meaning of the word conveyance, nor within its enlarged meaning. When can it be said that this contract became a "conveyance"? At the time it was signed? If not then, at what subsequent time? It was said that Lord Cairns in *Credland* v. *Potter* had interpreted the word "conveyance" as including an equitable charge. Lord Cairns was there construing a different Act, (West Riding Registry Act, 2 & 3 Anne, c. 4), and that is no authority for the construction of the word in this Act. If he had been considering the true meaning of the word in equity or at law, the decision might have been of general importance. But he was doing nothing of the kind; he was only interpreting the word as used in a particular statute.

Next, is this contract a memorandum of charge? By section 3 the expression "memorandum of charge" shall include any memorandum of a lien or charge on any land which may be registered under the provisions of this Act. There was no lien or charge upon land when this contract was signed, and this contract is not a memorandum of any charge. A lien might arise subsequently, if the contract fell through owing to the default of the vendor, but there must then be a memorandum of that lien or charge. Further, the last words in the definition—"which may be registered under the provisions of this Act"—pointed to section 7, which dealt with a vendor's lien for unpaid purchase-money or a charge by deposit of title deeds. This contract, therefore, for the sale and purchase of land was outside the Act.

LOPES, L.J.—I am of the same opinion. This is a conditional agreement for the sale and purchase of land. The question is whether it is capable of registration under the Yorkshire Registries Act, 1884. Section 4 says that all assurances by which any lands are affected may be registered under the Act. Section 3 says that an assurance shall include a conveyance or memorandum of charge. First, is it a conveyance? By section 3 "conveyance" is to include any assignment, appointment, lease, or settlement made by deed, &c. Therefore "conveyance," in addition to its ordinary meaning, is to include those other matters there specified, all of which must be by deed. Conveyance ordinarily means an instrument which passes a freehold interest in land. The present document was not a conveyance in its ordinary or enlarged meaning. In *Credland* v. *Potter* Lord Cairns said that "conveyance" in that Act included an equitable charge on land. But the words "made by deed" were not contained in the Act there under consideration.

Secondly, is it a memorandum of charge? Section 3 says that a memorandum of charge shall include any memorandum of a lien or charge on any land which may be registered under the provisions of this Act. To see what that means we must refer to section 7, to which it clearly applies, which says that where any lien or charge on any lands within any of the three ridings is claimed in respect of any unpaid purchase-money or by reason of any deposit of title deeds, a memorandum of such lien or charge may be registered. That refers to a vendor's lien for unpaid purchase-money or a charge by deposit of title deeds. The charge alleged to exist in the present case is for money paid by a purchaser. Therefore this agreement does not come within section 7, and cannot be registered under this Act.

KAY, L.J.—I agree. By section 4 assurances by which any lands within any of the three ridings are affected may be registered under the Act. It would never strike the mind of a conveyancer that a contract for the sale of land could be treated as an assurance of that land. It is said, however, that this instrument comes within the definition of an assurance given in the Act. It is said that it is either a conveyance or a memorandum of charge. First of all, is it a "conveyance" within the language of conveyancers? I never heard of the word being applied to such an instrument. I never heard of a memorandum evidencing a contract of sale being called a conveyance. Section 3 of the Act, however, contains a definition of "conveyance" as including any assignment, appointment, lease, or settlement made by deed on a sale, mortgage, demise, or settlement of any land. All the things said to be included in the word "conveyance" must be "made by deed." Conveyance is to have its ordinary meaning among conveyancers—that is, a deed by which a freehold interest in land is transferred—and is also to include certain other specified things, but it does not say that it is to include a contract for those things. That interpretation is assisted by the fact that no case can be found since the statute of Anne in which it has been suggested that "conveyance" included a contract for the sale of land. In *Credland* v. *Potter* there was a mortgage by deed, and subsequently a further memorandum of charge was given. The latter was not an assurance of the legal estate; an additional charge was all that was intended to be created; and Lord Cairns, dealing with a totally different Act, held that the word "conveyance," as used in that Act, might include that memorandum of charge. The words there were "deed or conveyance," showing that a conveyance might be something other than a deed. Neither that case nor any other case went so far as to say that a contract for the sale of land was a "conveyance" within the meaning of the Act of Anne. Therefore the word "conveyance" in this Act was not intended to include a memorandum in writing of a contract for the sale and purchase of land.

Secondly, is it a "memorandum of charge"? The

purchaser has to show that he has a charge on the property. The purchaser obtains a lien for his deposit only in the event of the contract going off through the default of the vendor, and from that moment. That is not a lien from the date of the contract. It cannot be assumed at that time that the vendor will not carry out the contract. How can it be supposed that the Registry Act intended the purchaser to register the contract as a memorandum of a charge which might never arise? Section 3 says that a "memorandum of charge" shall include any memorandum of a lien or charge on any land which may be registered under the provisions of this Act. Those latter words are restrictive, and point to section 7, which contains a distinct provision that an unpaid vendor's lien may be registered, and there is no provision that a purchaser's lien may be registered.

Appeal allowed.

Solicitors for the plaintiff, *Few & Co.*

Solicitors for the defendants, *Paterson, Snow, Bloxam, & Kinder.*

High Court of Justice.

Chan. Div. } Chitty, J. } Jan. 17-19.

In re HARVEY.
HARVEY *v.* GILLOW. (*a.*)

Will—Lapse—Children as a class—Issue taking by substitution—Wills Act (1 *Vict. c.* 26), *s.* 33.

The 33rd section of the Wills Act, preventing lapse in case of gifts to a child or other issue of the testator, does not apply where the devise or bequest is to children as a class.

The principle is, that the section leaves the construction of class gifts unaltered, and that the gifts are still to be read as gifts to those only who survive, and not as gifts to the possible members of the class who die in the lifetime of the testator; and that the gift in regard to those children who so die is not to be treated as a gift to individuals.

Where G., a possible member of such a class of children, died in the testator's lifetime, leaving issue that survived the testator, and there was never, in fact, any other possible member,

Held, in conformity with the above principle, that the 33rd section did not apply.

Olney *v.* Bates, 3 *W. R.* 606, 3 *Dr.* 319, *and* Browne *v.* Hammond, *Johns.* 210, 7 *W. R. Dig.* 101, *considered and followed.*

Summons.

Admiral Sir Edward Harvey, who died in May, 1865, by his will, dated in November, 1857, bequeathed his residuary personal estate to trustees, upon trust as to one fourth part thereof to pay the income to his daughter, Eliza Ann, wife of R. J. Emmerson, for life, and after her decease, as to the capital of such one-fourth share, upon trust for the child, if only one, or the children, if more than one, lawfully begotten and to be begotten of his said daughter, who should, if a son or sons attain the age of twenty-one years, or if a daughter or daughters attain that age or be married, if more than one in equal shares; and if there should be no such child of his said daughter, then upon trust to pay the income of the said fourth part to the said R. J. Emmerson for life, in case he should so long remain unmarried, and after his decease or marriage the testator gave this fourth share upon certain trusts for the benefit of the testator's children other than Mrs. Emmerson, and otherwise.

Mrs. Emmerson had one child only, a daughter. This daughter, who attained twenty-one, and was married in 1863 to the defendant A. Gillow, died in the testator's lifetime (viz., in August, 1864), but left a child who survived the testator.

Mrs. Emmerson died in February, 1892.

This summons was thereupon taken out to determine to whom, and for what estate or interest, the one-fourth share belonged.

Church, for the trustees.

Farwell, Q.C., and *Dauney*, for the legal representatives of Mrs. Gillow.—The circumstances of this case distinguish it from *Olney* v. *Bates*, 3 W. R. 606, 3 Dr. 319, and *Browne* v. *Hammond*, Johns. 210, 7 W. R. Dig. 101, where it was held that section 33 of the Wills Act, preventing lapse in case of gifts to a child or other issue of the testator, does not apply when the gift is to the testator's children as a class. No doubt, where any members of the class survive the testator, those survivors must take as the children interested on the construction of the will. Section 33 says that the legacy shall not lapse or slip away from the beneficiary, and there is no lapse in such a case. But the section does apply to prevent lapse where a lapse would but for the section occur, as here, whether the gift be to my child A., or such of my children as attain twenty-one. Whether lapse, if it were permitted, would benefit legatees over or next of kin is immaterial. Moreover, the gift is in terms to "child or children" here; this child is therefore in the position of a *persona designata*, and for that reason also within section 33.

Byrne, Q.C., G. M. Prior, and *Robertson Macdonald*, for those claiming under the gifts over in the will.—The principle of *Olney* v. *Bates* and *Browne* v. *Hammond* applies here. There is nothing given by the will to any child, and the case provided for by the 33rd section, therefore, does not arise.

Farwell, Q.C., replied.

Jan. 19.—CHITTY, J., delivered a written judgment, as follows:—

Olney v. *Bates* was decided by Kindersley, V.C., in 1855. The decision turned upon a consideration of the established law relating to a gift to a class in connection with the law of lapse. It may have been thought by some that the decision was founded upon too strict an application of these doctrines to the 33rd section of the Wills Act; and undoubtedly, as observed by Jarman, as gifts to the testator's children as a class are of frequent occurrence, their exclusion from this provision of the statute greatly narrows its practical operation (see 1 Jarman on Wills, 4th ed., p. 353). But the same point came in 1858 before Wood, V.C., in *Browne* v. *Hammond*, and he followed and adopted the decision in *Olney* v. *Bates*. These two authorities have put a construction on the 33rd section which has been since constantly acted upon by the courts, and has never, so far as I am aware, been judicially called in question. The decisions appear to have been accepted by text writers, subject only to the observation already cited, which, however, does not attempt to impeach their authority, but merely states their practical effect (see 1 Jarm., *ubi sup.*, and Theobald on Wills, 3rd ed., p. 558). It seems too late after this lapse of time for any court to reopen the question thus apparently settled, and upon which

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

many titles doubtless depend (see the observations of Lord Selborne in *Holyland* v. *Lewin*, 32 W. R. 443, 26 Ch. D. 266, at p. 271). I certainly cannot, and I ought not to attempt to impair the decisions or to fritter away the principles upon which they are founded.

The difference between a gift to named individuals and a gift to a class in reference to lapse is firmly established. A gift by will to a class is taken, in law and in equity, to be a gift, when it is immediate, to those only who survive the testator; and when it is not immediate, but postponed, to be a gift to those only who survive the testator or come into being before the period of distribution. Take gifts to children: when the gift is to a child named, and he dies in the testator's lifetime, it fails to take effect, apart from the 33rd section. The reason of its thus lapsing is found in the ambulatory nature of a will which does not come into operation until the testator's death; a dead person cannot take under a will, just as a dead person cannot take under a deed which has an immediate operation. But where the gift is to children as a class to take as tenants in common, a child dying in the testator's lifetime was excluded by the law as it stood before the passing of the Wills Act; and, according to the decisions already cited, the 33rd section does not apply, although the child leaves issue that survives the testator. The principle acted upon was that the section leaves the construction of these class gifts unaltered, and that the gifts are still to be read as gifts to those only who survive, and not as gifts to the possible members of the class who die in the testator's lifetime; and that the gift in regard to those children who so die is not to be treated as a gift to individuals. The difference between gifts to individuals and to a class is, if I may use the expression, engrained in the law. It is well illustrated by *Leake* v. *Robinson*, 2 Mer. 363, and the numerous subsequent decisions on the same point, including *Pearks* v. *Moseley* in the House of Lords, 29 W. R. 1, 5 App. Cas. 714. The distinction formed the ground of the decision in *Olney* v. *Bates* and *Browne* v. *Hammond*. Kindersley, V.C., in *Olney* v. *Bates*, laid it down that the effect of the devise which he had under consideration was to give to children living at the death, and "therefore," as he says, "there was no gift to Mrs. Foster, and the statute only applies to the representatives of children or issue to whom something is given." Wood, V.C., in *Browne* v. *Hammond*, concurs in this opinion, and says expressly that a gift to children as a class is not within the 33rd section, and he goes on to explain that a knowledge of the law as to the operation of a gift to a class must be imputed to a testator.

But it was contended in the case before me that the section does apply, because there was, in the events which happened, no child of the testator's daughter, Mrs. Emmerson, who took under the gift to her children. Consequently, as it was urged, there was a lapse, and the authorities therefore do not apply.

Mrs. Emmerson had, in fact, one child only, a daughter, who died in the testator's lifetime, leaving issue who survived the testator.

But this contention is, when examined, only asking me in another form to hold that the gift to the testator's daughter's children as a class is in effect a gift to individuals. Mr. Dauney felt this: he raised an argument upon the construction of the will which, although it was untenable and presently abandoned, is worth noticing. He fastened on the words "for the child, if only one," at the beginning of the gift to the daughter's children, and said that the daughter's child living at the date of the will was a *persona designata* by virtue of these words. The answer is simple. These words of amplification do not make the gift the less a gift to a class. A gift to all the testator's grandchildren as tenants in common would, without such words, carry the whole property to an only child; and if the daughter had had an after-born child, who being a son had attained twenty-one, or being a daughter had married, that child would unquestionably have taken Mrs. Emmerson's share, and would just as much or as little have been an only child within the words relied on. The descriptive words are not a designation of any particular child. In truth, I am asked to depart from the principle of the two decisions cited by holding that the gift to the grandchildren has lapsed by reason of the death of a possible member of the class in the testator's lifetime. It is not correct to say that it has lapsed for that reason; it has failed to take effect by reason of there being no grandchild to take; by reason of Mrs. Emmerson (who survived the testator) not having had any children or child answering the description. It was impossible to say that the gift had failed until Mrs. Emmerson, who might have had other children, had herself died.

Moreover, if I acceded to the contention of Mrs. Gillow's representatives extraordinary anomalies would result. If a testator had several, say five, children living at the date of his will, and four of them died in his lifetime leaving issue who survived him, the effect of the decisions is that the fifth child surviving would take the whole; but if that child also happened to die in the testator's lifetime leaving issue who survived him, the representatives, not only of the fifth child, but also of all the other four children, would, according to the argument, be let in and in equal shares. And, further, if there had been a sixth child who had died before the date of the will leaving issue who survived, the representatives of that sixth child, who by no possible construction of the will could himself have taken, would be inevitably let in to share with the representatives of his brothers and sisters all dying as above supposed For these reasons I am unable to hold that the representatives of the deceased granddaughter can take anything under this will.

Solicitors for the personal representatives of Mrs. Gillow, *Speechly, Mumford, Landon, & Rogers.*

Solicitors for the trustees and other parties interested, *Prior, Church, & Adams*, for *R. T. Emmerson*, Sandwich.

Chan. Div.
Stirling, J. } Dec. 16.

ATTORNEY-GENERAL v. MOORE. (a.)

Coroner—Treasure trove—Title of Crown—Prerogative—Grant to subject—Coroner's inquisition—Jurisdiction—Coroners Act, 1887 (50 & 51 *Vict. c.* 71), *ss.* 4 (2), 18 (1), 36.

The Crown is primâ face *entitled to treasure trove, and it is not necessary that an inquest should be held for the purpose of informing the Crown as to its rights (following the Irish case of* Reg. *v.* Toole, 16 *W. R.* 439); *but its title may be displaced by a grant to a subject of the franchise of treasure trove.*

Articles of silver were found concealed in the earth. The coroner for the district held an inquest on them before a jury, who unanimously agreed that the articles were treasure trove. The coroner then desired to hold a

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

further inquisition to decide who was entitled to the treasure.

Held, that the coroner has no jurisdiction, either under the Coroners Act, 1887, or otherwise, to determine the question of title.

Motion.

This was a motion on behalf of the Crown asking for an order directing the coroner of Hereford to deposit certain articles of plate, alleged to be treasure trove, in court, or for an injunction restraining him from parting with the possession of the articles to any persons other than the Lords Commissioners of her Majesty's Treasury pending the trial of the action.

On the 16th of December, 1891, two men were ferreting rabbits on a farm at Stoke Prior, in the county of Hereford. One of them, on putting his hand into a rabbit-hole, discovered a piece of silver plate. Further search was made, and ultimately three cups, a chalice, two pyxes, and a paten, all of silver, were unearthed. On the discovery being made known, the coroner for the district took possession of the plate, and proceeded to hold an inquest on the treasure before a jury empanelled for the purpose. The jury unanimously agreed that the plate was treasure trove, and thereupon a claim was made by the lord of the manor to the plate, on the ground that he was entitled under a deed of grant of "royalties," dated in 1620, and executed by King James I., to the Marquis of Buckingham, a predecessor in title to the present lord of the manor. The jury failed to agree as to the ownership of the plate, and the coroner bound them over to appear at the next assizes for the county. On that occasion one of the jury was absent through illness, and Day, J., discharged them. An application was then made to his lordship, on behalf of the Crown, that the coroner be directed to record the verdict of "treasure trove" upon the inquisition. Day, J., being of opinion that the inquiry was not then complete, and that the coroner was bound to inquire into the question of title, refused this. He said the office of coroner was a very ancient and responsible one, and, being an officer of the Crown, he had to inquire into the dues of the Crown, and as to the falling in of the rights of the Crown. The Crown was entitled, *primâ facie*, to treasure trove, though not absolutely, and had in many instances granted those rights to the subject. The coroner was justified in this case in the course he had adopted, because if, without considering claims made, the coroner had to hand treasure over to the Crown, the subject would only have the very precarious remedy of presenting a petition of right.

The coroner thereupon arranged to hold a fresh inquiry, when the present action was commenced by the Crown, and the motion as above stated was made.

Sir John Rigby, S.G., and *Ingle Joyce*, for the motion, contended that no further inquiry by the coroner was necessary; the jury having found a verdict of treasure trove, the coroner had merely to record the verdict, and then his duties were at an end, and he had no jurisdiction, by statute or otherwise, to try the question of title. They asked for the protection of the plate until the question of title had been determined by this court.

Corner, for the coroner, argued that there had been no verdict, nothing reduced into writing, and therefore another inquest must be held. For this purpose it was necessary that the coroner should hold the plate, in order that the jury might view it. [He referred to sections 4 (2), 18 (1), and 36 of the Coroners Act, 1887.] On the suggestion of his lordship he was willing to give an undertaking not to part with the possession of the articles mentioned in the notice of motion until further order.

A. J. David, for the lord of the manor.

STIRLING, J.—Having regard to the turn the matter has taken, it is not necessary for me to make a formal order, but I will say a few words in order to explain the ground upon which I proceed. This action is brought by Her Majesty's Attorney-General against the coroner of the district of Hereford, and it asks that "the defendant may be ordered forthwith to deposit in court the three silver cups, silver chalice, silver paten, and silver pyxes in the indorsement upon the writ of summons in this action mentioned, and claimed to be treasure trove belonging to Her Majesty, or otherwise that he may be restrained by injunction until the trial of this action or further order from delivering, parting with, or in any manner disposing of any of the articles aforesaid to any person or persons other than the Lords Commissioners of Her Majesty's Treasury." The circumstances are somewhat peculiar. It appears that the articles mentioned in the notice of motion were found concealed in the earth, that the finders took them to the coroner, and that the coroner now has them in his possession. An inquest has been held, and the proceeedings have proved to be abortive in this way. There appears to have been no question that the articles are treasure trove. The jury, as I understand, were willing so to find, but the coroner desired that the inquiry should be prosecuted further, and that the title to those articles should be found by the jury. The jury were unable to agree. The matter, in pursuance of the Coroners Act, was adjourned to the assizes. It came before Day, J., who discharged the jury. Therefore there has been no finding as yet in the matter, and it is proposed by the coroner to hold a further inquest. With that I am not asked to interfere, and I conceive it to be no part of my duty to interfere. But as certain observations have been made by the learned judge at the trial which have been read to me, and which would seem to point to a conclusion which does not quite occur to me to be the one in accordance with the authorities that have been cited, I desire simply to refer to one or two authorities.

First of all I will refer to Chitty on the Prerogatives of the Crown, where, at p. 152, "treasure trove" is thus defined: "Treasure trove is where any gold or silver in coin, plate, or bullion is found concealed in a house, or in the earth, or other private place, the owner thereof being unknown, in which case the treasure belongs to the king, or his grantee having the franchise of treasure trove; but if he that laid it be known or afterwards discovered, the owner, and not the king, is entitled to it; this prerogative right only applying in the absence of an owner to claim the property." Now there is no question at all at the present moment that a *primâ facie* case of treasure trove has been made out. *Primâ facie*, the title to treasure trove is in the Crown, but no doubt that title will be displaced by producing a grant to a subject of the franchise of treasure trove. But the question between the Crown and the subject must be decided by an interpretation of the grant, and I cannot conceive that it is possible that that title can be decided either by the coroner or by the verdict of the coroner's jury. It does not seem to me that it is a matter which falls within the jurisdiction of the coroner in cases of this kind to determine that title under section 36 of the Act of 1887. That Act says that "a coroner shall continue as heretofore to have jurisdiction to inquire of treasure that is found, who were the finders, and who is suspected thereof." Now it is limited to an inquiry who were the finders, and who is suspected thereof. I do not see, as at

present advised, that there is any jurisdiction at all in the coroner to determine the title. No doubt he may have incidentally to refer to the title, as was the case where the verdict of the jury is set out on p. 536 of Umfreville on the Law and Practice of the Office of Coroners; but I think it is absolutely impossible that according to law that title can be determined by the coroner. That being so, it is further clear to my mind, according to the authorities, that the title of the Crown is independent of the finding of the jury. Chitty on Prerogative, p. 259, says: "As to personalty, the general rule seems to be that the king is entitled, without office or other matter of record, as in the case of goods and *choses in action* of felons, wreck of the sea, treasure trove, or the profits of lands of clerks, &c., convicted of felony, or of persons outlawed in a personal action," and the learned author goes on to cite the following passage from Blackstone: "with regard to other matters, the inquests of office still remains in force, and are taken upon proper occasions; being extended not only to lands, but also to goods, and especially as to forfeiture for offences." So that although it may be proper that an inquest should be held for the purpose of informing the Crown as to its rights, it is not essential according to the law as there laid down to the title of the Crown to chattels.

Then that view appears to me to be borne out by a case in Ireland to which I have been referred—*Reg.* v. *Toole*, 16 W. R. 439, in which the conclusion was arrived at after an investigation which evidently was most carefully considered of all the old cases, that in an indictment for concealing treasure trove it is not necessary to state any inquisition before the coroner or office found as to the title of the Queen. That being so, the Crown is clearly entitled to come here and to have its title determined, and, as it would seem to me, most conveniently determined, in an action of this sort in which questions arise as to the construction of ancient Crown grants and other matters which cannot be properly gone into at the coroner's inquest. I think, therefore, the Crown is fully entitled to come here, and that it is entitled to have the articles the title to which is in question secured until the dispute which has arisen is settled. For that purpose it seems to me that the lord of the manor ought to be made a party, and the learned Solicitor-General is willing that he should be let in and that the writ should be treated as amended at once, so that he would be made a defendant immediately. He appears on this occasion by counsel. The learned counsel for the coroner has asked me that he may not be deprived of the articles with a view to the inquisition which he proposes to hold. I think that is reasonable; but he is willing to give an undertaking not to part with them until the further order of the court. I am willing to accept that undertaking. That is all that is necessary to dispose of this motion on the present occasion.

The motion, therefore, will stand over generally, but when the coroner has performed his duty and held the inquest, I suggest that the most convenient course would be that he should make an application to the court, when it will be able to decide the question of the costs; the costs of this motion ought to abide the result of the trial.

There will be no undertaking in damages.

Solicitor for the Crown, *Solicitor to the Treasury.*

Solicitors for the coroner, *J. T. & G. F. Marshall.*

Solicitor for the lord of the manor, *H. Andrews*, for *W. T. Sale*, Leominster.

Chan. Div.
Vaughan Williams, J. } Jan. 23; Feb. 7.

In re THE VARIETIES (LIMITED). (a.)

Company—Winding up—Shareholder's petition for compulsory winding up—Subsequent resolution for voluntary winding up—Preponderating influence of one shareholder.

Where, after the presentation of a shareholders' petition for the winding up of a company by the court, a special resolution is passed for voluntary winding up, the court will inquire into the composition of the majority voting for the voluntary winding up, and if it is found that there are matters requiring investigation, and that the resolution was passed by the preponderating influence of one shareholder, a compulsory order will be made.

In re West Surrey Tanning Co., 14 *W. R.* 1009, *L. R.* 2 *Eq.* 737, *followed.*

Petition.

This was a petition by shareholders holding respectively seventy-five and fifty shares to wind up the above-named company, which was incorporated in August, 1892, with a nominal capital of £100,000 divided into 50,000 shares of £2 each. The objects of the company were to adopt an agreement of the 25th of August, 1892, between William Foster Shaw and a trustee of the company, and to undertake and carry on the business of opera house, theatrical or music hall or cafe chantant, proprietors.

The agreement of the 25th of August, 1892, provided for the granting of a lease by Shaw to the company of a piece of land in St. Martin's-street, Leicester-square, in the county of London, at a rent of £1,200 per annum, and that a theatre should be built on the ground by Shaw, who was promoter of the company, for £89,000, payable, as to one-third, in fully paid-up shares of the company when formed, at the option of the directors. The price was payable, as to £20,000, fourteen days after allotment of shares, and as to the residue upon the certificates of the architect of the company. The agreement was adopted by the company on the 19th of September, 1892. The theatre was to be completed in twelve months. By another agreement, made the 28th of October, 1892, between the company and Shaw, the first agreement was modified by a provision that £47,000 should be payable in fully paid-up shares, less any sum of cash received by the company in respect of shares prior to the 1st of May, 1893, excepting £500 to be retained for the use of the company. These shares were to be issued to the vendors by instalments as the works proceeded.

The original directors thought the number of applications for shares was insufficient to justify them in going to allotment, and two of them retired, but the remaining directors after having arranged the modification of the contract went to allotment. It appeared that the amount of cash at the company's bankers was insufficient to enable the company to carry out its contract. The London County Council refused to give the necessary sanction to the plan of the buildings proposed to be erected.

The petition alleged that it had become impossible to carry out the agreement, and that it was just and equitable that the company should be wound up by the court. Since the presentation of the petition the company had duly passed a special resolution for voluntary liquidation, with the secretary as liquidator. It was objected by the petitioners that the voting at the meetings at which the resolution for voluntary wind-

(a.) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

ing up was passed was deceptive, inasmuch as the majority of votes were in respect of shares held by Shaw and not were independent. The figures are stated in his lordship's judgment.

Farwell, Q.C., and *Job Bradford*, for the petition.

Brice, Q.C., and *Abraham*, for the company, referred to the following cases:—*In re Middlesborough Assembly Rooms Co.*, 28 W. R. 868, 14 Ch. D. 104, *In re Gold Co.*, 27 W. R. 757, 11 Ch. D. 701; *In re Langham Skating Rink Co.*, 5 Ch. D. 669, 25 W. R. Dig. 65; *In re Krasnapolsky Restaurant and Winter Garden Co.*, 40 W. R. 639, [1892] 3 Ch. 174.

Higgins, for shareholders in opposition.

Farwell, Q.C., in reply.—The court will order a compulsory winding up, notwithstanding a voluntary winding up, if the voluntary winding up is a sham: see the judgment of James, L.J., in *In re Gold Co.; In re West Surrey Tanning Co.*, 14 W. R. 1009, L. R. 2 Eq. 737.

VAUGHAN WILLIAMS, J.—It does not appear by the contract of the 25th of August, 1892, that at this time there was any plan in existence or any architect of the company, although I suppose that Mr. Shaw had in effect prepared plans himself. It is to be observed that the first issue of shares to the vendors was to be immediately after the balcony girders should have been placed in a manner and according to plans approved by the London County Council. The prospectus says that "the plans have been prepared by Mr. Greatbach," and "the buildings will be erected in strict accordance with the known requirements and regulations of the London County Council." The affidavits do not make it clear how many shares other than vendors' shares were in fact applied for and issued, but the total amount paid into the company's bankers in respect of applications seems to have been £2,875, and the whole available cash of the company seems to have been insufficient to enable the company to carry out the contract. The company seem to have paid Mr. Shaw £1,000 on October 21 and £350 in the course of November and December. The sum paid to Mr. Shaw seems to have been largely expended in the payment of the legal costs and office expenses. The London County Council refused to sanction the plans presented to them. The petition alleges in substance that it is just and equitable that the company should be wound up, because the substratum of the company is gone, it being plain that, in view of want of funds and the refusal of the London County Council to sanction the plans, the scheme cannot be carried through, especially as the refusal of the county council was, as I gather from the statement of the chairman of the company, based on the insufficiency of the ground space afforded by the land the subject of the lease.

It seems clear that there must be a liquidation, and the only question which I have to decide is as to the mode of liquidation—shall it be voluntary or compulsory? It is said on behalf of the company that the shareholders of the company have expressed a clear wish in favour of voluntary liquidation, and that the petition is a wrecking petition by two shareholders who hold only 75 and 50 shares each, and that a compulsory order will largely increase the costs of liquidation. It is said on behalf of the petitioners—first, that the voting at the meeting of shareholders is deceptive, for that of the 3,633 votes in favour of voluntary liquidation, 2,570 votes were in respect of shares held by Mr. Shaw, and I understand it to be admitted that only 210 votes can be regarded as independent. If this is so, and the votes in respect of shares held by the vendor and his nominees are excluded, it would seem that, out of the residue of 355 votes, 210 were recorded in favour of voluntary liquidation and 145 against it, whereas, in order to obtain the majority requisite, three-quarters, or 264 votes, should have been recorded in favour of voluntary liquidation. It is further said that the holders of no less than 847 shares have signed circulars in favour of compulsory liquidation, and the originals of those circulars have been produced before me, although the shareholders themselves have not thought fit to appear and support the petition. It is said, however, that on these facts it is clear that if you exclude the preponderating vote in respect of the fully paid-up shares held by the vendor and his nominees, the majority of the independent shareholders wish for compulsory liquidation. It is said, further, that there are matters here which require to be investigated. Why did the directors proceed to allotment? Why did they pay £1,300 to Mr. Shaw before the plans had been approved by the London County Council? I am not sure that the first of these matters can be investigated at the instance of shareholders who complain of their creation; but I think there is enough here to make it my duty to make an order for compulsory winding up.

Solicitors, *Vallance & Co.; Bridger & Son; Beall & Co.*

Q. B. Div.
(Day and Collins, JJ.) Jan. 24.

HARE v. ELMS. (a.)

Landlord and tenant—Relief against forfeiture after judgment in ejectment action—Application by mortgagee by sub-demise—Parties—Original lessee—23 & 24 Vict. c. 126 (Common Law Procedure Act, 1860), s. 1.

In an application under section 1 of the Common Law Procedure Act, 1860, made (after judgment in an action of ejectment for non-payment of rent) by a mortgagee of land by sub-demise, for relief against forfeiture of the lease, the original lessee must be made a party to the proceedings.

Semble (per Collins, J.), *that such an application may be made by an underlessee.*

Berney v. Moore, 2 *Ridgeway*, 310, *explained.*

Doe d. Whitfield v. Roe, 3 *Taunt.* 402, *distinguished.*

Appeal from chambers.

The applicants, the No. 3 Borough of Lambeth Permanent Building Society, asked under the following circumstances for relief in an action of ejectment brought under a power of re-entry for non-payment of rent in a lease for ninety-nine years of land and houses at Dulwich dated the 7th of July, 1880, in which Newman was the lessor and Siler the lessee.

In 1891 the property had become vested in Roberts, but whether as assignee or as underlessee was, it was stated, uncertain.

In that year Roberts gave an underlease of the property for the residue of the term, less three days, to Mears, and Mears subdemised the property by way of mortgage to the applicants.

The plaintiffs were the assignees of the reversion subject to the lease, and on the 31st of May, 1892, the rent being in arrear, they issued their writ in this action, claiming to recover possession of the demised premises under the proviso for re-entry in the lease.

The defendants were the tenants in possession:

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

neither the original lessee nor the applicants, nor any of the intermediate owners were made parties.

The defendants allowed judgment to go by default, and on the 30th of June, 1892, the plaintiffs took possession under their judgment.

On the 8th of September the applicants became for the first time aware of these proceedings, and on the 5th of December, after some correspondence had passed between them and the plaintiffs, they took out a summons asking for relief.

The master held that he had no power to grant relief, because the applicants were only underlessees and the lessees were not before the court.

The applicants appealed, and Barnes, J., in chambers, referred the case to the court.

Willes Chitty (*Frank Newbolt* with him), for the applicants.—The decision of the master was wrong; this relief can be granted upon the application of underlessees without the presence of the original lessees. The old courts of Chancery granted such relief if it appeared just to do so, even though the lessee was present and declined to be relieved: *Webber* v. *Smith*, 2 Vern. 103; *Berney* v. *Moore*, 2 Ridgeway, 310. The Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 1, empowers a judge to grant relief in cases of forfeiture "up to and within the like time after execution executed and subject to the same terms and conditions in all respects . . . as in the Court of Chancery, and if the lessee, his executors, &c., shall, upon such proceeding, be relieved, he and they shall hold the demised lands according to the lease thereof made without any new lease." The older enactment as to relief against forfeiture was 4 Geo. 2, c. 28, s. 4, and under that section relief was given in courts of common law to a sub-lessee (*Doe d. Wyatt* v. *Byron*, 1 C. B. 623), and to a mortgagee (*Doe d. Whitfield* v. *Roe*, 3 Taunt. 402). That section was substantially re-enacted by the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 212, as to which see Day's Practice, under the Common Law Procedure Acts (ed. 1872), p. 206.

Bowser v. *Colby*, 1 Hare, 109, was referred to by the court.

Frank Gover, for the plaintiffs.—The master was right. *Doe d. Wyatt* v. *Byron* is no authority as to the jurisdiction of the courts of common law to grant relief after execution executed. That case was merely an application to stay proceedings before judgment, and no new lease was ordered to be granted because the original lease had never been determined by a decree of ejectment. But here the lease has been determined, and with it the lessee's liability on the covenants; this liability cannot be revived against him in his absence. An underlessee has no equitable rights against the original lessor, but only against the lessee who has granted him the underlease. The decree in *Webber* v. *Smith* shows that the real decision in that case was that, the lessor consenting to grant a new lease, such of the underlessees (the plaintiffs) as would accept a new lease for the residue of the term upon the conditions of the original lease should be entitled to have such a lease granted to them. That would throw no liability on the original lessee, and is no authority for the contention of the applicants.

The applicants are not in a position to claim relief at all under section 1 of the Common Law Procedure Act, 1860; they are merely derivative underlessees, and have no privity with the lessors: *Cresswell* v. *Davidson*, 56 L. T. N. S. 811, 35 W. R. Dig. 110; *Burt* v. *Gray*, 39 W. R. 429 [1891] 2 Q. B. 98.

Chitty replied.

DAY, J.—This is a case which has been referred to us by the learned judge at chambers, and it seems to me to involve the question whether relief against forfeiture under a forfeiture clause in a lease can be granted to an undertenant who seeks that relief as against the landlord, and incidentally also against the original lessee. He does not bring the lessee before us, and he asks to have the lease and the old liability of the lessee restored without giving the lessee any opportunity of showing cause why that should not be done. We have to determine whether such an application ought to be granted or not.

Now I do not propose to base my judgment upon the determination of the statutory rights of lessees and underlessees, but I intend to deal with the question in a broader sense, and to consider whether redress can be given—whether at law or in equity, and whether under statute or not under statute—in the absence of the original lessee.

This is a lease for a long term, which, after various underleases, has found its way as to certain portions of the term into a building society, who are mortgagees of some interest in the lease. The property has been parcelled out amongst several occupiers, and the ground-rent has been allowed to get into arrear. In the result the lessor, not being able to obtain his ground-rent, has brought his action of ejectment. He has not only brought his action, but he has recovered judgment in it, and has obtained execution and enforced the forfeiture, and is now in possession of the property. The present applicants, the mortgagees, have had notice of these proceedings, and come within the statutory period of six months to obtain relief. It is very likely that they have a remedy, and I am very far from saying that they have not. I think it is not at all improbable that mortgagees, whether by underlease or otherwise, have a remedy against forfeiture under such circumstances; but it is quite clear to my mind that, whatever remedy they have, they must enforce it in the proper manner, and must bring the proper parties before the court, or make adequate excuse for not doing so.

Now, in my judgment, this question must be treated historically. We must try to find out what the original principle was, and what the practice was before comparatively recent statutes. At law for a great length of time it has undoubtedly been the practice of the courts to restrain the further prosecution of an action of ejectment, brought in respect of an alleged forfeiture for non-payment of rent, upon the party proceeded against paying the rent into court. The courts were long in the habit of looking on forfeiture for non-payment of rent as merely a security for the payment of the rent, and therefore they would not allow the action of ejectment to proceed to its final end where the tenant thought fit to bring the money into court. Where that was done, such actions were habitually restrained.

This remedy was afterwards more precisely defined by statute. The earliest statute which has been referred to as dealing with the subject is 4 Geo. 2, c. 28. That Act (section 2) relieved the landlord from the embarrassments in which he constantly found himself by having to prove a demand for the rent between certain hours upon the day upon which it fell due, and it also provided (section 4) that if the rent, arrears, and costs were paid into court all further proceedings should be discontinued. That provision was substantially re-enacted by subsequent statutes, and in the Common Law Procedure Act, 1860 (section 1), a new provision was introduced giving the common law courts power to give relief in the same manner as it had been given in courts of equity, and in courts of equity alone. What the courts of law did was to restrain the action and to prevent the completion of

the forfeiture. The courts of equity were in the habit of doing more than that. Where forfeiture had been completed, upon the money being brought into court and full compensation made to the landlord the courts of equity were in the habit of directing a new lease to be executed similar to the old lease, and for this purpose of course they had before them the lessee, because they could not compel the granting of a new lease to a man without having him present upon the application for the granting of it. We have appealed to the counsel on the one side and on the other to suggest any instance in which the court of equity has ever directed a new lease to be granted where the lessee was not before them to take the lease. The lessee, of course, was ordinarily the person who made the application. Applications by underlessees, mortgagees, and others are comparatively not very numerous. I shall deal with one or two cases to which our attention has been called in a moment; but the ordinary class of applicant has been a lessee who has applied to have a lease granted to him by the lessor, and these two essential parties have always been, in all the cases that I can find, before the court. There is a case in the Irish courts which has been pressed upon us a very great deal, merely on account of the form of the answers of one or two judges. The answers of the judges are to be taken in connection with the questions put to them, and the questions put to the judges must in all reason be taken to be put with reference to the facts of the case. The case is *Berney* v. *Moore*, reported in 2 Ridgeway. In that case the lessee undoubtedly was before the court, and the court seems to have thought it only fair and reasonable that he should execute this lease, and he was directed to do so. That is a jurisdiction which the Court of Chancery undoubtedly always possessed. In the case in Ridgeway the lease was executed, no doubt, for the benefit of the underlessee; but it was executed with the privity of the lessee, who was a party to the proceedings and who was directed by the order of the court to execute the lease; so that that case is a very different case from the present and it seems to me to be no authority upon the point at issue. The theory of the law was that when an entry had been made under the ejectment the lease was gone, and therefore unless a new lease were executed there would have been no documentary evidence of the title of the tenant. It was for this reason that courts of equity required that a new lease should be granted, and their decrees contained provisions for that purpose. It was afterwards found inconvenient that in all cases the execution of a new lease should be required; the only object of the new lease was to set up the old lease again, and the Legislature very properly thought that the best way of doing that was simply that the courts should declare that the old lease was set up. It seems to me that that makes no substantial change in the remedy or in the procedure; all that was done was to dispense with the trouble and expense of having a new lease drawn up, and to relieve the parties from the payment of the burdensome stamp duties which had to be paid upon the new lease. For these reasons the Legislature provided that in the future it should not be necessary to direct that a new lease should be executed; but that the old lease should continue in force. That does not, in my judgment, alter the rights or remedies of the parties, and if it was necessary before to have all the parties interested in the lease before the court, I think it is necessary now, and I can find no authority to the contrary.

Our attention was called to *Doe d. Whitfield* v. *Roe*. There judgment of ejectment had been obtained and execution issued. The lease in that case had no doubt been forfeited. Then a mortgagee came and proved that he was mortgagee and had a right to be put in possession of the property, as between himself and the lessor, and the court, after hearing the lessor, directed that the mortgagee should retake possession of the land, but they did not give him any rights as against the lessee, they merely put him in the same position as if no ejectment had been brought. Then we were referred to *Doe d. Wyatt* v. *Byron*. There the defendants were underlessees of the term less two days. There had been no judgment in ejectment at all. The defendants, as soon as they heard of the writ, and before judgment could be obtained, entered an appearance and took out a summons asking for a stay of proceedings upon payment of the rent and costs under 4 Geo. 2, c. 28, s. 4. The judge gave them that leave, and his decision was upheld by the court. The lease had never been determined, there had been no judgment or entry in ejectment. The lessees were not necessary parties there at all. The application was merely to stay proceedings in ejectment, not to set up a lease which had been formally determined by the acts of the parties and by the law.

In the present case we are asked to set up a lease which has been determined against lessees who are not before the court. It is said that they have no interest in the matter, but in my opinion they may have a very great interest in the matter, and may have many equities to set up against an attempt by underlessees, or mortgagees, or any one else to saddle them with a renewal of the lease. They have been relieved from this lease through the failure on the part of somebody to pay rent. It may be the building society or it may be the lessees who are to blame—I do not know—but it may well be that the lessees, if they were before the court, could show good cause why this lease should not be set up against them, and why they should not be bound again by the covenants contained in it, and have reimposed upon them a burthen of which they have been relieved. For these reasons I am of opinion that this application should not be granted.

COLLINS, J.—I am of the same opinion. After the elaborate judgment of Day, J., I need only say a very few words. The application is made at the instance of the mortgagees of a sub-lessee, and they have made that application in the absence of the first lessee as party to the proceedings. Now a point has been taken by the learned counsel for the plaintiffs that the mortgagee by sub-demise is not within the 1st section of the Common Law Procedure Act, 1860, at all, and he says that is an answer to the whole case. It is not necessary for us to decide that point, because I am of opinion here that whether he is right or wrong in that, the absence of the first lessee is a fatal blot; but I should be sorry to give an opinion in favour of that contention of the plaintiff, and I think that it is substantially met by the reasons given by Henn, J., in the case of *Berney* v. *Moore*, 2 Ridgeway, at p. 329. 11 Anne (Irish), c. 2 is in these terms:—"If such lessee or lessees, his or their executors, administrators, or assigns, shall upon such bill filed as aforesaid, be relieved in equity, he and they shall have, hold, and enjoy the demised lands, according to the lease thereof made, without any new lease to be thereof made to him or them." Henn, J.'s answer to the question put to him is said by him to depend on the consideration "whether undertenants are comprehended under the general words, intent, and meaning of the Acts 11 Anne, c. 2 and 4 Geo. 1, c. 5, and he conceives they clearly are, and that the interest of an undertenant is derived out of the original lease; the existence of his interest depends on the existence and continuance of the original lease; if the original lease should be defeated the interest of

the undertenant drops, of course." On that reasoning he holds that they are persons entitled to the benefit of that relief. However, as I have said, I do not think it is necessary to decide that point here, because I am of opinion that the lessee is a necessary party to these proceedings. These proceedings are taken under the 1st section of the Common Law Procedure Act, 1860. That section gave to the common law courts the right of exercising an equitable jurisdiction. It was to be exercised on the same terms and conditions in all respects as to payment of rent, &c.—I need not read that further—as in the Court of Chancery. Prior to that time the common law courts had no such jurisdiction. They could intervene, it may be at the instance of a sub-lessee, before execution to stay proceedings, and when proceedings were stayed then the parties seeking relief had to go to equity, and adopt the proceedings of equity in order to get that relief. If judgment had gone the court of common law could do nothing and the person seeking relief had to go to equity.

Equity before the Common Law Procedure Acts appears to have proceeded by granting a new lease. The application came after the forfeiture, and therefore after the first lease had been determined. That involved granting a new lease, and therefore the presence, as one of the parties, of the person to take a new lease. Then it was thought inconvenient that that cumbrous process should continue, and instead of granting a new lease it became, under the provisions of the statute, competent for the courts to say that the old lease should be deemed to continue; but that, again, involved a burthen being superimposed upon the person who had got rid of it, in just the same way as if they had granted or imposed upon him a new lease.

Now, under those circumstances, who is the real party against whom relief is sought on an application of this kind? It went without saying that the lessor was bound to accept the tender of rent, because, as has been pointed out, the forfeiture clauses were looked upon merely as securities for payment of the rent, and therefore the lessor, when the rent was paid, had nothing more to say in the matter. He could not help having the lease and having the tenant re-imposed upon him. He was a necessary party to the proceedings. But there was another person who might have had a great deal to say, and that was the first lessee. That first lessee may have got rid of his liability by something entirely independent of any default of his own. He may have relied, and properly relied, upon somebody else. He may have forfeited his lease without knowing it and without any default on his part, and he may have—and we do not know in this case that he has not—very good reasons to urge why that liability should not be re-imposed upon him; and I certainly do not think that we can say it should be re-imposed upon him without his having a right to be heard. No decision has been cited to show that any such thing was ever done by the courts of equity; but it is said that two authorities of the court of common law, before this jurisdiction was extended to the common law courts, carry the applicants through, and establish that the relief can be given in the absence of the person principally entitled to object.

I think, for the reasons—I will not go through them again—which have been so fully stated by my brother Day, the first of these cases—*Doe d. Whitfield* v. *Roe*—is distinguishable. That case is the only one which, even according to Mr. Chitty, goes the length of his proposition, because it is the only one that deals with relief after judgment; but I think it is open to the distinction pointed out by Day, J.; and, further, if it is not open to this distinction, it would affirm the proposition that the courts of common law had, before the Common Law Procedure Act, 1860, the jurisdiction which was then extended to them, and that that section was not necessary. That case really does not decide what Mr. Chitty says it does—namely, that the common law courts had full jurisdiction after forfeiture to relieve, and to consider upon what terms it would relieve, in the absence of the first lessee.

The second case cited by Mr. Chitty—the case of *Doe d. Wyatt* v. *Byron*—is only a case of an application to stay proceedings before judgment or before ejectment, and therefore it does not touch the point here.

For these reasons I am of opinion that this application cannot be successful, the applicants not having brought in the first lessee as a party to these proceedings, and having given no reason why they should not have done so

Summons dismissed.

Solicitors for the applicants, *Wyatt & Co.*

Solicitors for the plaintiffs, *Henry Gover & Sons.*

Q. B. Div. (Day and Collins, JJ.) — Jan. 20.

BRADLEY v. CHAMBERLYN. (a.)

Practice — Writ — Specially-indorsed writ — Condition precedent—No averment of performance—Ord. 3, r. 6; ord. 14, r. 1.

The defendant agreed to pay £210 to the plaintiff if he would deliver to the defendant's husband certain bills. In an action to recover the £210, the writ, which was specially indorsed under ord. 3, r. 6, did not aver that the plaintiff had delivered the bills to the defendant's husband.

Held, that, notwithstanding the non-averment of performance of the condition precedent, it was a good special indorsement.

Appeal of the plaintiff against an order of the judge in chambers reversing an order of the master directing judgment for the plaintiff under order 14.

The writ, which was specially indorsed, was as follows:—

"The plaintiff's claim is for £210, payable to the plaintiff on demand, under an agreement bearing date 21st June, 1892, made by the defendant in favour of the plaintiff for value.

"PARTICULARS.

"1892, Oct. 13th.—To amount due ... £210.

"The following is a copy of the said agreement:—'To A. M. Bradley, 42, Lombard-street, London, 21st June.—Dear Sir,—If you will deliver to my husband, Mr. A. H. Chamberlyn, the three bills you hold accepted by Edwardes (1) and Chatterton (2) I undertake to pay you on demand the sum of £210, which he owes to you for cash advanced.—Yours truly, MAY CHAMBERLYN.'

"The defendant is sued in respect of her separate estate possessed by her at the time the said agreement was entered into."

Oswald, for the plaintiff, referred to *Gurney* v. *Small*, [1891] 2 Q. B. 584, 40 W. R. Dig. 192; *Fruhauf* v. *Grosvenor*, 8 Times L. R. 744; *Satchwell* v. *Clarke*, 66 L. T. N. S. 641, 40 W. R. Dig. 192; *Paxton* v. *Baird*, *ante*, p. 88, [1893] 1 Q. B. 139.

Sylvain Mayer, for the defendant.

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

COLLINS, J.—The question is whether this is a good special indorsement, and the only objection made to it is that it contains no averment of the performance of the condition precedent. I think that there is no authority which binds us to say that such an averment is necessary, and it is clear that if it is not necessary this is a good special indorsement. This is a case in which, before the Judicature Act, the sum due might have been recovered under the ordinary money count if the condition had been performed in fact. If authority is required in favour of the plaintiff there is the case of *Satchwell* v. *Clarke*, in which it was decided that it is a good special indorsement although an averment is omitted which would be material in a statement of claim. I, therefore, am of opinion that the indorsement in this case is a good special indorsement, notwithstanding the absence of averment of performance.

The defendant has made no affidavit on the merits, but has relied solely on the legal point, and it is too late now for the defendant to ask for leave to make an affidavit on the merits.

DAY, J., concurred.

Appeal allowed.

Solicitor for the plaintiff, *Plaintiff in person.*

Solicitor for the defendant, *Fereday.*

Q. B. Div.
(Lord Coleridge, C.J., and Cave, J.) Jan. 17.

SALT UNION (LIMITED) *v.* WOOD. (a.)

Master and servant—Workman—Person employed on ship engaged in traffic in rivers and estuaries—"Seagoing ship"—Employers and Workmen Act, 1875 (38 & 39 *Vict. c.* 90)—*Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 109, 243.

A ship engaged in carrying cargo upon rivers and their estuaries, although it may be capable of going to sea, is not a "seagoing ship" within the meaning of section 109 *of the Merchant Shipping Act*, 1854. *Therefore the provisions of section* 243 *of that Act for the punishment of offences by seamen do not apply to a man who is employed upon such a ship, and he may be dealt with under the Employers and Workmen Act*, 1875.

Special case stated by justices of the county of Cheshire.

The material facts were as follows:—

On the 24th of August, 1892, the appellants and the respondent and their respective solicitors appeared before the justices on a summons under the Employers and Workmen Act, 1875, issued on the complaint of the appellants, wherein it was alleged that at Wharton the respondent did, on the 19th of August, 1892, unlawfully refuse to carry out his contract of service with and to obey the orders of the appellants, who claimed damages in the sum of £10.

The respondent was one of the crew of the screw steamship *Albion*, a vessel or barge exclusively used for the conveyance of salt upon the rivers Weaver and Mersey from Winsford, the place of its manufacture, to Liverpool, where it was transferred to oceangoing vessels. The voyages of *The Albion* were upon the rivers Weaver and Mersey only, and did not extend upon the tidal waters of the Mersey beyond the limits of the Port of Liverpool.

The Albion was registered under the Merchant Shipping Acts as a British ship in 1887 at the Port of Liverpool, her gross tonnage being 142·87 tons, and registered tonnage 102·99 tons.

The respondent filled the post of "hand" or "mate" on board *The Albion*, the other members of the crew being the captain and engineer. His duties were to obey the captain's orders in navigating *The Albion* and keeping her in repair, and in working a derrick and assisting at the locks; he was paid weekly wages, and so much per ton winding, trip money, and tonnage.

No articles of agreement in writing had been entered into between the appellants and the respondent, nor was he registered as a seaman. The contract of service was determinable on a week's notice from either party, and a notice given by the respondent to the appellants was put in evidence.

It was alleged that the respondent on the 19th of August, 1892, refused to comply with an order of the superintendent of the vessels and barges of the appellants to transfer himself to another vessel.

The respondent's solicitor contended that *The Albion* was a ship and the respondent a seamen as respectively defined by the Merchant Shipping Act, 1854, s. 2; and that, although section 13 of the Employers and Workmen Act, 1875, which enacted that that Act should not apply to seamen, had been repealed by the Merchant Seamen (Payment of Wages and Rating) Act, 1880 (43 & 44 Vict. c. 16), yet the Merchant Shipping Act, 1854, s. 243, which provided for the punishment of acts of disobedience by seamen and others, by implication took away any other remedy against the respondent for breach of contract, and the appellants could not take proceedings for the recovery of damages under the Employers and Workmen Act, 1875. The respondent's solicitor cited the case *Great Northern Steamship Fishing Co.* v. *Edgehill*, 11 Q. B. D. 225, 31 W. R. Dig. 99, as an authority.

The appellants' solicitor contended that the respondent was a workman within the meaning of the term "workman" as defined by the Employers and Workmen Act, 1875, s. 10, and that the provisions of the Merchant Shipping Act, 1854, did not apply, as the respondent was not what is generally known as a seaman, but only a waterman, and *The Albion* was a river vessel, not a seagoing ship, to which class of vessels only section 243 applied, and that, therefore, the appellants' only remedy was by summons under the provisions of the Employers and Workmen Act, 1875.

The justices were of opinion that *The Albion* was a "ship" and the respondent a "seaman" within the meaning of the Merchant Shipping Act, 1854, and on the authority of the case of *Great Northern Steamship Fishing Co.* v. *Edgehill* held that the appellants had no remedy under the Employers and Workmen Act, 1875, and, therefore, dismissed the complaint.

The question of law for the opinion of the court was whether the respondent was a workman who could be dealt with under the summons issued under the Employers and Workmen Act, 1875; or whether he was a seaman and ought to have been summoned and dealt with under the Merchant Shipping Act, 1854.

"Workman" is defined by section 10 of the Employers and Workmen Act, 1875, to mean any person (except a domestic or menial servant) engaged in manual labour who works under an oral or written contract with an employer.

Section 13 provides that the Act shall not apply to seamen, but this provision is repealed by section 11 of the Merchant Seamen (Payment of Wages and Rating) Act, 1880.

The Merchant Shipping Act, 1854, s. 2, defines "seaman" as including "every person (except masters, pilots, and apprentices duly indentured and

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

registered) employed or engaged in any capacity on board any ship," and by the same section "'ship' shall include every description of vessel used in navigation not propelled by oars."

Part 3 of the Act (sections 109-290) deals with "masters and seamen," and section 109 enacts that "the various provisions of the third part of this Act shall have the following applications, unless the context or subject-matter requires a different application (that is to say), . . . the whole of the third part of this Act shall apply to all seagoing ships registered in the United Kingdom" (with certain specified exceptions), "and to the owners, masters, and crews of such ships respectively."

Section 243 provides for the summary punishment of seamen who have committed certain offences, including (clauses 4, 5) wilful disobedience to lawful commands.

J. E. Bankes (*Joseph Walton, Q.C.*, with him), for the appellants.—The magistrates ought to have dealt with this case under the Employers and Workmen Act, 1875. *The Great Northern Steamship Fishing Co.* v. *Edgehill* does not affect the right of the appellants to proceed under that Act, for they have no remedy under the Merchant Shipping Act, 1854. By virtue of section 109, which introduces and applies to Part 3 of that Act, section 243 (which is contained in Part 3) only applies to seamen upon "seagoing ships." The justices have found that the voyages of *The Albion* are confined to rivers, and that her cargo is transferred in the Mersey to oceangoing ships. She is therefore not a "seagoing ship." As to the distinction to be drawn between "rivers" and "the sea," the judgment of Lindley, J., in *The Overseers of Woolwich* v. *Robertson*, 29 W. R. 892, 6 Q. B. D. 654, is in point.

T. G. Carver, for the respondent.—Section 109 of the Merchant Shipping Act, 1854, does not by any negative words limit the application of the other sections of Part 3 of that Act; it does not enact that the words specified are never to have any other meaning than that assigned to them in that section. That was the view of Dr. Lushington in *The Milford*, 6 W. R. 554, Swab. 362, and *The Jonathan Goodhue, ib.* 524. I contend, therefore, that "seaman" in section 243 does not necessarily denote a seaman falling within the categories specified in section 109. Moreover, *The Albion* is a "seagoing ship." She is of a sufficient size to enable her to go to sea, and she is capable of doing so, although she happens to be used only in rivers and estuaries. She is registered, and that is done with the object of getting her clearance before going to sea: Merchant Shipping Act, 1854, s. 19.

Lord COLERIDGE, C.J.—The point which arises in this case is a simple one—namely, whether section 243 of the Merchant Shipping Act, 1854, does or does not apply to this case. If it does not apply these proceedings were rightly taken, if it does apply they were wrong. That depends upon the construction of a single word in the 109th section. That section says that the third part of the Act is to apply to "all seagoing ships registered in the United Kingdom," with certain exceptions which are not material to this case. This ship is registered. Is she also a seagoing ship? for both qualifications must co-exist. I am of opinion that she is not a seagoing ship within the meaning of the Act of Parliament. We must give a simple, sensible interpretation to an eminently practical statute, with regard to which it is extremely important that its true meaning should be understood and should be a meaning capable of being at once applied by the tribunals which have to apply it. If we were to accede to the argument of the respondent we should oblige every bench of magistrates before whom a similar case arose to embark on an inquiry, not as to whether a particular ship actually does go to sea and is therefore a seagoing ship—an exceedingly simple matter to ascertain—but as to whether she is or is not fit to go to sea, or might, under certain circumstances, be sent to sea. I cannot imagine anything more difficult for the magistrates to enter into. But I think that we may properly hold that a seagoing ship is a ship that goes to sea, whose practice and occupation is to go to sea. Now this ship does not do so in any ordinary or reasonable sense. She is one of a number of ships engaged in this traffic in the Weaver and the estuary of the Mersey, where, we are told, they transfer their cargo to oceangoing ships: that is the avocation which this ship pursues from day to day. It may be that she is very capable of going to sea, but she does not go to sea, and is, therefore, not a seagoing ship. It follows that the first question put by the justices must be answered in the affirmative and the second in the negative. The respondent ought to be dealt with under the Employers and Workmen Act, and not under the Merchant Shipping Act.

CAVE, J.—I am of the same opinion. The point, which is, comparatively speaking, a narrow one, turns on the construction of the last part of section 109 of the Merchant Shipping Act, 1854, and that again depends upon the application of the maxim *expressio unius exclusio alterius*. To apply that maxim it is necessary to see what is the *unus* and what is the *alter*. The cases in Swabey's reports which were cited to us are authorities in favour of the appellants rather than of the respondent. The learned judge did not mean to say that section 109 had no meaning; he had to consider what was the *unus* and what was the *alter*. Now the *unus* was clearly seagoing ships registered in the United Kingdom; was the *alter* foreign ships or all other ships British or foreign, or was it ships that did not go to sea? The judge decided that the *alter* did not embrace foreign ships, but only ships that did not go to sea, and consequently that that part of the Act might be taken as applying in some cases to foreign ships. That conclusion is, as I said, rather in favour of the appellants.

With regard to the question of whether this was a seagoing ship I entertain no doubt whatever, and I entirely agree with what my lord has said on that point.

Case remitted to the magistrates.

Solicitors for the appellants, *Busk & Co.*, for *J. H. Cooke*, Winsford.

Solicitor for the respondent, *J. W. Thompson*, Liverpool.

Q. B. Div.
(Bruce and Kennedy, JJ.) Nov. 3.

MALLEY v. SHEPLEY. (a.)

County court—Practice—High Court action with London agent's address for service—Action remitted to county court—County court proceedings with country solicitor's address for service—Notice of appeal—Service on London agent—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 65—*County Court Rules*, 1889, *ord.* 6, *r.* 10; *ord.* 33.

In an action commenced in the High Court the address for service mentioned on the writ was the address of certain London solicitors, agents for the plaintiff's soli-

(a.) Reported by CECIL CHAPMAN, Esq., Barrister-at-Law.

citor. The action was remitted to a county court, and on the particulars which were duly lodged with the registrar and a copy of which was served upon the defendant's solicitors, the address for service was stated to be that of the plaintiff's country solicitor. After the action had been heard and judgment had been delivered in the plaintiff's favour, a notice of appeal on the part of the defendant was, on the last day for service of appeal, served upon the London agents, whose names appeared upon the writ.

Held, that the service was bad, on the ground that the notice had not been served upon the plaintiff through his country solicitor, whose address for service was the only one given in the county court proceedings.

This was an appeal by the defendant from the decision of the county court judge sitting at Stourbridge.

The action had been commenced in June, 1892, in the High Court of Justice, by a writ which stated that "this writ was issued by Messrs. A. H. Arnould & Son, whose address for service is 10, New-court, Lincoln's-inn, London, agents for Joseph Higgs, Brierley Hill, Staffordshire, solicitor for the said plaintiff." On the 13th of July the action was remitted by order of a judge at chambers to the Worcestershire County Court, and in accordance with the County County Rules, 1889, ord. 33, r. 1, the plaintiff's solicitor lodged particulars of the plaint with the registrar of the county court, and indorsed thereon his own name and place of business as the address for service of all proceedings in the action as required by ord. 6, r. 10. The registrar duly forwarded a copy of the said particulars to the defendant. At the hearing on the 6th of October judgment was given in favour of the plaintiff, and notice of appeal was left with Messrs. Arnould & Son, the agents for the plaintiff's solicitor, twenty-one days after the hearing, being the last day for service under ord. 59, r. 12, of the Rules of the Supreme Court, 1883.

Macaskie, for the plaintiff, took a preliminary objection that the appeal was out of time, as the notice of appeal had been served on the last possible day upon the London agents of the plaintiff's solicitor instead of on the plaintiff's solicitor himself, whose address for service was the only one given in the county court proceedings. Such a service is bad, and was so determined in the case of *Powell* v. *Thomas*, 39 W. R. 224, [1891] 1 Q. B. 97. The cause had become a county court cause, and the only solicitor whose name had been given for service was the plaintiff's solicitor. There is no time now to serve the notice in a proper way, and this is not a case in which the court should grant any indulgence.

E. Pollock, for the defendant.—The case of *Powell* v. *Thomas* is not applicable, as that was an action commenced in the county court and no notice had been served upon any person whose name appeared in the record. In this case the address for service was given upon the writ with which the action commenced. The notice from the registrar was in the terms of form 73 in the appendix to the County Court Rules, 1889, and in that form there is nothing to notify the place of service. The address of the solicitor indorsed upon the particulars is the same as that which appears upon the writ, and the defendant was justified in presuming that the name of the London agent had been omitted by inadvertence. The case of *Powell* v. *Thomas* has never been held to apply to a remitted action, but if it is so held this is a case in which the court ought to extend the time for service, which is within their discretion: *Cusack* v. *London and North-Western Railway Co.*, 39 W. R. 244, [1891] 1 Q. B. 347.

Macaskie replied.

BRUCE, J.—The only question before us is whether a notice of appeal could be properly served on the London agents of a plaintiff's country solicitor. Upon the writ issued in the High Court the address of the London agents was given for service. But under the order remitting the action to the county court the action and all proceedings therein were tried and taken in such court as if the action had originally commenced therein in accordance with section 65 of the County Courts Act, 1888. The whole of the proceedings were rightly regulated by the county court procedure, and the plaintiff accordingly filed his particulars with the registrar, on which the plaintiff's solicitor's address was indorsed for service. The registrar was bound to send to the defendant a notice of the date of hearing, together with the particulars indorsed with the name of the plaintiff's solicitor, and all the proceedings, were regulated by the terms of the Act of 1888, as if the action had commenced in the county court. There can be no doubt that for service in all proceedings in that court the country solicitor's address was the only right one. This notice of appeal is therefore bad; but it is said that this objection is only a technical one, and a new one as applied to remitted actions. The words of the Act are quite plain, but as there seems to be a slip or mistake, we are unwilling to shut the defendant out from his appeal; but it must be clearly understood that these rules of procedure exist in order to be observed.

KENNEDY, J., concurred.

The appeal was subsequently heard and dismissed.

Solicitors for the plaintiff, *Arnould & Son*, for *Joseph Higgs*, Brierley Hill, Staffordshire.

Solicitors for the defendant, *W. Robinson & Co.*, for *W. Waldron*, Brierley Hill, Staffordshire.

Prob. Div. & Adm. Div. Probate. } Jan. 24.

In re CRAWSHAY (DECEASED). (*a.*)

Probate—Will—Bankrupt executor out of England—Testator's desire to change executor—Wish not carried out—Grant to widow—Citation—Court of Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.

A sole executor named in a will during the lifetime of the testator left England under an assumed name, after selling all his effects to his landlord, and was subsequently adjudicated bankrupt.

The testator, on hearing of the facts, desired to alter his will by removing the name from the executorship, but, owing to illness and the inaccessibility of the will at the time, died without carrying out his intention.

The court, on motion, granted letters of administration with the will annexed to the testator's widow under section 73 of the Probate Act, 1857, *and dispensed with citation of the absent executor.*

Application for grant of letters of administration with last will and testament of Herbert Henry Crawshay, late of St. Aubyns, Brighton, deceased, annexed of all and singular the personal estate of the said H. H. Crawshay to Maria Courtenay Crawshay, widow of the deceased, the sole beneficiary named in the will.

Affidavits were filed stating that the deceased died at Biarritz on the 2nd of November, 1892, having made a will dated the 24th of February, 1891, by which he

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

appointed Ernest Jerdein, of the Isthmian Club, sole executor thereof. Ernest Jerdein, in August, 1892, left England under an assumed name without leaving any address, having first sold the whole of his effects to his landlord saying he was going to San Francisco. He had since been adjudicated bankrupt.

It was further stated that on the deceased hearing of these facts he desired to alter his will by removing the said Ernest Jerdein's name as executor, but owing to his sudden illness and unexpected decease, and to the fact that the will was packed up in some part of his luggage which was not accessible, being in another city, and his wife could not leave him during his last illness, he had been unable to carry out his intention.

Deane, for the widow, made the application *ex parte* under section 73, asking the court to dispense with citing the absent executor.—He can only be cited by advertisement. We do not know where to advertise, and if we did advertise so that the citation came to the knowledge of the executor, it is plain that he has no intention to return; if he did and claimed to act, I should, under the circumstances, ask the court to refuse the grant to him.

JEUNE, P.—In this case, considering the strength of the affidavits and looking at the special circumstances af the case, I think I can dispense with service on the executor and grant the application.

Application allowed.

Solicitors for the applicant, *Carlisle, Alma, & Fisher.*

Prob. Div. & Adm. Div. Admiralty. } Nov. 25.

"THE MONTE ROSA." (*a.*)

Shipping—Damage—Pilot in charge by compulsion of law—Carrying anchor at the hawse pipe with stock above water within province of pilot — Order in Council, February 5, 1872, par. 20 (Thames Conservancy Bye-Laws).

Whether the anchor of a steamer in the Thames should be carried at the hawse pipe with the stock above water is a matter within the province of the pilot, notwithstanding that the carrying of the anchor in such a position may be an infringement of rule 20 of the Thames Conservancy Bye-Laws for the Navigation of the River Thames, in force under the Order in Council of the 5th of February, 1872.

The Ripon, 33 *W. R.* 659, 10 *P. D.* 65, *explained.*

This was an action of damage instituted on behalf of the owners of the steamtug *Contest* against the steamship *Monte Rosa.*

The action was now heard before Barnes, J., assisted by two of the Elder Brethren of the Trinity House.

The result of the evidence appears from the judgment.

Pyke, Q.C., and *Nelson*, for the plaintiffs.

Sir W. Phillimore, and *Aspinall, Q.C.*, for the defendants.

In addition to the cases referred to in the judgment, the following authority was cited: *Davies* v. *Mann*, 10 M. & W. 546.

BARNES, J.—In this case the collision took place on the 1st of June, 1892, about six o'clock in the evening, between the tug *Contest* and the steamer *Monte Rosa*, in Bugsby's Reach. Both vessels were proceeding up the Thames, and the tug was about to assist in docking *The Monte Rosa*, and was proceeding up at the same speed on her starboard side. The collision happened by the steamer coming into contact with the port quarter of the tug, making a hole in two plates on that quarter, knocking off the propeller, and doing some other damage. The steamer, it is necessary to add, was in charge of Mr. Henderson, a duly licensed Trinity House pilot, and was under his charge by compulsion of law. The first point to determine is by whose default the collision was occasioned, and at an early stage of this case, after hearing the evidence of the tug, I intimated—and in that intimation the Elder Brethren agreed—that the principal cause of the collision was the careless management of the tug, in allowing herself, by the improper action of her starboard helm, to get across the bows of the steamer on the occasion of the attempt to make fast to the steamer. We have no doubt whatever that the cause of the collision was the improper manœuvring of the tug in the way I have indicated, which brought her across the bows of the steamer. I do not feel disposed to accept the statement that the tug was signalled. I cannot help thinking that those on board the tug thought it was about time to attempt to get a rope on board, and that in that attempt, and while they were engaged in it, she was carelessly handled and allowed to get across the bows of the steamer.

It is suggested that the steamer ought to have eased her speed or stopped and reversed her engines when she saw that there was a likelihood of danger from the approach of the tug. I have asked the Elder Brethren their view upon these points, and they consider, and in their opinion I entirely agree, that the steamer did stop when she saw that there was danger, that she had no time to do anything more than she did, and that she is not in any way to blame in respect of the points made against her of not easing speed or stopping and reversing. I think these two parts of the case are really free from any doubt or difficulty. But I now come to that which has been the principal matter in contest—namely, what was it that caused the damage to the plates which have been produced in court, and to the propeller of the tug? It is said by the plaintiffs that that damage was due to the stem of the steamer coming in contact with the plates, and afterwards with the propeller. I have asked the Elder Brethren to give me their opinion upon this part of the case. After careful examination of the plates and the model, said to be to scale, though there is a dispute as to the actual shape of the anchor and the fluke which would be projecting from the side of the steamer, the conclusion they have come to—and they advise me on this point with considerable confidence—that the damage to the plates and the propeller was done by the anchor, and I see no reason to differ from them, and I accept their view on that part of the case, and come to the conclusion that the anchor did the immediate damage to the tug.

This conclusion raises a question of some nicety. The plaintiffs say that the steamer was guilty of a breach of rule 20 of the Thames Conservancy Rules approved by the Order in Council of the 5th of February, 1872, which provides that "no vessel shall be navigated or allowed to lie in the river with its anchor or anchors hanging by the cable perpendicularly from the hawse-pipe unless the stock shall be awash, except during such time as shall be absolutely necessary for catting or fishing the said anchor or anchors, or during such time as may be absolutely

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

necessary for getting such vessel under way." Now there can be no doubt that the anchor of *The Monte Rosa* was carried up the Thames with the shackle up at the hawse-pipe, and in that position the stock was considerably out of the water and the flukes were just carrying the anchor just about level with the water—and it is clear that this mode of carrying the anchor was not in accordance with the above rule. The defendants, however, say that the anchor was carried in that position by the orders of the pilot, and that, that being so, as the anchor's position is a matter for the pilot to deal with, they are exonerated from liability for anything that happened in consequence of that position of the anchor by virtue of the pilot's orders. That, again, raises two questions, one of fact and one of law. The first question is whether the anchor was in that position in which it was, in accordance with the pilot's orders. On that the master's evidence is, taking it very shortly, that the pilot said: "I see your anchor is at the hawse. You will let it remain there till she eases down to go into the dock." The master adds: "He told me to tell the mate when we eased down to go into dock, that the stock was to be put awash. I told him to do so. I heard him repeat the orders to the mate. We had not eased down at the time of the collision." The mate said: "I got an order from the pilot in Long Reach to lower the anchor when easing for the docks." The pilot said: "Don't lower it till we ease for the docks, and then lower it stock awash. We had not eased for the docks at the time of the collision." I have no hesitation in accepting the story of the two officers of the ship that the anchor was in its position by the pilot's orders at the time of the accident.

Then it is contended by Sir Walter Phillimore and Mr. Aspinall that if that is so, the position of the anchor is a matter within the pilot's jurisdiction, even though there is a Thames Conservancy bye-law to the effect that it ought not to be in the position to which it was ordered by him. The short way of putting that point is that the position of the anchor forms part of the navigation of the ship which is in the pilot's jurisdiction. It is said on the other side that that is not the true position with regard to the anchor; that the same consequence must follow as if the Thames bye-laws as to lights had been disobeyed, when, as was decided in the case of *The Ripon*, 33 W. R. 659, 10 P. D. 65, the owners of the steamer would not have been exonerated from liability. In that case a vessel in motion in the Humber, in addition to the side lights, by the pilot's orders had a white light from the main peak showing astern, and it was held that that was a breach of the statutory regulations; that there being no circumstances to make that departure from the rule necessary, and it being impossible to say that the white light at the peak might not have contributed to the collision, the shipowners were not exempt from liability, though the pilot was in charge by compulsion of law; and that, although the light in question had been exhibited by the order of the pilot, the master should not have permitted an infringement of the regulation. If one states the case of *The Ripon* a little more broadly, it is that the position of the lights and their proper exhibition is a matter for the master and not for the pilot. I have considered that case with some care by the light of two other cases cited —namely, *The Rigsborgs Minde*, 8 P. D. 132, 31 W. R. Dig. 175, and *The Gipsey King*, 2 Wm. Rob. 537. In the latter case a vessel had come into collision with another in such a way that the anchor, which had not been hoisted on deck nor catted, as proper and customary, and was hanging over her bow under water, made a hole in the other vessel, Dr. Lushington said: "If the pilot, then, is to decide the mode of anchoring a vessel it appears to me that it follows as a necessary consequence that the pilot is responsible to see that the anchor is in a proper situation to be dropped when necessary. In the present case this view of the pilot's duty is confirmed by the rules and regulations of the river in which this collision occurred, and in which he is licensed to act as pilot. Those rules specially enjoin what is to be done as regards having the anchor in a proper position, ready to be dropped, and such rules must be considered as peculiarly binding upon the pilot on board *The Gipsey King* as being prescribed by the authority under which he was entitled to act." In *The Rigsborgs Minde* damage had been done by the fluke of a schooner's anchor piercing the side of a flyboat. The court held that there was no want of care on the part of the crew, and it was held that the damage was caused by the fault of the pilot in the course of his duty. It is said, as against that, that even if it is within the pilot's duty to attend to the position of the anchor, and give orders as to the anchor, still the master is to blame, and his owners through him, because the master is bound to comply with the rules, and interfere with the pilot with reference to his orders in connection with the anchoring of the ship if such orders are infringing any rule laid down by authority. I think it would be dangerous to lay that down as a sound proposition in face of such a decision as that of *The Argo*, Swab. 462, where a steamer, which was being navigated on the wrong side of the channel, contrary to the section of the Act then in force, was doing so under the pilot's orders, and it was held that the master was not bound to interfere, and that the owners were not responsible for the damage caused thereby. It really comes, when one considers it, to be a question of whether what is being done is part of the ordering of the navigation of the ship and her manœuvres, and the case of *The Argo* and that class of case seems to be much more analogous to the present case, than the case of *The Ripon*, decided as to a matter of lights, with which the pilot has nothing to do, and which it is entirely the master's duty to see to.

I think that in this case, the infringement of the rule having been by the pilot's order, the shipowners are exempt from responsibility for his accident in the matter. There is, however, a further point in this case which I think is equally fatal, if established, to the plaintiff's case. [His lordship then proceeded to examine the question whether, notwithstanding the position of the steamer's anchor, the tug might not have avoided the collision, and, coming to the conclusion that she could, concluded his judgment as follows:—] I am of opinion that the damage in this case was caused by the action of the tug; that the anchor was an obvious danger which could have been avoided by the exercise of reasonable care on the part of the tug; that at that time no want of care was exhibited on the part of the steamer which could have in any way affected the matter; and that the tug is alone to blame for this disaster. Therefore the claim must be dismissed, with costs.

Solicitors for the plaintiffs, *Lowless & Co.*

Solicitors for the defendants, *Cooper & Co.*

Court of Appeal.

From Chan. Div. (Lindley, Lopes, & Kay, L.JJ.) [and Chan. Div. (Chitty, J.)] — Jan. 20, 21, 24, 25, 31; Feb. 6, 7.

WITHINGTON LOCAL BOARD OF HEALTH *v.* CORPORATION OF MANCHESTER. (*a.*)

Hospital — "Noxious business" — Smallpox hospital — Local authority — Adjoining district — Consent — Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 112, 131, 285.

A hospital is not within the provisions of section 112 *of the Public Health Act,* 1875.

The powers conferred by section 131, *exercisable by a local authority, are not limited for their exercise to the district of the particular local authority which exercises them.*

Section 285 *does not apply to the powers conferred by section* 131 *so as to require for their exercise in an adjoining district the consent of the local authority of such adjoining district.*

Decision of Chitty, J., *affirmed.*

Motion.

The question was whether a smallpox hospital was a "noxious or offensive trade, business or manufacture" within the meaning of section 112 of the Public Health Act, 1875, or whether by virtue of sections 131 and 285 of that Act the erection of such a hospital by a local authority in an adjoining district required the consent of the local authority of such district.

The defendants proposed to build on certain ground of their own, but which was situate within the district of the plaintiff local board of health—an urban sanitary authority whose district adjoined the district of the defendants—a temporary hospital for the reception of smallpox patients for the use of the inhabitants of their own district.

The plaintiffs moved for an *interim* injunction to restrain the defendants from establishing or carrying on such hospital without their consent.

Section 112 of the Public Health Act, 1875, provides as follows: "Any person who, after the passing of this Act, establishes within the district of an urban authority, without their consent in writing, any offensive trade; that is to say, the trade of blood boiler, or bone boiler, or fellmonger, or soap boiler, or tallow melter, or tripe boiler, or any other noxious or offensive trade, business or manufacture, shall be liable to a penalty not exceeding fifty pounds in respect of the establishment thereof, and any person carrying on a business so established shall be liable to a penalty not exceeding forty shillings for every day on which the offence is continued, whether there has or has not been any conviction in respect of the establishment thereof."

Section 131 provides that "any local authority may provide for the use of the inhabitants of their district hospitals or temporary places for the reception of the sick, and for that purpose may themselves build such hospitals or places of reception, or contract for the use of any such hospital or part of a hospital or place of reception, or enter into any agreement with any person having the management of any hospital, for the reception of the sick inhabitants of their district, on payment of such annual or other sum as may be agreed on. Two or more local authorities may combine in providing a common hospital."

Section 285 provides that "any local authority may, with the consent of the local authority of any adjoining district, execute and do in such adjoining distric all or any of such works and things as they may execute and do within their own district, and on such terms of payment or otherwise as may be agreed on between them and the local authority of the adjoining district; moreover two or more local authorities may combine together for the purpose of executing and maintaining any works that may be for the benefit of their respective districts, or any part thereof."

Farwell, Q.C., Clare, and *Norris,* for the Withington Local Board. — First, the proposed hospital is a noxious or offensive business within section 112 of the Act: *Bramwell* v. *Lacy,* 27 W. R. 463, 10 Ch. D. 691; it would be a private nuisance: *Metropolitan Asylums District* v. *Hill,* 29 W. R. 617, 6 App. Cas. 193. The penalty in section 112 implies a prohibition: *In re Cork and Youghal Railway Co.,* 18 W. R. 26, L. R. 4 Ch. App. 748. Secondly, the powers of a local board under section 131 are confined to their own district: *Haywood* v. *Lowndes,* 7 W. R. 279, 4 Dr. 454. Thirdly, the consent of the Withington Local Board is necessary under section 285.

Byrne, Q.C., Maberly, and *Macmorran,* for the Corporation of Manchester.—As to the first point, the business is not *ejusdem generis* with those mentioned in section 112: *Wanstead Local Board of Health* v. *Hill,* 11 W. R. 368, 13 C. B. N. S. 479; *Passey* v. *Oxford Local Board,* 43 J. P. 622; *Braintree Local Board of Health* v. *Boyton,* 52 L. T. N. S. 99, 33 W. R. Dig. 147. It would not necessarily be a private nuisance: *Fleet* v. *Metropolitan Asylums Board,* 2 T. L. R. 361. As to the second point, the rule in *Haywood* v. *Lowndes* is only a *primâ facie* rule. On the construction of section 131 no such limit is implied. As to the third point, section 285 is in an entirely distinct part of the Act from section 131, and does not control it. Section 131 occurs in Part 3 under the head of "Sanitary Provisions," "Infectious Diseases and Hospitals." Section 285 is in Part 8 in a group of sections relating to "Union of Districts."

Farwell, Q.C., replied.

CHITTY, J.—As to the first point which arises on section 112, I observe that that section has already received a judicial construction. It first enumerates certain specific trades which are described as offensive, and which, according to the habits of mankind, are offensive, and then winds up with "any other noxious or offensive trade, business, or manufacture." A penalty is imposed upon any person establishing such trades without the consent of the local authority, and such establishment is therefore unlawful. The question is whether the proposed hospital falls within the above general words. Now the Court of Common Pleas (in *Wanstead Local Board of Health* v. *Hill*) had before it practically the same point under a similar section of the Public Health Act, 1848 (11 & 12 Vict. c. 63, s. 64), the words not being identical, but very similar. It was a question whether brickmaking was a noxious or offensive trade, business, or manufacture within the meaning of the section, and a strong court, consisting of Erle, C.J., and Williams, Willes, and Keating, JJ., held it was not, and that to bring the case within the general words the trade or business must be in itself of a noxious or offensive nature analogous to those mentioned. No one can say that carrying on a smallpox hospital is analogous to blood boiling, or the other businesses specifically mentioned. It has been decided that carrying on a hospital is a business, and so far the plaintiffs are right, but it is impossible to hold it is an analogous business. There was a subsequent de-

(*a.*) Reported by ARTHUR LAWRENCE and G. ROWLAND ALSTON, Esqrs., Barristers-at-Law.

cision (*Braintree Local Board of Health* v. *Boyton*) as to fish frying, a case as to which there was more to be said against the trade, and more to be said in favour of its falling within the section.

I base my decision on the case in the Common Pleas, and the principles there laid down. I should be misreading the section if I held this hospital fell within it.

It was pointed out by Willes, J., that the jurisdiction under the section rests with the justices of the peace. He thought, as I think, that their task would be easier if they had to find that the noxious trade was analogous to those specified.

This disposes of the first point, which is far from unimportant. As to the remaining points, I will reserve judgment.

Jan. 31.—CHITTY, J.—The question reserved depends upon the true meaning of section 131 and section 285 of the Public Health Act, 1875. The defendants propose to build on their own ground within the plaintiffs' district, which adjoins their own district, a hospital for the use of sick inhabitants of their own district. The defendants intend to use the hospital for the reception of smallpox patients; but, on the question reserved, there is no distinction between patients suffering from infectious sickness such as smallpox, and patients suffering from a non-infectious sickness. The propositions for which the plaintiffs contend are, first, that the powers as to hospitals conferred by section 131 are, on the true construction of that section, exercisable by a local authority only within their own district, and, secondly, that section 285 applies to these powers, and enables a local authority to exercise them within an adjoining district, but only with the consent of the local authority of such adjoining district. The propositions for which the defendants, on the other hand, contend are, first, that the powers of section 131 are not confined to the district of the local authority by whom they are exercisable, but are unlimited in point of space, and, secondly, that section 285 has no application to the exercise of powers under section 131. The arguments on each side were supported by an elaborate examination of the provisions of the two sections themselves, and by copious references to numerous other sections of the Act bearing, or supposed to bear, on the question. In fact the Act, which contains 343 sections, was ransacked by counsel, and nothing that had any relevancy was omitted in the discussion. The general scheme of the Act is to divide England, except the metropolis, into districts, and to subject these districts to the jurisdiction of local authorities invested with the powers conferred by the Act. Hence it is said for the plaintiffs that the consideration of the particular provisions of the Act must be approached with due regard to this general scheme, and, consequently, with a presumption that the powers conferred on a local authority are restricted in their exercise to the particular district for which they are specially constituted, and the decision of Kindersley, V.C., in *Heywood* v. *Lowndes* is relied upon in support of the argument. The soundness of the argument may be admitted if it is advanced merely in a general way; the presumption is merely of a *primâ facie* nature, which may be displaced by an examination of the Act itself.

Another argument of a general nature put forward for the plaintiffs was that a corporation created by statute for a specific purpose has those powers only which the statute confers, and, consequently, that a local authority which is empowered to provide a hospital in an adjoining district with the consent of the local authority of that district has no power to provide a hospital there without such consent. Stated in a general way the argument is correct. The question, however, is whether it applies to this case. The ground on which the plaintiff's case rests is not simply that the defendants are acting *ultrà vires*. If that were all, the plaintiffs would have no right of action, although the Attorney-General might complain. But the plaintiffs say that the defendants are invading their district unlawfully, because the plaintiffs' consent is rendered necessary by section 285 and has not been given, and that by reason of their consent being required by the statute they have a sufficient interest to support their action. To succeed it is plain that the plaintiffs must show that section 285 applies. In addition to these observations of a general character there is another which strikes me as pertinent. When the plaintiffs' counsel speak of the defendants invading the plaintiffs' district and interfering with their jurisdiction, and when they say that the care of the health of the inhabitants of their district is committed to the plaintiffs' charge, it must be borne in mind that the powers and jurisdiction of the plaintiffs as the local authority are of a special and limited kind strictly defined by the Act. One thing is clear. If a wealthy and charitably disposed person were minded to set up a hospital for the sick within the plaintiffs' district the plaintiffs could not stop him. They would have no power of interference with the establishment or the management of the hospital as such. They could, of course, require plans of the building and drains to be submitted, and generally could exercise all their powers in regard to infection and the like, just as they could in reference to any other house or building within their district; but they could not prohibit the erection or carrying on of any such hospital, even though it was established for the reception of patients suffering from infectious diseases.

All this was necessarily admitted by the plaintiffs' counsel after a careful examination of the statutes. The plaintiffs' case, then, comes to this—that their consent is required only where it is a local authority that purposes to provide the hospital within the plaintiffs' district. I proceed now to examine shortly section 131. It is altogether silent as to the place where the hospitals or temporary places for the recep- of the sick are to be situate. An examination of upwards of forty other sections of the Act gives the following result:—The powers and duties of the local authority are in some cases in express terms made exercisable within their own district; in others in express terms both within and without; and in others no mention is made, one way or the other, as to district or place. Of the last class examples are found in the section under consideration (section 131), and also, amongst others, in section 141 (as to mortuaries) section 164 (as to recreation grounds), section 165 (as to clocks), section 39 (as to urinals, &c.), and sections 120, 121, and 122 (as to disinfection). In these circumstances it is argued for the plaintiffs that where the Legislature intends to confer a power exercisable without the district it says so in direct terms, and consequently, that where there is silence as to the district the inference is that the power is exercisable only within the district; while, on the other hand, it is contended for the defendants that where the Legislature intends to confer a power exercisable within the district it says so in direct terms, and consequently, where there is silence as to the district, the inference is that the power is exercisable without as well as within the district. These conflicting arguments, which would have delighted the mediæval schoolmen, are calculated to reduce the matter to a standstill. The right practical method of interpretation is not to sweep every section which is silent as to district into one and the same class, but to consider each of these sections, with its context, separately,

with a view to ascertain whether it is or is not intended to be confined to the district.

I do not intend to venture to put a construction on each of the sections where silence is preserved as to the district; I confine myself to saying that I can see no reasons which tend to restrict some of the sections to the particular district, but which would not be applicable to others of the same sort of sections. On the whole, I think that silence as to place affords some ground in this Act for holding that the Legislature did not intend to confine the local authority to its own particular district. Continuing the examination of the 131st section, I find the term "district" occurs twice. The hospital which the local authority may provide is "for the use of the inhabitants of their district," and the agreement which they are authorized to enter into is for the reception "of the sick inhabitants of their district." The attention of the Legislature was, therefore, directed in the section itself to the district of the local authority; yet the section does not in terms confine the local authority to its own district as to place when the hospital or other accommodation for the sick is to be provided. Again, for the purpose of providing a hospital or temporary place for the reception of the sick, the local authority are empowered—(*a*) "to contract for the use of any such hospital or part of a hospital or place of reception" and (*b*) "to enter into any agreement with any person having the management of any hospital for the reception of the sick inhabitants of their district." "Any such hospital" and "any hospital" in these clauses mean, *primâ facie*, any hospital for the sick anywhere, and I can find no sufficient reason for saying that the hospital or place of reception in respect of which the local authority may enter into a contract or agreement must be confined to a hospital or place of reception within the district of the local authority. On the other hand, I see reasons for holding that the *primâ facie* meaning is the right one. A local authority, not having provided a hospital of its own, purposes to enter into an agreement with persons having the management of a hospital outside its own district for the reception of its sick inhabitants; the local authority may be a rural sanitary authority having but few sick. It seems reasonable and convenient that they should be at liberty to send their sick to any hospital, wherever situate. Why should the local authority within which the hospital happens to be situate, and which authority has, as already shown, no power to interfere with the hospital as such, have a special veto as to the sick to be brought there, simply because the sick are sent by another local authority? And, what is more strange, a veto only in the case of the sick being sent by the local authority of an adjoining district. If the plaintiffs are right no local authority can contract to send their sick to a seaside convalescent home out of their own district. I can find no sufficient ground for saying they cannot. The evidence affords a curious illustration of the effect of the plaintiffs' contention.

The plaintiffs, under an agreement they have come to with the managers of the Monsall Hospital, are sending their sick to that hospital, which is situated within the district of the defendants; yet, if their contention is right, the agreement is of no effect and they are not justified in sending their sick to the Monsall Hospital unless they first obtain the consent of the defendants. The provisions of section 131 are not severable; the hospital to be provided is for the sick, without any distinction as to the nature of the sickness, whether it be infectious or not; and the powers to provide a hospital or temporary place for the reception of the sick must, one and all, either be confined to the district or must, one and all, without distinction, be exercisable without regard to place. The test to ascertain whether the powers are severable is to try and read the sections, inserting the limitation of place as to some of the provisions and omitting such limitation as to others. I invited the plaintiffs' counsel so to write out the section, and, after some attempts, he rightly admitted that it was impossible. No distinction, then, can be maintained between the cases of the local authority providing the hospital (*a*) by themselves building it, (*b*) by contracting for the use of a hospital belonging to others, or (*c*) by entering into an agreement with persons having the management of a hospital.

One other observation remains to be made on section 131. It concludes with a provision empowering any two or more local authorities to combine in providing a common hospital. This power of combining is not confined to adjoining districts, but is general, and the place where the common hospital is to be situate is not specified. For these reasons I think that section 131 must be read as it stands, and that, in the exercise of the powers thereby conferred, local authorities are not confined to their own districts.

I have already to some extent necessarily dealt with section 285. In my opinion it does not apply to section 131. It is not a negative, but an affirmative section. It occurs in an entirely distinct part of the Act. The Act is divided into parts, and under such parts sections are grouped together under distinct headings. Section 131 occurs in "Part 3, Sanitary Provisions," which embraces sections 13 to 143, both inclusive. Section 131 is grouped with sections 132 and 133 under the heading of "Hospitals." Section 285 occurs in "Part 8, Alteration of Areas and Union of Districts," which embraces sections 270 to 292 both inclusive. Section 285 is found with other sections under the heading of "Union of Districts." One would hardly expect to find a limitation in section 131 in so different a part of the Act. Section 131, with its special power for authorities to combine for the purpose of providing a common hospital, seems not to require any supplementary provision. But I admit that in so complex an Act of Parliament as this is, observations on the particular place where provisions are found are not of any great weight.

The plaintiffs' argument rested on the first sentence of section 285, which runs thus: "Any local authority may, with the consent of the local authority of any adjoining district, execute and do in such adjoining district all or any of such works and things as they may execute and do within their own district, and on such terms as to payment or otherwise as may be agreed on between them and the local authority of the adjoining district." The section then proceeds thus:—"Moreover, two or more local authorities may combine together for the purpose of executing and maintaining any works that may be for the benefit of their respective districts or any part thereof." The plaintiffs asked me to read the words "execute and do within their own district" as applying to the cases where the power is confined by implication or just construction to the district of the authority purposing to execute it, and consequently as including section 131, inasmuch as that section is, as they say, confined to the local authority's own district. But I have declined so to read section 131, and I think section 285 was not intended to limit the powers conferred by section 131. Again, the plaintiffs' contention would restrict what I may term the hospital powers exclusively to the district of the local authority providing the hospital and the adjoining districts. I think that such a construction of the Act is too narrow. The powers of a local authority to acquire land by agreement are not confined to land within their own district. (See section 175.) Suppose a local authority

desires to acquire a site for a hospital on some open moor near their own district, but separated from it for a short distance by an intervening district adjoining their own. The land may be bought without the consent of the local authority within whose district it lies; but no hospital can be provided there if the plaintiffs are right, because the requisite statutory consent cannot possibly be given. The only body that can give the statutory consent is the local authority of an adjoining district, but in the case supposed the hospital would not be within any district; and the consent of the local authority within whose district the hospital would be situate would be of no avail. It would be absurd to suggest that the consent of the local authority of an adjoining district to the establishment of a hospital within another non-adjoining district would satisfy the statute. The plaintiffs' counsel pressed for an exhaustive definition of the "works and things" intended to be included within the first part of the 285th section. I am not bound to do that which the Legislature has not done, and I decline to frame any such definition. It is obvious that there are many works and things to which the section would readily apply without including a hospital and without drawing in the 131st section. I am content to say that, in my opinion, the building and providing of a hospital by a local authority on their own ground in an adjoining district are not the kind of works and things to which the 285th section was intended to apply.

The result is that I hold that the plaintiffs have failed in their contention on the point raised under sections 131 and 285 of the Public Health Act, 1875. I refuse the injunction, and make no order except that costs be costs in the action.

Injunction refused.

The plaintiffs appealed.

Gully, Q.C., Farwell, Q.C., and *O. L. Clare*, for the appellants, used similar arguments to those advanced in the court below.

Sir Richard Webster, Q.C., Byrne, Q.C., and *Macmorran*, for the respondents, were not called upon to argue.

LINDLEY, L.J.—This is an appeal from the decision of Chitty, J., refusing to restrain the Corporation of Manchester from erecting a smallpox hospital on land of their own in a district of which the Withington Local Board of Health is the urban sanitary authority. The judgment of Chitty, J., has been read, and I confess I feel very great difficulty in improving upon it. It appears to me to be right from beginning to end upon every point. But there are one or two observations I will make with reference to the arguments which have been addressed to us.

First of all, let us consider who the plaintiffs are, and what they must prove in order to entitle them to any relief in this action. They are the urban sanitary authority of the district which has been called the Withington District, which is near Manchester. They have certain statutory rights and statutory duties, and unless their statutory rights are infringed, or they are prevented from performing their statutory duties, they have no right to complain at all. That is their position. The position of the defendants is that they are a municipal corporation having some land (about 100 acres) in the district of which the plaintiffs are the urban sanitary authority, and what the defendants are proposing to do is to build a hospital on their own land.

Now let us consider upon what ground the plaintiffs can interfere with them or prevent them from doing that. I put out of sight the broad ground that the hospital will be a public nuisance, because that question does not arise in this action. That will arise in the other action which we are told is pending, which is in the form, I understand, of an action by the Attorney-General. Therefore I leave that out of the question, and say nothing at all about it as to whether it will or will not be a public nuisance. Apart from that the plaintiffs are driven to rely upon certain sections in the Public Health Act of 1875, and they rely, first of all, on section 112, which is the "noxious trade" section.

Now before I make any observations upon that particular section and upon the decisions which have already been given upon it, explaining the meaning of it, I must point out that the word "hospital" does not occur in the section at all, and that "hospitals and noxious diseases" are specially mentioned, and specially provided for, in another group of sections, beginning with section 120—the very next group but one. It would, therefore, be rather strange if one were to find language in section 112—general language—of such a kind as to relate to hospitals, which are specifically mentioned and dealt with in another part of the Act, and to my mind that observation is extremely cogent. It is an observation which I could not notice in the judgment of Chitty, J., but it is one which to my mind is very strong indeed. Bearing that in mind when we are asked to say that a hospital is a noxious or offensive trade, business, or manufacture—leave out manufacture and leave out trade—noxious or offensive business within section 112, my answer is, *primâ facie* it is not, because you find other provisions specially addressed to that very thing, hospitals, and you do not want this section in order to deal with them. When we look at the words of section 112, such as "blood boiler, bone boiler, fellmonger, soap boiler, tallow melter, tripe boiler," and these other words "other noxious or offensive trade, business, or manufacture," and when you bear in mind that those words have been construed already so as not to include businesses which may or may not be noxious, the conclusion at which I have arrived is clear and strong, that, even assuming that a hospital may be made out to be a noxious business, it is not a noxious business to which section 112 has any application at all, but it is a thing to be dealt with under the other group of sections which relate specifically to hospitals and infectious diseases.

That is the short answer to the first contention of the plaintiffs that they are entitled to prevent the defendants from erecting a hospital in the plaintiffs' district without their consent. Section 112, to my mind, has nothing whatever to do with it.

The next point raised is that, under sections 131 and 285 combined, the plaintiffs are entitled to say to the Corporation of Manchester, "You cannot erect this hospital upon this piece of ground without our consent." Let us see how this matter stands. First of all, let us assume that the Manchester Corporation, having got this piece of land, which is their own property, have got funds applicable to the erection of a hospital for smallpox patients. Assume that for a moment. Assume that they have got funds to which the Public Health Act has no relation at all. Can you spell out of the Public Health Act any prohibition against the Manchester Corporation building a hospital upon their own land? There, again, I say it is utterly impossible. I have gone through the sections; I am not going to go through them in detail; it has been very skilfully done by Mr. Gully, and partly by Mr. Clare, and exhaustively by the learned judge in the court below, and after spelling through those forty or fifty sections the result is a negative one: that you cannot get out of them any-

thing like a prohibition which prevents the owner of land from building a hospital upon it. But it is put in another way. It is said, "Well, but the Corporation of Manchester are going to build this hospital out of rates, which they have no power to raise except under the Public Health Act, and therefore the Public Health Act is to be drawn in, and must be drawn in, to warrant them in doing what they are about to do." I suppose that is so. Let us look for a moment at section 131 and see whether it is possible to put upon that section the limited construction contained in that argument that will include the Corporation of Manchester. The words are: "May provide for the use of the inhabitants of their district hospitals or temporary places for the reception of the sick, and for that purpose may" do these four things: they may "themselves build such hospitals or places of reception"—no limitation as to place, none whatever; "or contract for the use of any such hospital or part of a hospital or place of reception"—no limitation as to place; "or enter into any agreement with any person having the management of any hospital, for the reception of the sick inhabitants of their district, on payment of such annual or other sum as may be agreed on"—no limitation as to place; or "two or more local authorities may combine in providing a common hospital"—no limitation as to space there either. I think it is perfectly impossible to read that section and get out of it any implied prohibition against building the hospital, or contracting for the use of a hospital, or entering into any agreement with anybody having the management of a hospital, out of the district of a particular local board. Of course, if they cannot get it without exercising compulsory powers, and so on, that is quite another matter; but that is not the case with which we have to do.

Then reliance is placed upon another section—285. The observations made by Chitty, J., upon sections 131 and 285 cannot, in my opinion, be improved upon. He notices what is worthy of attention—that they occur in totally different parts of the Act of Parliament—and the argument based upon section 285 really breaks down when you observe that it is confined to adjoining districts and does not extend to districts which do not adjoin. It appears to me, any argument based upon that section for the purpose of getting out of it a prohibition such as is wanted by the appellants cannot be supported. I cannot, upon this point, add anything to what the learned judge has said; it appears to me when the appellants base their case (as in this action they do) upon the sections of the Public Health Act they hopelessly fail.

Then, that being so, we need not discuss the convenience or inconvenience. They have no right to their injunction: that is the short answer to their appeal, and I think it must be dismissed with costs.

LOPES, L.J.—I entirely agree with the judgment of Chitty, J. In point of fact, if I may say so, I think it is an admirable judgment, and I can add nothing to it.

But there is one observation I should like to make with regard to section 112. If I had been called upon to interpret that section, I should have come to the conclusion, independently of any other sections of the Act, that it had no application to hospitals of this kind. I think the words "any other noxious or offensive trade, business or manufacture" must be read as contemplating something *ejusdem generis* with those things preceding those words. I am clearly of opinion that a hospital is not an analogous kind of business. Assuming it to be a business, as I do, and assuming it, for the purpose of what I am now upon, to be noxious, I think it is not an analogous business with any of those mentioned, and on that ground I should have held it did not come within section 112.

But when I look at the next heading—"Infectious Diseases and Hospitals"—beginning at section 120, and find that hospitals and things connected with hospitals are specially dealt with under that heading, and in sections which follow that heading, I am very much confirmed in the view which I have already expressed with regard to the true interpretation to be put upon section 112. It seems inconceivable that the Legislature intended hospitals to have been included in the enumeration of noxious businesses mentioned in section 112, when we find the Legislature immediately afterwards in express terms dealing with those very businesses. I do not desire to say anything with regard to section 131 and section 285, because I entirely agree with every word in regard to the true interpretation to be put upon those sections that was uttered in the court below by Chitty, J.

In regard to the matter of convenience—the balance of convenience—that is a question which has not to be considered, because we are here dealing with the construction to be put upon an Act of Parliament.

Shortly I say this: that I find nothing in the Public Health Act of 1875 which prohibits the defendants from erecting a hospital on their own ground.

KAY, L.J.—I entirely agree, and should add nothing except from a motive of respect to the able and admirable arguments. There are several that were put to us as to which I feel respectfully bound to say a few words, and also upon one part of the case.

I agree entirely with the result at which the learned judge in the court below has arrived, and I think it may be put upon ground rather stronger than the reasons for which he arrived at his conclusion.

A good deal has been said in course of the argument in this case about the nuisance, and annoyance, and possible injury to the neighbourhood. I agree that much of that was said in order to make out that this was a noxious business; except for that purpose no argument of that kind can possibly be used in this particular case. In this case the Local Board of Withington say, "You have no right to erect this hospital upon your own ground which is within our district without our consent." That depends entirely upon the construction of this Act of Parliament, about which so much argument has been addressed to us—the Public Health Act. It is a question of the construction of that Act of Parliament. I agree this is a motion for an interlocutory injunction, but the plaintiffs, who come and say, "Our consent is requisite before you can build this hospital upon your own land," are bound to make that out as the first step to the relief which they ask, and unless they make that out, their case falls necessarily; no question of convenience or inconvenience arises in a matter of this kind. The question is simply, Aye or No, is that the meaning of this Act of Parliament? Does it make the consent of the Withington Local Board requisite before the Manchester Corporation can make this use of their own land within the Withington district?

Now on section 112 I confess that my opinion has wavered a good deal during the argument. First of all I was rather inclined to doubt whether you could call this a business at all, and whether, if it was a business, it was a noxious business; but the real question is: Even if it can be considered a business, and even if it can be considered a noxious business, does it come within that section? I have come to the conclusion that, even if you could consider the carrying on of a smallpox hospital to be a noxious business, it is not one of the noxious businesses to which

section 112 is addressed, and for this simple reason. I think it is difficult to say that it is not a business, and probably a business within the meaning of the word as used in that section, because, as Mr. Clare particularly pointed out in his most ingenious argument, if it were carried on for the purpose of profit by an individual, as it might be, like the numerous private surgical hospitals in London, it certainly would be a business then. A thing or an operation is not made into a business because it is carried on for the purpose of a profit; otherwise you might say, if it does not produce profit it is not a business, which would be ridiculous. Therefore, *primâ facie*, it seems to me it is made out to be a business.

Then upon the other question: Is it noxious or not noxious? I confess I think a great deal may be said in favour of the view that it is noxious *per se*, that the establishment of a smallpox hospital, which is one of the most infectious diseases known, and which generally does produce an increase of smallpox cases in the neighbourhood of the hospital by some means or other (the means not being quite thoroughly recognized even by medical authority) is establishing a business which, in one sense of the word, is of a noxious kind.

But, then, is it a noxious business within the meaning of this section? The section is one of a group which is headed with the words "Offensive Trades." Then it goes on to particularize certain trades which certainly are as unlike the carrying on of a hospital as could possibly be imagined, and it contains, no doubt, the words at the end of the enumeration of the particular trades, "any other noxious or offensive trade, business or manufacture." You have got the word "business" there put in between the words "trade" and "manufacture," undoubtedly meaning that that section is to apply to what are ordinarily called trades, businesses, or manufactures; and it gives the local authority a power of veto over the establishment or commencement of a trade, business, or manufacture which is noxious or offensive. I agree that it would be possible to construe that section as including within the word "business," and possibly —I do not say more—within the word "noxious" also, the establishment of a smallpox hospital, if you do not look to the rest of the Act of Parliament. But the very next group of sections, the one beginning with section 120, is headed "Infectious Diseases and Hospitals." Then you have a number of sections applying to hospitals distinctly. To my mind it is impossible to read this Act of Parliament so as to include within the group of sections headed "Offensive Trades" the establishment of a hospital, when you find another and separate group of sections actually addressed to hospitals and to infectious diseases—"Infectious Diseases and Hospitals"—which give the urban authority such powers as the Act intended they should have with reference to institutions of that kind. For that reason, which was not so much, I think, insisted upon by Chitty, J., it seems to my mind a conclusive reason for coming to this result—that the proper construction of this Act of Parliament is that a hospital, though it may be a business, and though it may be a noxious business, is not within the provisions of section 112, which require the consent of the district within which the hospital is being erected, before it can be so erected.

So much for that point. On the other point a very ingenious argument was raised upon sections 131 and 285. I really can add nothing to what has been said by the learned judge in the court below, whose argument I follow and agree with entirely, and also with what Lindley, L.J., has said.

I think on both grounds the appeal fails, and it is plain, as I have said, that no consideration of convenience or inconvenience can possibly arise on this discussion if the plaintiffs fail to make out, as I think they have failed, that their consent is necessary before this hospital can be erected upon the land within their district which belongs to the Corporation of Manchester. They have to make that out under the Act of Parliament; and I can see nothing which makes their consent necessary, nothing which gives them a power of veto, and therefore, for this reason, I think the appeal must be dismissed with costs.

I will only say one word as to another point which has been raised in argument, and that is this. It was suggested that the Manchester Corporation, in building this hospital, were exceeding their own powers. Now with that the Withington Local Board have nothing on earth to do. It is a point which cannot be raised in this action at all. If that is to be raised it must be raised by the Attorney-General in an action properly framed in the nature of an information, and the point must be raised by pleadings and evidence. I understand there are no pleadings and evidence addressed to that point in this case at all. Therefore I think that argument cannot be made use of.

Appeal dismissed.

Solicitors for the Withington Local Board, *Chester & Co.*, for *Crofton & Craven*, Manchester.

Solicitors for the Corporation of Manchester, *Austin & Austin*, for the Town Clerk, Manchester.

High Court of Justice.

Chan. Div. North, J. — Dec. 1.

In re Corcoran.
Corcoran *v.* Riddell. (*a.*)

Will—Contingent bequest to charity—Statute of Mortmain—Investment on mortgage—Discretion of trustees.

A testator bequeathed the residue of his personal estate to trustees on trust for sale, conversion, and investment, and to stand possessed of the same on trust for his niece for life, with remainder to her issue, and on her decease without issue, on trust to transfer the same or so much thereof as might by law be so applied for the benefit of a charity. He gave his trustees power to postpone the conversion of his mortgage securities, and also power to invest on real securities. The trustees invested part of the residuary personal estate on mortgage of real estate; and some part of the residuary personal estate, consisting at the decease of the testator of real securities, was left unconverted. Testator's niece died without issue.

Held, that the charity could only take such parts of the residuary estate as at the decease of the testator's niece consisted of pure personalty.

By his will, dated the 14th of August, 1879, James Corcoran appointed his nephew, Edward de Vernon Corcoran, and his niece, Anna Corcoran, and C. J. Johnson executors and trustees thereof, and bequeathed the residue and remainder of his personal estate to his trustees upon trust for sale and conversion, with full discretionary powers to permit any part of his said residuary personal estate which should at his death consist of mortgages, stocks, funds, shares in public companies, colonial and foreign Government securities, or any other species of investment yielding income, to remain in the same state of investment for

(*a.*) Reported by J. Arthur Price, Esq., Barrister-at-Law.

such periods as his trustees should think fit; and as to moneys to arise from the sale and conversion of his said residuary personal estate, upon trust to invest the same in their names in or upon the public funds, Government securities of the United Kingdom, real securities in England or Wales, or the bonds, debentures, or debenture stock or guaranteed stock or shares of any railway or dock company in England authorized by special Act of Parliament and at the time of the investments therein respectively paying dividends, with power for his trustees to vary such investments; and upon further trust to permit his said niece Anna Corcoran to receive the income of his said residuary personal estate and of the investments thereof, and after her death to hold the said principal in trust for her issue. But if no object of the last preceding trust should acquire an absolute vested interest in the said trust funds, then on trust, upon the death of his niece, the said Anna Corcoran, to pay, assign, and transfer his said residuary personal estate, and the stocks, funds, and securities whereon the same might be invested, or so much or such parts thereof as might by law be so applied, unto the Roman Catholic bishop of the Roman Catholic diocese of Northampton for the time being, his then vicar-general, and the Roman Catholic priest who should be then in charge of the Roman Catholic mission at Bedford, who should hold and apply the same as part of the general funds of the said Roman Catholic diocese of Northampton. And the testator declared that if his said nephew Edward de V. Corcoran should purchase the Angel Hotel, Wellingborough, and the Rose Inn at Bedford, or either of them, his executors and trustees should lend to him out of his residuary personal estate the amount of the purchase-moneys thereof at the rate of £3 per cent. per annum.

The said James Corcoran died on the 22nd of August, 1879, and his will was proved by his said executors on October 14, 1879.

Edward de Verdon Corcoran, after the death of James Corcoran, purchased the Angel Hotel, Wellingborough, for the sum of £2,400, and the trustees of the will advanced to him the sum of £1,200 upon the security of a mortgage of the said hotel premises. Anna Corcoran died on February 20, 1892, without ever having married. Of the testator's estate, which at his death consisted chiefly of pure personalty, £2,175 had been advanced by the trustees on mortgages, and other investments represented impure personalty.

A summons was taken out by the trustees of the will to determine whether the whole of the residuary estate of the testator, or, if not, what part of the stocks, funds, and securities representing the same, passed on the death of Anna Corcoran, the tenant for life, to the Right Rev. Arthur Riddell, Roman Catholic Bishop of Northampton, the Very Rev. Canon Scott, his vicar-general, and the Rev. R. C. Middleton, priest in charge of the Roman Catholic Mission at Bedford, who, together with Martin and Maria Lynch, the testator's next of kin, were made defendants to the summons.

Macnaghten, for the trustees, stated the facts.

Cozens-Hardy, Q.C., and *Butcher*, for the Roman Catholic charity.—The general rule is that the date of the testator's death is the proper time to ascertain what part of his estate consisted of pure and what of impure personalty. The words of the will are not sufficient to prevent its application. What at the testator's death was pure personalty must pass to the charity. The testator's intention cannot be defeated by the action of the trustees. [NORTH, J.—Do you say that if the testator had directed his trustees to invest his pure personalty on mortgage of freehold land the charity could have taken?] No; but we contend that this is not the case. Charity trustees are, however, authorized by statute to invest on mortgage securities, although they cannot foreclose: 33 & 34 Vict. c. 32. The trustees had no right to defeat the testator's intention in any case. [NORTH, J.—Does not the testator authorize them to advance money on the mortgage of the two inns?] No. He authorizes them to lend money. [NORTH, J.—Without security?] He only intended that they should take personal security. The £1,200 secured on mortgage of the Angel Inn was pure personalty at the death of the testator, and as such it ought to go to his residuary legatees, the Roman Catholic charity.

Sir Arthur Watson, Q.C., and *Warrington*, for the next of kin.—All such investments, whether made by the testator or the trustees acting in their discretion, that savour of the realty belong to the next of kin. Especially is this true of the money advanced on mortgage by the testator's direction to his nephew. The trustees had an absolute discretion and they acted *bonâ fide*. [They referred to *Baker* v. *Sutton*, 1 Keen, 224.] The express trust in the testator's will is that the whole of his residuary personal estate, and the stocks, funds, and securities whereon the same might be invested, or so much and such parts thereof as might by law be so applied, should be transferred to the charity. This certainly must exclude all impure personalty. The express direction to the trustees to advance the purchase-money to his nephew was necessary, because his nephew was a trustee of his will. There is, however, no direction in the will permitting the trustees to advance the purchase-money to him merely on his personal security.

Cozens-Hardy, Q.C., replied.

NORTH, J.—I think that the real securities existing at the date of the death of the tenant for life cannot be transferred to the three charitable trustees named in the will. The language of the testator's will is: "Upon the death of my niece shall transfer my residuary personal estate, and the stocks, funds, and securities whereon the same may be then invested, or so much and such parts thereof as may by law be so applied, unto" the three persons. Now, supposing that all his personal estate had been pure personal estate, the direction is that it is to be invested, and after the death of the tenant for life to be transferred to these persons. The investment is made, in part, upon a mortgage. I do not think that can be transferred. If the testator had directed that the trustees should take his personal estate and invest it in the purchase of land and transfer that to the charitable trustees, it is conceded that that could not have been done. If it had been, instead of purchasing, to invest it on mortgage of real estate and transfer the mortgage to the trustees, it is again admitted, and clearly settled by authority, that that could not have been done. Then supposing it had been this: "I give my pure personal estate to trustees upon trust to invest it as they please on the purchase or mortgage of land, or on pure personal security, and transfer the property so acquired to trustees." In that case, in my opinion, the trustees would have had a discretion to exercise which might have the effect of enabling it to go to the trustees of the charity, or might have prevented it from going to the trustees of the charity, and if they had exercised their power *bonâ fide* in the exercise of their discretion, the charity trustees would or would not have taken according to the result. In a case of that sort it might be rather difficult to say whether the trustees had exercised a discretion *bonâ fide* or not,

because they had only one thing to look to—viz., where the fund was going.

In the present case there is a tenancy for life, and it is with reference to the tenant for life, and, after the death of the tenant for life, for the benefit of her children, if any, that the discretion is to be exercised, and it is only after the death of the tenant for life and failure altogether of her children that the charities take at all. Under the circumstances the trustees did in the exercise of their discretion invest part of the pure personalty upon a mortgage of real estate. Can, in the events that have happened, the trustees of the charity ask to have the mortgage transferred to them? In my opinion they cannot do so. They can only claim under the will. The testator gives the property existing at the death of the tenant for life without issue, and that property must be dealt with according to the state in which it is then found, under the terms of the will. The will says: "The residuary personal estate and the stocks, funds, and securities wherein the same may be then invested or so much or such parts thereof as may by law be so applied." The direction therefore is that the then investments are to be transferred. In my opinion it makes no difference as regards the power of the testator whether he directs a mortgage security to be transferred upon the death or whether he directs his pure personalty to be invested on a mortgage and the mortgage to be transferred, or, thirdly, whether he directs the pure personalty to be invested on a mortgage and held for the benefit of the tenant for life, and after the death of the tenant for life to be transferred, or, fourthly, whether he gives a discretion to the trustees as to what the investment should be, when that discretion is *bonâ fide* exercised by them in the acquisition of a mortgage security. Under these circumstances it seems to me that the only claim the charity can make in this case under the express direction in the testator's will is that, having regard to the events which have happened, a mortgage security should be transferred to them, and that in my opinion cannot be granted, having regard to the statute bearing upon the subject. I do not think that the statute referred to, authorizing charity trustees to invest on mortgage, really has any application here. That statute doubtless gives them power to invest money that is clearly and admittedly the money of a charity, upon mortgage security, taking care that the evil intended to be avoided by the Mortmain Acts, namely, the acquisition by a charity of land, shall be avoided in that particular case by the restriction that they shall never be able to foreclose. I do not think that applies here as regards the final clause.

Solicitors, *Crossman & Prichard*, for *H. Tebbs*, Bedford; *Speechly, Mumford, & Co.*, for *Whyley & Piper*, Bedford.

Chan. Div.
Vaughan Williams, J. } Jan. 12, 13; Feb. 14.

In re BOROUGH COMMERCIAL AND BUILDING SOCIETY (LIMITED). (*a.*)

Company—Winding up—Unlimited liability—Reduction of capital—Memorandum and articles—Clause in articles giving right of withdrawal.

An unlimited company was incorporated under the Companies Acts, 1862 *to* 1880, *with the object (as stated in the memorandum) of, among other things, lending money to its members. The articles provided that the capital of the company should not be of any fixed nominal amount, that every person should be deemed to be a member who became possessed of a share, and that any member desirous of withdrawing before his share or shares were fully paid should give notice to the company, and, if the committee allowed his withdrawal, he might, on payment of all moneys due to the company, receive back his subscription according to a scale. The company went into voluntary liquidation, and the liquidator took out a summons to make members withdrawing in accordance with the memorandum and articles of the company declared liable for calls on shares they had held.*

Held, that, according to the observations of Lord Herschell in Trevor *v.* Whitworth, 36 *W. R.* 145, 12 *App. Cas.* 409, *there was a distinction between a limited and an unlimited company with respect to the validity of a clause of withdrawal like the above, and that persons who had withdrawn from membership in pursuance of such clause were under no liability in the winding up.*

Summons.

The above-named company was incorporated in 1883, under the Companies Acts, 1862 to 1880, with unlimited liability.

By the memorandum of association (clause 3) the objects for which the company was established were the following:—

"(*a*) To accumulate capital by means of monthly subscriptions from members, and also to raise funds by borrowing money from members or other persons or companies, on such security and on such terms as the committee may deem conducive to the interests of the company.

"(*b*) To advance or lend any portion of the said capital or funds to members or other persons on the security of real or personal property, bills of exchange, bills of sale, promissory notes, machinery, stock-in-trade, and such other security as the committee may deem sufficient.

"(*c*) To purchase or otherwise acquire any land or buildings on any tenure, and any other kind of property, whether on land or sea, in the United Kingdom, the British colonies, or in any foreign country, and to sell, mortgage, let, work, develop, or otherwise dispose of the same, or any part thereof.

"(*d*) To receive money on deposit from members or other persons or companies, at such rate of interest or on such terms as may be agreed upon, and to issue debenture bonds or other securities based upon any of the real or personal property of the company; and

"(*e*) To do all such other things as may be incidental or conducive to the attainment of the above objects or any of them."

The articles of association, so far as is material for the purposes of this report, provided as follows:—

(2) The capital of the society shall not be of any fixed nominal amount, and shall be divided into shares of the ultimate value of £50 each. The shares shall be paid up by contributions of 10s. per month for each share taken up, and all contributions and other moneys shall be paid at the registered office of the society. . . .

(3) Every person shall be deemed to be a member of the society who shall become possessed of a share either by original allotment, transfer, or transmission, and upon his name being entered on the register of members of the society.

(9) Any member desirous of withdrawing from the society before his share or shares are fully paid shall give one calendar month's notice in writing to the secretary, and if the committee allow his withdrawal he may, on payment of all fines or other moneys due to the society, receive back his subscriptions according to the following scale, or such other terms as the com-

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

mittee may decide:—Withdrawal during first year of membership for every £1, 18s.; withdrawal during second or third year of membership for every £1 paid, 19s.; withdrawal during fourth or any subsequent year of membership for every £1 paid, 19s. 6d.

(39) Any member wishing to receive an advance from the society shall apply to the committee, and state the security he proposes for the loan, and the committee shall decide whether the loan be made on the security offered, and shall cause all such inquiries and arrangements to be made, and do all things in and about the matter which they may think necessary. All loans shall bear interest at £5 per cent. per annum, such interest to be paid monthly along with the subscription, and in calculating such interest the monthly subscriptions from time to time paid by the borrower are not to be taken as reducing the amount of the loan. Any member may, subject to these articles, receive a loan from the society equal to the amount he has paid into the society, subject to the former part of this article, on his giving his own promissory note for the amount, such note to carry interest at £5 per cent. per annum. All the costs and expenses of or in any way connected with the giving or taking any security as aforesaid shall be paid by the borrower. All promissory notes, receipts, or other securities shall be attested by the secretary or his deputy, or by a member of the committee or a solicitor.

Messrs. Lunn, Sellars, and Wood became members of the society, and after they had become members they became borrowers, and before the voluntary winding up hereafter mentioned, had paid off the loans made to them by the society. The facts were complicated, but it appeared that in practice the society never lent to persons who were not members except in the case of kindred societies, and that after the payments made by Lunn, Sellars, and Wood, the society ceased to treat them as members.

The company went into voluntary liquidation and the liquidator put Lunn, Sellars, and Wood on the list of contributories, and now took out this summons in the winding up calling on them to show cause why they should not pay the amounts set against their names in the schedule to the summons, which were sums alleged to be due from them in respect of calls. Sellars did not appear.

Farwell, Q.C., and *Davenport*, for the summons.—The clause in the articles giving the members a right of withdrawal is *ultrà vires* and inconsistent with the Companies Acts, and is a reduction of capital in a manner different from that required by those Acts: *Trevor* v. *Whitworth*, 36 W. R. 145, 12 App. Cas. 409.

R. W. Harper, for Wood.—*Trevor* v. *Whitworth* only relates to a company with limited liability, as is clear from the judgment of Lord Herschell, who expressly distinguishes unlimited from limited companies.

Leverson, for Lunn.

Farwell, Q.C., replied.

Some further facts and arguments are stated in the judgment.

VAUGHAN WILLIAMS, J.—I find as a fact that the intention of the society, with regard both to Lunn and Sellars and Wood, was to accept the total sums paid by them in full satisfaction of all claims by the society, and that the society further intended that on such payments being made these persons should be treated as withdrawing from membership. The intention of the society in its general practice was that any person holding shares only for the purpose of obtaining a loan should, on paying off such loan and any other moneys then due to the society, *ipso facto* cease to be a member thereof. That was the idea of those who had the conduct of the society, and I think that, if anyone had asked any officer of the society before the winding up whether persons paying off their loans continued to be members, the answer would have been "No." The society carried on a business of making loans, and those who had borrowed were treated, on making payment, as having withdrawn from membership. The result would be that if in law the society was competent so to deal with its members, the persons so dealt with would in law cease to be members, and, in case of a winding up, would not be liable to be placed on the list of contributories. The question remains whether it was competent for the officers of the society so to deal with its members. If the company had been one with a limited liability, then, according to the decision of the House of Lords in *Trevor* v. *Whitworth*, no such arrangement would have discharged these persons. When I say that no such payment would have freed the members, I feel that I am attempting to compare things which it is perhaps impossible to compare, for in a limited company, if there had been a £50 share, the payment of £50 by the holder would pay off the amount of his liability, and it is difficult to put the hypothesis to one's mind of liability continuing after payment of the £50. But I have cited the case to show that I am not overlooking the fact that it was there laid down that a member of a limited company could not get rid of his liability otherwise than by payment or by means of a forfeiture, and not always then.

It seems that *Trevor* v. *Whitworth* is a useful authority in the present case, rather for the observations made by Lord Herschell than for other purposes. Lord Herschell said: "I will first consider the question apart from authority, and then examine the decisions relied on. The Companies Act, 1862, requires (section 8) that in the case of a company where the liability of the shareholders is limited, the memorandum shall contain the amount of the capital with which the company proposes to be registered, divided into shares of a certain fixed amount; and provides (section 12) that such a company may increase its capital and divide it into shares of larger amount than the existing shares, or convert its paid-up shares into stock, but that, 'save as aforesaid, no alteration shall be made by any company in the conditions contained in its memorandum of association.' What is the meaning of the distinction thus drawn between a company without limit on the liability of its members and a company where the liability is limited, but in the latter case to assure to those dealing with the company that the whole of the subscribed capital, unless diminished by expenditure upon the objects defined by the memorandum, shall remain available for the discharge of its liabilities? The capital may, no doubt, be diminished by expenditure upon, and reasonably incidental to, all the objects specified. A part of it may be lost in carrying on the business operations authorized. Of this all persons trusting the company are aware, and take the risk. But I think they have a right to rely, and were intended by the Legislature to have a right to rely, on the capital remaining undiminished by any expenditure outside these limits, or by the return of any part of it to the shareholders."

It is remarkable that Lord Herschell said this of a limited company, and pointed out that there was in this respect a distinction between a limited and an unlimited company. I am therefore of opinion that in the view of Lord Herschell, as expressed in those observations—I do not say it was a judgment, but it was Lord Herschell's view—that these matters mentioned there as distinguishing a company limited from a company unlimited do not apply to a company

unlimited. I am therefore of opinion, after having carefully looked through the Companies Acts of 1862 and 1867, that there is nothing to prevent a company unlimited from providing by its memorandum and articles for a return of capital to the members of the partnership, or for the withdrawal of members from the company. I do not say that if you had a company unlimited, with no fixed amount of capital, in the absence of any provisions for withdrawal of members, the officers of the company could arrange with a member for his withdrawal so as to discharge him from liability to creditors in the event of a liquidation. There was a great deal in the argument of Mr. Farwell that it never could have been intended by the Legislature that the law should be in such a condition that, whenever the affairs of a company seemed to be in an unfavourable condition, the more solvent shareholders should be in a position to go to the insolvent shareholders, who had nothing to lose, and say, "Pass a resolution consenting to our withdrawal, and then the liquidation may follow and the creditors may get what they can, and we shall escape from our liability." That would be an unsatisfactory state of the law, and I doubt whether such a withdrawal would be of any validity against creditors. But I have not to decide that question, and do not decide it. All I say is that there is nothing in the words or in the spirit of the Acts of Parliament which prevent an unlimited company being associated on the terms that members may withdraw in the mode provided by the particular memorandum or articles. It seems if one limits the matter in that way the creditors have nothing to complain of. They could look at the articles and see that a member could withdraw by doing particular acts. If a large number of members were to withdraw by taking advantage of those articles, the creditors, with notice of the rules, would have nothing to complain of. So I arrive at the conclusion that, notwithstanding *Trevor* v. *Whitworth*, it is possible to have an unlimited company so formed that withdrawal of members may be made in accordance with the memorandum and articles, and that there is no wrong to the creditors in giving effect to a memorandum and articles so drawn. By the very force of the terms it is plain that in the case of an unlimited company the creditors know that there is no fixed capital, and therefore they have no right to complain of a reduction of that which had never been fixed in any way.

Taking this view, the next matter I have to deal with is the question whether the rules of this society provide for the withdrawal of members, and whether these members availed themselves of these provisions and have withdrawn. The plain meaning of the memorandum and articles is that, in respect of shares taken for the purpose of enabling those who took them to borrow money from the society, as soon as the loan had been discharged the membership in respect of those shares came to an end, and the members were *ipso facto* withdrawing members. That was the view taken by the society's officers. As soon as the loan was paid off the society ceased to send to members who had paid off notices of the transactions of the society, whereas, if the view of the liquidator is accurate, a member who had paid off would have the deepest interest in knowing how the society was going on. Article 9 deals with an indulgence which might be granted to those who had not paid up their shares by allowing them nevertheless to withdraw. If *Trevor* v. *Whitworth* applies, that claim would be *ultra vires*. But, having regard to the fact that this is an unlimited company, that decision does not apply. If this conclusion is wrong, a member in default could withdraw, whereas a member not in default could not withdraw. It must be remembered that this society was not formed to make a money profit or for the distribution of its earnings amongst its members, but for their mutual advantage. When a member had obtained his advantage and had paid for it, it was only consistent that the society should have its rules so framed that such a member should be allowed to withdraw.

Under the circumstances I come to the conclusion that those who had fully paid their shares were intended by the rules of the society to cease to be members. The object was effected, their liability discharged, and they were no longer to be members unless their liability was pledged to the creditors. Though their liability would be so pledged in the case of a limited company, in a case like this the credit of the members is in no way pledged, and they are not liable as contributories. The summons must be dismissed as against Wood and Lunn, with costs, but the liquidator will be allowed to pay such costs and his own costs out of the assets of the company.

Solicitors, *Iliffe, Henley, & Sweet*, for *G. G. Fisher*, Huddersfield; *Ramsden, Radcliffe, & Co.*, for *Sykes & Ramsden*, Huddersfield; *Crossman & Prichard*, for *J. Sykes & Son*, Huddersfield.

Q. B. Div.
(Day and Collins, JJ.) Feb. 1.

BELTON v. LONDON COUNTY COUNCIL. (*a*.)

Lands Clauses Acts—Compulsory purchase—Compensation—Reversionary interest in licensed premises—Admissibility of evidence to prove the present market value of the claimant's interest in the premises as licensed premises.

In estimating the amount of compensation under the Lands Clauses Acts to be paid to the reversioner of licensed premises, let on lease with twenty-six years unexpired, required by a public body under compulsory powers, the arbitrator ought to admit evidence to prove the present market value of the claimant's reversionary interest in the premises as licensed premises, and need not confine the evidence to the estimated rental value of the premises as a house and shop apart from the question of whether, when the reversion falls in, they would then be licensed premises.

This was a special case stated by an umpire, submitting for the opinion of the court a point of law which had arisen during arbitration proceedings to assess the compensation payable to the claimant in respect of his reversionary interest in certain premises about to be acquired by the county council under compulsory powers. The case was stated as follows:—

1. Under the powers of the Thames Tunnel (Blackwall) Act, 1887, the London County Council (hereinafter called "the council"), as successors of the Metropolitan Board of Works, are authorized to construct a tunnel or subway under the River Thames at Blackwall, with the roads and approaches thereto in such Act described, and for the purposes thereof required to purchase and take certain lands and premises belonging to the said John Belton (hereinafter called "the claimant").

2. The council duly served notice to treat for such lands and premises, and a claim was duly made by the claimant in respect thereof, and subsequently each

(*a*.) Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

side duly appointed arbitrators. The arbitrators failed to agree as to the amount of compensation to be paid by the council to the claimant, and duly appointed me to be the umpire to determine the question of such disputed compensation.

3. The premises in question consist of a fully-licensed public-house known as the "Cooper's Arms," High-street, Poplar, and certain houses, shops, workshops, and stabling adjoining. No question of law arises as to any portion of the premises except the public-house.

4. The Cooper's Arms" is a copyhold property, and has been, together with the house adjoining, being No. 311, High-street, Poplar, let by the claimant for a term, of which twenty-six years are unexpired, at the annual rent of £100.

5. When the case was being heard by me counsel for the claimant tendered evidence for the purpose of showing the present market value of the claimant's reversionary interest in the "Cooper's Arms" as it now exists, being licensed as a public-house.

6. Counsel for the council objected to my admitting the evidence in question, upon the ground that the licence was not an element of value attaching to the premises in reversion after twenty six years, and that for the purposes of estimating the reversionary value I must estimate the rental value of the premises as a house and shop apart from the question of whether they would then be licensed premises and requested me to state a case for the opinion of the court, raising the question as to the admissibility of the evidence.

7. I was prepared to admit the evidence, but as counsel for the council protested against such admission, and stated that he was not prepared with evidence upon the point, I consented to state a case for the opinion of the court before admitting the evidence.

8. The question for the opinion of the court is whether I ought to admit evidence to prove the present market value of the claimant's reversionary interest in the "Cooper's Arms" as a licensed public-house, or whether, for the purpose of ascertaining the reversionary value, I should confine the evidence to the estimated rental value of the premises as a house and shop, apart from the question of whether, when the reversion falls in, they would then be licensed premises.

Moulton, Q.C. (*Freeman* with him), for the London County Council.—In assessing the value of this reversionary interest the capabilities of the premises should be included, but not the fact of their application to the particular trade carried on. The evidence here should not go further than showing that these premises are suitable for a licensed trade. It is not everything that raises the value in the market that is a legitimate element for the arbitrator to notice, and certain persons—viz., brewers—would give an unduly large price in the present case. The licence has not been granted in perpetuity; it only gives a temporary value to the house, and ought not to be considered in dealing with the reversioner.

He referred to *Wadham* v. *North-Eastern Railway Co.*, 33 W. R. 215, 34 *Ib.* 342, 14 Q. B. D. 747, 16 *Ib.* 227; *Beckett* v. *Midland Railway Co.*, 16 W. R. 221, L. R. 3 C. P. 82; *Ricket* v. *Metropolitan Railway Co.*, 15 W. R. 937, L. R. 2 H. L. 175; *Metropolitan Board of Works* v. *McCarthy*, 23 W. R. 115, L. R. 7 H. L. 243.

Sir H. James, Q.C., and *Edward Pollock*, for the claimant, were not called upon.

DAY, J.—I am clearly of opinion that the course which the umpire proposed to take was the right one, and that the answer to his question is that he ought to admit evidence to prove the present market value of the claimant's reversionary interest in the "Cooper's Arms" as a licensed public-house, that is, as a public-house which is now licensed. I cannot conceive any other test of value. The argument put forward by Mr. Moulton involves great injustice, and its success would result in public bodies being enabled to obtain property under compulsory powers at less than its fair market value, to obtain it at one price and, if they were sufficiently dishonest, to avail themselves of the opportunity to sell it again at a very much enhanced price. The fair market price of the claimant's interest is what he has a right to have; he ought not to suffer by reason of what are deemed public improvements; he is to get its value as if he had brought it into the market and sold it at public auction. The umpire proposed to receive evidence to ascertain what this property was worth in the market such as it is now, and I am clearly of opinion that he was entitled to do so. No sound argument can be brought forward to show that the council are at liberty to take property at less than the fair market value. That is the true test; casual expressions of judges in other cases on other subjects must be read in reference to their subject-matter. In the cases of *Wadham* v. *North-Eastern Railway Co.* and *Beckett* v. *Midland Railway Co.*, to which our attention has been called, the judges were dealing with the question of compensation for injuriously affecting lands under section 68 of the Lands Clauses Act, 1845, and no case has been cited to us which would exclude evidence to enable the umpire to find the fair present market value of the property which he is required to assess on its transfer from the owner to the public buyer.

COLLINS, J.—I am of the same opinion. I think there is a strong *primâ facie* objection to holding that the Legislature intended to deprive the claimant of that which it is admitted would be an important factor if he were ascertaining the present market value of his interest. Mr. Moulton adduced no authority for that proposition; his cases referred to section 68, which deals with injuriously affecting property, and seem to me to bear not in his favour, but against him. In *Wadham* v. *North-Eastern Railway Co.* the question was whether depreciation in the special value of the premises as a hotel and public-house could be taken into account under section 68. When the case came before the Court of Appeal a question arose as to whether the proper inferences had been drawn by the court below from the findings as stated by the arbitrator, and the case was sent down to him again. He then found in terms: "I considered that the hotel premises were from their construction and situation specially suitable to be let or sold as premises to be used as a hotel and public-house. I looked at the fact that the premises known as the 'Royal Hotel' were being, and had been for some time, used as a hotel and public-house as part of the evidence that such premises were suitable for being used as a hotel and public-house." In consequence of this report Sir Farrer Herschell for the railway company declined to further argue the case; so that this is a decision of the Court of Appeal that, in dealing with the question of injuriously affecting property under section 68, the arbitrator is not only justified, but is bound to take into consideration evidence that the premises are being used for a particular purpose, and Mr. Moulton admits that the possibility of the premises being used as a public-house may be taken into consideration; but he says that in appraising that possibility you are not to take into consideration the probability, which appears to

me to be an absolutely impossible contention. Even upon Mr. Moulton's own authorities then, apart from common sense, it is clear that an element of value which would affect the price of the property in the open market may be taken into consideration, and evidence may be received upon it by the umpire in assessing the compensation to be paid upon compulsory purchase.

Appeal dismissed.

Solicitors for the claimant, *Young, Jones, & Co.*

Solicitor for the county council, *Blaxland.*

Q. B. Div.
(Day and Collins, JJ.) Jan. 25.

WHITWORTH *v.* DARBISHIRE AND OTHERS. (*a.*)

Practice—Pleading—Statement of claim—Joinder of causes of action—Claim against executor as such—Claim against executor for personal wrong—Right to join such claims—Ord. 18, *r.* 5.

The earlier paragraphs of a statement of claim in an action against executors, alleged that, in consideration of certain services which the plaintiff performed for their testator in his lifetime and at his request, the testator had promised the plaintiff to bequeath him the sum of £5,000, but that the testator had not done so. Then came two paragraphs claiming the same sum in the alternative, as against the defendants personally, on the ground that the defendants had, by undue influence and fraud, induced the testator to break his contract with the plaintiff as to leaving the plaintiff the above sum.

Held, that these two paragraphs, as they showed a cause of action against the defendants in their private capacity, and without any reference to the estate of the testator, could not, under ord. 18, *r.* 5, *be joined with the claim against the executors as such.*

Appeal from an order of Wright, J., reversing an order of a master. The master had refused to strike out three paragraphs of a statement of claim, but the learned judge in chambers ordered all three—namely, paragraphs 7, 8, and 9 of the statement of claim—to be struck out, on the ground that they were irrelevant and showed no cause of action beyond that shown in the preceding paragraphs, and that they were therefore useless; also that they could not, under ord. 18, r. 5, be joined with the previous paragraphs of the claim.

The facts, as disclosed in the statement of claim, were as follows:—The plaintiff was an engineer, and the three defendants were the executors and residuary legatees under the will and codicils of the late Sir Joseph Whitworth, who died in 1887. During the lifetime of the late Sir J. Whitworth—namely, from the year 1875 until 1880—the plaintiff was in the employment of Sir J. Whitworth as private secretary, and also assisted him in perfecting and developing certain patents in which Sir J. Whitworth was interested, and also provided materials, constructed models, and made experiments under the direction and at the special request of Sir J. Whitworth, until his death in 1887. Sir J. Whitworth in his lifetime promised the plaintiff that, in consideration of the plaintiff rendering him the services and supplying the materials and doing the work already mentioned, he (Sir J. Whitworth) would, by his will, leave and bequeath to the plaintiff the sum of £5,000. Alternatively, the plaintiff sued the defendants, as executors, for money payable by Sir J. Whitworth on a *quantum meruit* for work done and materials provided by the plaintiff; and the plaintiff alleged that the defendants as executors had sufficient assets of the testator to pay the debt of the plaintiff, and had not paid it.

Then came paragraph 7, which set out: "That in the further alternative the plaintiff's claim is against all and each of the defendants personally, for that, knowing of the contract between the plaintiff and the late Sir J. Whitworth, they fraudulently and by undue influence, and while the said Sir J. Whitworth was in a state of senile dementia, induced him to make the will and codicils that he purported to make, and of which they are executors, and whereby they practically became possessed of the whole of the property of the late Sir J. Whitworth, no provision in the said will or codicils having been made by the said Sir J. Whitworth for payment to the plaintiff of the agreed sum of £5,000."

Paragraph 8: "By the fraud and undue influence of the defendants in the preceding paragraph set forth the late Sir J. Whitworth was induced to break his said contract with the plaintiff to leave him on death the sum of £5,000."

Paragraph 9: "In the further alternative the plaintiff says that before and at the time of the execution by Sir J. Whitworth of the said will and codicils the defendants knew that the said Sir J. Whitworth had contracted and then intended to bequeath to the plaintiff the said sum of £5,000 as remuneration for the services rendered by the plaintiff to him, and that the said Sir J. Whitworth was desirous that the plaintiff should be paid out of his estate the said sum of £5,000, which is one of the wishes referred to in the fourth codicil to the will, and the plaintiff contends that the defendants took the said residuary estate burdened with a trust in the plaintiff's favour to pay to him thereout the sum of £5,000, and the plaintiff claimed £5,000."

The words of the fourth codicil relied on by the plaintiff to create a trust in his favour were these:—"And I accordingly give to them" (that is, the defendants), "such real and personal estate in equal shares for their own benefit, having full confidence that they will respectively desire to carry out my wishes to the utmost of their power, but nothing in this codicil or in my will shall be construed so as to impose any trust upon my residuary legatees and devisees" (that is, the defendants), "or any of them, or in any manner to abridge or qualify their absolute ownership or rights."

The learned judge at chambers struck out paragraphs 7, 8, and 9; and the plaintiff appealed.

Lionel Hart, for the plaintiff.

Sir C. Russell, A.G., and *Danckwerts*, for the defendants.

DAY, J.—This is an application by way of appeal from the learned judge at chambers, who has struck out of the statement of claim, paragraphs 7, 8, and 9. The grounds upon which the decision of the learned judge is supported are different with regard to paragraphs 7 and 8 from what they are with regard to paragraph 9. As to paragraphs 7 and 8 the decision of the learned judge is supported on the ground that the cause of action raised in these paragraphs cannot be joined with the other cause of action. As to the 9th paragraph the objection is a different one, and substantially it is that that paragraph is frivolous and that no foundation of any sort is shown for it in point of law.

As to paragraphs 7 and 8, we are both clearly of opinion that they must be struck out of this statement of claim. To my mind they do not come within the

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

rule (ord. 18, r. 5). They are not claims which in any way affect the estate. They do not arise out of the estate at all, but they are causes of action which, if there is any foundation for them, are just as applicable whether the defendants were executors or strangers, whether they derived any benefit under the estate or no benefit at all. They have no bearing on their position as executors, and they are improperly joined with the cause of action previously alleged.

Even if I were of opinion that they came within the terms or spirit of ord. 18, r. 5, I should still not allow them to be joined with the other previous paragraphs as forming one cause of action. I should strike them out and disallow them in the exercise of my discretion, and I should not allow them to be joined with the other cause of action. If we look at the previous paragraphs and paragraphs 7 and 8, these latter are essentially dependent on the establishment of a contract, and if that contract is maintained, then the whole £5,000 would be recoverable, and it is not to be tolerated that such paragraphs should be allowed when they are utterly unnecessary, and when they are based substantially on the same cause of action as the previous paragraphs. Therefore, if I were called upon to exercise a discretion, I should certainly order them to be struck out.

With regard to paragraph 9, I consider that is utterly frivolous. As reference has been made to the fourth codicil, we have looked at it and read it, but it gives no shadow of support to the claim which is based on it. The claim is utterly frivolous, and therefore we disallow the 9th paragraph also.

The result is that we affirm the decision of the learned judge in every particular.

COLLINS, J., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *P. Collings & Co.*

Solicitors for the defendants, *Cookson, Wainewright, & Pennington.*

Prob. Div. and Adm. Div. Probate. } Dec. 6, 13.

In the Goods of WRIGHT (DECEASED). (*a.*)

Probate—Administration—Lost will—Grant until will found—Court of Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.

Where it appeared that a will had been duly executed by the testator, but it could not be found after his death, and his widow, who had made a statement to the effect that it had been accidentally destroyed, on being served with a notice to attend and be examined concerning the contents of the will, disobeyed the order, and was believed to have left the country, and it was necessary, for the purpose of selling certain leasehold property valued at between £300 and £400, the court made a grant of letters of administration to the testator's only son, with the consent of the remaining next of kin, limited to the property in question, and without requiring the widow to be cited.

Motion for a grant of administration of the goods and effects of J. T. Wright until his last will should be found.

J. T. Wright, late of 29, Nile-terrace, Bermondsey, died on May 1, 1887, leaving a widow and son, his next of kin and the only persons entitled in distribution, surviving him. J. T. Riches, secretary of a building society, deposed to the fact that he drew a will for the deceased some time in 1886 or 1887, which was duly executed, but he could not remember its contents. The attesting witness also deposed to the attestation.

The value of the estate was between £300 and £400, and consisted of leasehold houses which it was desired to sell, but this could not be done until a personal representative was appointed. J. T. Wright, the son, in his affidavit stated that the widow had told him that the deceased had made a will, but that it had been accidentally destroyed.

On August 12, 1892, an order was served personally on the widow, Mrs. Wright, under section 26 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), directing her to attend and be examined as to her knowledge of the deceased's will. She did not attend, and disappeared, it being supposed that she had left the country.

Dec. 6.—*Powles*, in support of the application, cited *In the Goods of Metcalfe*, 1 Add. 343. He asked for the grant under section 73 of the Court of Probate Act, 1857, to the son of the deceased.

BARNES, J.—The case of *Metcalfe* was practically a grant *ad colligenda*. The case of *In the Goods of Campbell*, 2 Hagg. Eccl. 555, is, however, an authority on which I can act. I am not, however, disposed to make the grant without the consent of the next of kin, and I shall have to consider what form the grant should take.

Dec. 13.—*Powles.*—An affidavit by Anna Wright, the sister and sole remaining next of kin, consenting to the application, has been filed.

BARNES, J.—Under the circumstances you may take the grant until the will is found, but it must be limited to the property mentioned in the application, and I shall dispense with the necessity of citing the widow.

Solicitors, *Maynard & Son.*

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

House of Lords.

From C. A. (England). Aug. 9, 1892.

LORD HENRY BRUCE *v.* MARQUIS OF AILESBURY. (*a.*)

Settlement—Settled land—Mansion-house—Sale by tenant for life—Sanction of the court—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 3, 15, 50, 53—*Settled Land Act,* 1890 (53 & 54 *Vict. c.* 69), *s.* 10 (2).

It is the duty of the court, on an application under the Settled Land Acts, 1882 1890 *for permission to sell the mansion-house and lands usually occupied therewith, to consider the interests of the estate itself, in addition to the wishes and interests of the remaindermen.*

A young tenant for life under a settlement of an old family estate, who had heavily mortgaged his life interest, and was unable to keep up the establishment, applied for an order sanctioning a proposed sale of the mansion-house and demesne lands for an adequate price. The remaindermen opposed.

Held (affirming the decision of the Court of Appeal, 40 *W. R.* 243, [1892] 1 *Ch.* 506), *that the sale should be allowed.*

This was an appeal from a decision of the Court of Appeal (Lindley, Bowen, and Fry, L.JJ.) reported as *In re Ailesbury (Marquis of) Settled Estates*, 40 W. R.

(*a.*) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

243, [1892] 1 Ch. 506, where the facts are set out at length. They are shortly as follows:—The Ailesbury Estates in Wiltshire and Berkshire, known as the Savernake Estate, were settled upon the present marquis as tenant for life in possession, without impeachment of waste, with remainder to his first and other sons successively in tail male, with remainder to Lord Henry Bruce for life, remainder to his eldest son for life, remainder to the first and other sons of such eldest son in tail male, with divers remainders over, and with an ultimate remainder to the present marquis in fee. The marquis, who was born in 1863, married in 1884, and his wife was still living, but there had been no issue of the marriage. The Savernake Estate comprised over 40,000 acres, and there were ninety-five separate farms upon it, besides about 1,000 cottages and other buildings. The park, pleasure-grounds, and lands usually occupied with the mansion-house comprised over 7,000 acres, and included Savernake Forest. The mansion-house had been the principal residence of the Ailesbury family since 1675. The present marquis had incumbered his life interest to the extent of more than £200,000, and the net income after paying outgoings, jointure, &c., was very small. The mortgagee had commenced an action for foreclosure, and a receiver had been appointed. Bankruptcy proceedings had also been instituted against the marquis, and a receiving order had been made at the suit of other creditors. In these circumstances the marquis had in June, 1891, entered into a contract with Lord Iveagh under the Settled Land Acts, 1882 to 1890, for the sale to him of the whole of the Savernake Estate, including the mansion-house and the lands usually occupied therewith, for £750,000; £500,000 of the purchase-money to be left upon mortgage for five years at four per cent., the agreement being conditional upon an order of the court being obtained to authorize the sale of the mansion-house, &c. The Marquis of Ailesbury presented a petition before Stirling, J., asking the court to sanction the proposed sale of the mansion-house, &c., and to the arrangement for the £500,000 being left on mortgage. The petition was opposed by Lord Henry Bruce and others. It appeared from the evidence that the price offered was in the opinion of experts a high one for the property, and was considerably enhanced by including the mansion-house and Savernake Forest with the rest of the estate in one sale. The Court of Appeal (reversing Stirling, J.) sanctioned the proposed sale.

Sir H. Davey, Q.C., and *Buckley, Q.C.* (*G. Henderson* with them), for the appellants, referred to *In re Earl of Radnor's Will Trusts*, 45 Ch. D. 402, 416, 39 W. R. Dig. 202; sections 53 and 37 of the Settled Land Act, 1882; section 10 of the Settled Land Act of 1890; and the Settled Estates Acts.

Rigby, Q.C., and *Fossett Lock*, for the Marquis of Ailesbury, and

Sir H. James, Q.C., and *Muir Mackenzie*, for the other respondent, were not heard.

The House took time for consideration.

Lord HALSBURY, L.C.—In this case your lordships are called upon to consider the exercise of the discretion which has been vested in the court by the Settled Land Act of 1890, s. 10, sub-section (2), which is in these words:—"(2) Nothwithstanding anything contained in the Act of 1882, the principal mansion-house (if any) on any settled land, and the pleasure grounds and park and lands (if any), usually occupied therewith, shall not be sold, exchanged, or leased by the tenant for life without the consent of the trustees of the settlement or an order of the court." Section 3, sub-section (1), of the Act of 1882, of which the sub-section I have just recited is an amendment, but which adds nothing which is relevant to any dispute between the parties here, gives an absolute power to the tenant for life to sell the settled land.

By section 53 of the Act of 1882 it was enacted that a tenant for life in exercising any power under the Act should have regard to the interests of all parties entitled under the settlement, and should, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties.

Of the 40,000 acres of which the estate now in question consists, it cannot be denied that the tenant for life has, in respect of 33,000 of them at all events, an absolute right to sell. That has not and could not be disputed. The question arises under the restriction as to the mansion-house and the lands, pleasure grounds, and park usually occupied therewith. It scarcely requires argument to show that, if the commercial interest is alone to be considered, the withdrawal from the sale of the mansion-house and the pleasure grounds usually occupied therewith, in this particular case would have a very serious depreciatory effect upon the sale of the remainder. The 7,000 acres by themselves, or the odd 33,000 acres by themselves, would not be likely to realize, if sold separately, the gross sum which would be obtained by selling both as one estate. But the question your lordships have to determine is whether, under the circumstances of this particular case, consent should be given to the sale of the whole.

It cannot be denied that the tenant for life is not in a position to do that which may be compendiously described as "keeping up the estate." If capital expenditure either for repairs or otherwise is required, he cannot supply it. The estate during the period of his life—and he is still a young man—must pass into the hands of his creditors, whose interest in it would be confined to realizing their security. I say nothing of his own wishes; I say nothing of his own conduct; I simply refer to dry facts, which render it to my mind a matter of absolute certainty that if the estate is to be continued as vested in him, neither improvement, repair nor profitable occupation either to the estate or to the individual, is likely to result from a continuance of the estate in its present incumbered condition. Under these circumstances the tenant for life has consented to sell, and an offer has been made for the estate, as to which it has hardly been seriously contended that it is not a good and even advantageous offer, though not, perhaps, as Sir Horace Davey said, an extraordinarily lavish one. The trustees of the settlement have not in this case consented, but are divided in opinion, and the court, therefore, has, to determine whether upon the facts of this case the consent ought or ought not to be withheld. Now the Act of Parliament itself contains, either by way of recital or preamble, nothing to show what the meaning or policy of the statute was; but the power given to the tenant for life to sell notwithstanding that by the terms of the settlement his powers do not extend beyond his own life, seems to me—apart from every extraneous consideration—enough to show that what the statute intended to do was to release the land from the fetters of the settlement, to render it a marketable article notwithstanding the settlement. And historically one knows very well what were the objections made to the law of settlement in its effect upon the cultivation and useful occupation of land. Now, it has been a very familiar canon of construction to contemplate what was the cause and reason of the Act, or, in other words, the mischief requiring a remedy. Thus, in *Heydon's case*, 3 Rep. 7b, 8a, the

They referred to *Pare* v. *Clegg*, 9 W. R. 795, 29 Beav. 589; *Bromley* v. *Williams*, 11 W. R. 392, 32 Beav. 177; *Springhead Spinning Co.* v. *Riley*, 16 W. R. 1138, L. R. 6 Eq. 551; *Prudential Assurance Co.* v. *Knott*, 23 W. R. 249, L. R. 10 Ch. App. 142; *Commissioners of Sewers* v. *Gellatly*, 24 W. R. 1059, 3 Ch. D. 610; Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 9.

E. Morten and *L. G. Pike*; and *T. W. Chitty*, for the several defendants, were not called upon.

Feb. 23.—The judgment of the COURT (Lord ESHER, M.R., and LINDLEY and BOWEN, L.JJ.) was delivered by

LINDLEY, L.J.—This is an appeal by the plaintiff against an order of the Divisional Court striking out from the title of the writ and statement of claim the words "as well on their own behalf as on behalf of and as representing all the members of each of the said societies and joint committee to which they respectively belong." In order to make the question clear it is necessary to state shortly the nature of the action. The plaintiff is a mason and builder carrying on business at Hull, and he sues the presidents and officers of the Hull branches of three trade unions and of the joint committee of the Hull branches of those trade unions personally, and also as representing all the other members of each of the trade unions and joint committee respectively, for maliciously and wrongfully doing certain acts of interference with his business, and he asks for an injunction to restrain the trades unions and joint committee from doing those acts. Whether the defendants can be so sued depends upon ord. 16, r. 9.

The question turns upon the true meaning of the words in that rule, "the same interest in one cause or matter." This expression only extends to persons who have or claim some beneficial proprietary right which they are asserting or defending in the cause or matter. The plaintiff in this case sues for damages, and the action, assuming it to lie at all—as to which we pronounce no opinion—is founded on tort. The old Court of Chancery had no jurisdiction to grant relief in such an action; and although its rules as to parties to actions or suits maintainable in it, have now to be applied in all divisions in the High Court when exercising the old jurisdiction of the Court of Chancery, the rules ought not to be construed as creating a jurisdiction in one division which was never exercised by any court in the country before the rules were made. But then the plaintiff seeks an injunction. This is an equitable remedy. But a suit for an injunction in such a case as this, even if maintainable at all, certainly could not be so framed as to bind persons not actually parties to it. What right is it which the plaintiff asserts? It is a right not to be molested in the conduct of his business. Who are the persons against whom he seeks redress? They are a number of persons belonging to various trade unions acting more or less in concert; but the persons assumed to be represented by the officers of those trade unions have no such interest as is contemplated by the rule as above explained. The truth is that this is an attempt to stretch the rule to cases to which it is wholly inapplicable, and the attempt is only plausible by reason of the ambiguity of the expression, "same interest." *The Springhead Spinning Co.* v. *Riley*, relied upon by the plaintiff's counsel, is no authority for them. In the first place, the case was overruled by the Court of Appeal in *The Prudential Assurance Co.* v. *Knott*; and, in the next place, the suit was not in form a suit against the defendants as representing others, although the prayer was for an injunction against them in that character. The point now raised could not arise, and did not arise, in that case on demurrer, for it was no objection to a bill in equity that, besides a relief which might lawfully be claimed, it claimed also a relief which was impossible. The words struck out by the Divisional Court ought never to have been inserted, and the appeal ought to be dismissed.

Appeal dismissed.

Solicitors for the plaintiff, *Bell, Brodrick, & Gray*, for *J. T. & H. Woodhouse*, Hull.

Solicitors for the defendants, *Shaen, Roscoe, Messey, & Co.; Collyer-Bristow, Russell, Hill, & Co.*, for *Laverack & Son*, Hull.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Kay, L.JJ.) Dec. 3.

HARRISON v. DUKE OF RUTLAND AND OTHERS. (a.)

Highway—Trespass—Right of owner of soil of highway—Right of public—Interference with owner's right of shooting.

The defendant was the owner of certain moors across which a public road ran. While the defendant and his friends were engaged in shooting over the moors, the plaintiff went upon the road for the purpose of preventing, and acted so as to prevent, the grouse, which were being driven, from flying across the road towards the place where the defendant and his friends were. The defendant's keepers thereupon seized hold of the plaintiff and held him down upon the road until the drive was over. In an action to recover damages for assault and false imprisonment,

Held, that, as the soil of the road was vested in the defendant as owner of the adjoining land, subject only to the right of the public to pass and repass along it, the plaintiff, not being upon the road in the exercise of the right of way, but for another purpose, was a trespasser.

Motion by the plaintiff for a new trial, and cross-motion by the defendants for judgment upon certain issues in the claim and upon the counter-claim.

The action was for assault and false imprisonment upon a highway. The defendants pleaded justification, on the ground that the plaintiff was a trespasser upon the soil of the defendant, the Duke of Rutland, and in the alternative paid 5s. into court as sufficient to satisfy the plaintiff's claim; and the defendant, the Duke of Rutland, counter-claimed for an injunction to prevent a repetition of the trespass and for damages. The action was tried before Lord Coleridge, C.J., and a jury, when the learned judge directed the jury that the plaintiff was not a trespasser upon the highway, and the jury found a verdict for the defendants, upon the ground that the 5s. paid into court was sufficient.

The facts are fully stated in the judgment of Lopes, L.J.

The plaintiff in person.

Sir H. James, Q.C., and *R. M. Bray*, for the defendants.

Cur. adv. vult.

Dec. 3.—Lord ESHER, M.R.—In this case the plaintiff brought an action against the Duke of Rutland and certain other persons who acted under his authority for an assault and false imprisonment. The defendants pleaded justification, and, in the alterna-

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

tive, paid 5s. into court as sufficient to satisfy the plaintiff's claim, and also counter-claimed against the plaintiff for trespass, claiming an injunction.

The case was tried before the Lord Chief Justice, and the jury found a verdict for the defendants on the claim, except upon the issues of justification, upon which issues, and also upon the counter-claim, the Lord Chief Justice directed a verdict and judgment for the plaintiff. Both parties appealed.

The main facts are not really in dispute. The duke had a right of shooting over certain moors, and upon the occasion in question he and his friends were exercising that right. A highway, the soil of which was vested in the duke, crossed the moors. The plaintiff, from some perverted notion, went on to the highway, knowing that it passed close to the place where the duke and his friends were shooting, and he went there, not for the purpose of using the highway as a highway, but solely for the purpose of interfering with the duke in the exercise of his rights as owner of the soil. He went along the highway near the butts towards which the grouse would be driven, knowing that the grouse would cross the highway, for the purpose of preventing the grouse coming across towards the butts, and thus interfering with the duke in the exercise of his undoubted rights. The plaintiff by waving his handkerchief and otherwise sought to prevent the grouse from approaching the butts, and when appealed to, refused to desist. The duke's keepers then seized him and held him down on the ground until the drive was over. The keepers held him down for the sole purpose of preventing him, and only so long as was necessary to prevent him, from so interfering. It was clear that they did not use any unnecessary force. The defendants justified the act upon the ground that the plaintiff was a trespasser on the duke's land for the purpose of interfering with the duke's enjoyment of and rights over his own land, and that no more force was used than was necessary to prevent such interference; and in the alternative they paid 5s. into court. The Lord Chief Justice, being anxious to maintain to its largest limits the right of the public over highways, with which anxiety I entirely sympathize, directed the jury as a matter of law that the plaintiff was not trespassing upon the defendant's land. The jury thereupon found a verdict for the defendants upon the claim, holding that 5s. was sufficient compensation, and judgment was entered for the defendants on the claim, except upon the issues of justification, upon which issues judgment was entered for the plaintiff, and judgment was entered for the plaintiff on the counter-claim.

It is clear that the plaintiff's appeal must fail, because in either view of the matter the verdict of the jury was right. Upon the cross-appeal of the defendants we are asked to enter the verdict and judgment upon the issues of justification and upon the counter-claim for the defendants. In my opinion the verdict and judgment upon the issues of justification should be entered for the defendants, and also upon the counter-claim for nominal damages if such damages are asked for. There is another remedy asked for on this counter-claim, with which I shall deal subsequently.

The difficulty I have is to express the reasons for my judgment in such a way as to give effect to the rights of the owner of the soil without at the same time interfering with the largest possible rights of the public over highways. The question is whether the plaintiff was trespassing on the soil of the highway. The true rule as to the nature of the user of a highway is laid down in *Reg.* v. *Pratt*, 3 W. R. 372, 4 E. & B. 860. The Lord Chief Justice thought that that decision did not apply, because it was a criminal case, and that it was founded on the fact that the defendant was using the highway for the purpose of committing a criminal offence. But the decision depended upon whether the defendant was a trespasser. The land in question was a highway, and the prosecutor was the owner of the soil of the highway, being the owner of the adjoining land. The defendant was charged with trespassing on the land of the prosecutor in search of game. The foundation of the charge was that he was a trespasser. The defendant there, as is the case with the plaintiff here, did not use the land as a highway, but went there solely in search of game. Lord Campbell said that "it is true the public had a right of way there, but subject to that right the soil and every right incident to the ownership of the soil was in Mr. Bowyer. Then Pratt, being on that land, was undoubtedly a trespasser if he went there, not in exercise of the right of way, but for the purpose of seeking game and that only." If, therefore, a person goes upon a highway, the soil of which is vested in another person, not for the purpose of using it as a highway, but solely for some other purpose, whether lawful or unlawful, he is a trespasser. That case is an authority for that proposition, and it is founded upon cases which preceded it, and it is supported by subsequent cases. Therefore, upon the ground that the plaintiff was on a part of the highway, the soil of which was vested in the duke, not for the purpose of using the highway to pass and repass along it, or for any other reasonable and usual mode of using it as a highway, he was a trespasser. The language of Erle, J., and Crompton, J., in *Reg.* v. *Pratt* might in one view interfere with the universal user of highways in this country, and if so would be productive of mischief. If that language were taken literally, highways could only be used for the purpose of passing and repassing along them. Highways are given *primâ facie* for that purpose, but things are done on them which are now recognized as done by the public in the exercise of a reasonable and usual mode of user, and if one of the public does no more than that, in my opinion he cannot be considered a trespasser.

The result is this: The person, to be a trespasser on a highway, must be committing the act of trespass at the spot where he is on the highway. If he is passing along the highway for the purpose of doing some act at a further point on the highway, which would make him a trespasser at that point, he is simply using the highway to pass along it, and the owner of that part of the soil of the highway over which he is passing cannot interfere with him. If, again, a man is passing along a highway for the purpose of entering upon the land of the same owner further on, he would not be a trespasser while so passing. But the plaintiff here was using this very part of the highway for the purpose of interfering with the duke's right of shooting. He stood upon the highway for the purpose of interfering with the duke's rights as owner of the land. Therefore he was not using the highway for the purpose of passing and repassing along it, or in any other reasonable and usual way. He was therefore a trespasser. It might be a question of fact whether a person was using a highway in the reasonable and usual mode of user, and if so that would be a question for the jury. But in this case the evidence was all one way, and we are bound to hold that the plaintiff was a trespasser. Therefore upon the issues of justification, judgment must be entered for the defendants. Consequently judgment must be entered for the defendants upon the whole claim.

As regards the counter-claim, the defendants do not ask for nominal damages, but for an injunction and a declaration. I have always felt disinclined to

introduce the procedure of the Court of Chancery into an ordinary common law action. I think it is mischievous, except in very special cases, to introduce it. This is a trespass committed by an obstinate man. There was no possible damage. If he repeated the act the jury would probably mark their sense of it by giving substantial damages. If an injunction were granted, and the plaintiff disobeyed it, he would have to go to prison. That would bring into a mere common law action the very severe procedure of the Court of Chancery. When before this court the defendants did not press for an injunction, but asked for a declaration that the plaintiff was a trespasser upon the occasion in question. Of what possible use can it be? The judge would have to direct the jury as to the law, and the declaration would be wholly misplaced in such a case after the direction of the judge laying down the law. In equity a declaration is useful in working out a decree. I think, therefore, that the verdict and judgment on the counter-claim should be entered for the defendants for nominal damages, but I differ from my brothers in thinking that there should be no declaration.

LOPES, L.J., read the following judgment:—This to my mind is a case of great importance, which must be my excuse for delivering a somewhat lengthy judgment. This is an action of trespass to the person brought by the plaintiff against the defendants claiming damages and an injunction. The defendants justified, amongst other defences, the alleged trespass on the ground that the plaintiff was trespassing upon the soil of the defendant, the Duke of Rutland, for the purpose of interfering with the legal right of shooting belonging to the said duke, which by his friends and keepers duly authorized in that behalf he was then exercising, and alleging the use of no greater force than was necessary for the purpose of abating such trespass. The defendant, the Duke of Rutland, also counter-claimed against the plaintiff in respect of a trespass by the plaintiff to the soil of the said duke, and for his interference with the exercise by the said duke of his legal right of sporting over the said lands, alleging threats to continue and repeat such unlawful interference, and claiming an injunction and damages. Alternately the defendants brought into court the sum of 5s. in satisfaction of all the causes of action of the plaintiff. The plaintiff joined issue on the defendants' defence, and denied the allegations in the counter-claim.

The case came on to be tried before the Lord Chief Justice. So far as material, the facts may be stated as follows:—At the times in question the Duke of Rutland was lawfully exercising sporting rights over certain moors belonging to him. These moors were in certain parts intersected by certain highways; the soil of such highways, subject only the easement of passing and repassing, which belonged to the public, was vested in the said duke, he being the owner of the lands on each side adjoining the said highways. Butts were erected at some places near the said highways, at other places at a distance of 200 yards from the highways, for the purpose of the sportsmen concealing themselves from the grouse which were to be driven towards them. The vision of the grouse is signally acute, and very little will induce them to shy away from the butts and follow a course which would be out of reach of the guns of the sportsmen occupying the butts. The plaintiff, knowing this and believing that he had cause of annoyance with the duke or with his predecessor in title, placed himself, avowedly and admittedly, on the highway in such a position and so acted as to prevent the grouse from approaching the butts. The plaintiff had done this on former occasions, and had threatened to continue so to act whenever the duke drove his moors. Some years before the moors had been let to a tenant. During that time the plaintiff, who had been paid by the tenant, had desisted from any interference with the shooting on the moors; but so soon as the duke resumed the shooting on his moors so soon did the plaintiff renew his interference with the sport. It was an undisputed fact in the case that the plaintiff did not use the soil of the highway as one of the public for passing and repassing, or for the legitimate purpose of travel, but was at the times in question using it for the purpose of interfering with and obstructing the legal right of the duke to exercise sporting rights over the said moors. There was a conflict of evidence as to the amount of force used by the defendants in their attempts to prevent the plaintiff interfering with the sport. In these circumstances the Lord Chief Justice directed the jury that the plaintiff was not a trespasser, and that therefore what the defendants did could not be justified; that the defendants had no cause of action on their counter-claim; and that the only question which they would have to consider was whether 5s. was enough to compensate the plaintiff for the acts of the defendants. The Lord Chief Justice said: "I do not think the plaintiff was a trespasser. I do not think, therefore, that what was done to him was lawful"; and again, "The trespass is hardly denied, and is attempted to be justified on grounds that, in my judgment, fail. The trespass, therefore, remains a trespass, not a lawful act. It is an unlawful act; 5s. has been paid in respect of that unlawful act. In your judgment is 5s. enough; if 5s. is enough, verdict for the defendants; if 5s. is not enough, then verdict for the plaintiff, with such an addition to the 5s. as you think on the whole necessary." The jury thereupon found a verdict for the defendants on the claim, thinking 5s. enough, and the Lord Chief Justice ordered judgment to be entered for the defendants on the claim, and for the plaintiff on the counter-claim and pleas justifying the trespass. The result is that, while the defendants succeed on the issue raised as to the 5s. paid into court, the plaintiff has had entered for him the issues raised by the pleas of justification, and has judgment on the counter-claim. This arises from the holding of the Lord Chief Justice that the plaintiff was not, under the circumstances, a trespasser. The plaintiff and defendants have both appealed to the court, the plaintiff seeking judgment for him on the claim so far as the issue with regard to 5s. being enough to satisfy the claim is concerned, alleging the 5s. to be contemptuous and inadequate; and the defendants seeking to have judgment entered for them on the pleas justifying the trespass and on the counter-claim.

I am of opinion the Lord Chief Justice was wrong in directing the jury that on the facts as admitted the plaintiff was not a trespasser. In my opinion the Lord Chief Justice ought to have told the jury that the plaintiff, on the admitted facts, was a trespasser, and that the pleas justifying the trespass and the counter-claim must be found for the defendants, and that the only question they had to consider was whether there had been an excess of force used in abating the trespass, and, if so, whether 5s. was enough to compensate the plaintiff for such excess. The Lord Chief Justice ought further to have told the jury that if there was no excess then they must find everything for the defendants; but if there was an excess, then if 5s. was enough they ought still to find everything for the defendants; but if, on the other hand, they thought 5s. was not enough, then they should find for the plaintiff for such sum as in their opinion he was entitled to beyond the 5s. The jury were of opinion that 5s. was enough to cover every-

thing to which the plaintiff was entitled. Their finding on that issue is therefore conclusive, and the verdict and judgment in that respect must stand. But ought the Lord Chief Justice to have told the jury that the plaintiff was not a trespasser?

The interest of the public in a highway consists solely in the right of passage; the soil and freehold over which that right of way is exercised is vested in the owner or owners of the adjoining land, who may maintain actions of trespass against persons infringing his or their rights therein; as, for instance, by permitting cattle to depasture thereon: *Dovaston v. Payne*, 2 H. Bl. 527. Buller, J., says: "Whether the plaintiff was a trespasser or not depends on the fact whether he was passing and repassing and using the road as a highway, or whether his cattle were in the road as trespassers." Again, Heath, J., says: "If it be a way, he must show that he was lawfully using the way; for the property is in the owner of the soil subject to an easement for the benefit of the public." In the case of *Reg.* v. *Pratt* Pratt had been convicted by justices under 1 & 2 Will. 4, c. 32, s. 30, of committing a trespass by being in the daytime on land in the occupation of B. in search of game. On appeal, a case was reserved by the sessions for the opinion of the court, and the facts appeared to be that Pratt was in the daytime on a public road (the soil of which as well as the land on both sides belonged to B.) carrying a gun and accompanied by a dog, that Pratt sent the dog into a cover by the roadside which was in the actual occupation of B., and that a pheasant flew across the road from the cover and was fired at by Pratt, who was still standing upon the road. Upon these facts the court held that the conviction was right, the road being land in the occupation of B. subject only to the right of way of the public; and the evidence showed that Pratt was not on the road in the exercise of the right of way, but for another purpose—namely, the search for game—and that thus he was a trespasser. "On these facts," said Lord Campbell, C.J., "I think the magistrates were perfectly justified in concluding that Pratt was trespassing on land in the occupation of B. in search of game. He was, beyond all controversy, on land the soil and freehold of which was in the owner of the adjoining land—that is, B. It is true the public had a right of way there, but subject to that right the soil and every right incident to the ownership of the soil was in B. The road, therefore, must be considered as B.'s land. Then Pratt, being on that land, was undoubtedly a trespasser if he went there, not in exercise of the right of way, but for the purpose of seeking game and that only. If he did go there for that purpose only, he committed the offence named in the Act; he trespassed by being on the land in pursuit of game. The evidence of his being there for that purpose is ample. He waved his hand to his dog; the dog entered the cover and drove out a pheasant, and Pratt fired at it. The magistrates were fully justified in drawing the conclusion that he went there, not as a passenger on the road, but in search of game." Erle, J., in the same case, says: "There can be no doubt, in fact, that Pratt was on the land, and that he was in search of game; but it is said he could not be a trespasser because it was a highway. But I take it to be clear law that, if in fact a man be on land where the public have a right to pass and repass, not for the purpose of passing and repassing, but for other and different purposes, he is in law a trespasser, like the cattle in *Dovaston* v. *Payne*." Crompton, J., in the same case, says: "I take it to be clear law that if a man use the land, over which there is a right of way, for any purpose lawful or unlawful other than that of passing and repassing, he is a trespasser." I do not think the language used by the learned judges in that case too large or that it in any way impeaches the legitimate use of highways by the public. The Lord Chief Justice, however, appears to have thought that this decision was founded on the fact that Pratt was committing an offence on the highway. The Lord Chief Justice says —I quote his own words—"As he was using the highway not to pass and repass, but to be guilty of a criminal offence, the judges held that his being on the highway for the purpose of committing that criminal offence, he was none the less doing that criminal offence because he was on the highway; but they could not take exception and say he had a right to be there, as he had for all purposes, and try to make that a defence for being there for a criminal purpose."

In my opinion that is not the ground of the decision. The ground of the decision is that Pratt was using the highway for purposes other than those of legitimate travel, and was, therefore, a trespasser on the soil and freehold of the adjoining owner; he could not have been convicted unless he had been a trespasser. The conclusion which I draw from the authorities is that if a person uses the soil of the highway for any purpose other than that in respect of which the dedication was made and the easement acquired he is a trespasser. The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose, whether lawful or unlawful, is an infringement of the rights of the owner of the soil, who has, subject to the easement, precisely the same estate in the soil as he had previously to any easement being acquired by the public. If this is the law, the plaintiff, on the admitted facts, was a trespasser. He was using the soil of the highway, not for the purpose of passing and repassing, but for the purpose of interfering with the exercise of a legal right by the defendant, the Duke of Rutland. In these circumstances the defendants are entitled to judgment on the pleas of justification, and also on their counter-claim for nominal damages. The plaintiff's appeal will, therefore, be dismissed, and the defendants' appeal be allowed with costs. Sir H. James, on the part of the duke, does not press for an injunction; if he had I should have thought it ought to be granted; but he asks for a declaration that the plaintiff, on the facts appearing, was, at the time when he interfered with the legal right of the duke, a trespasser. This I think he ought to have. An injunction is constantly granted by the Queen's Bench Division for trespasses threatened to be repeated. It is the effect of the Judicature Act, and a most wholesome remedy. This action might have been brought in the Court of Chancery, and an injunction on the facts appearing would, in my opinion, have been readily granted; and under ord. 25, r. 5, there is full power to make a declaration such as we make.

KAY, L.J., read the following judgment:—The soil of a highway belongs, *primâ facie*, to the owner of the land adjoining it. If the land on either side is the property of different owners, each is owner of the soil on his side *ad medium filum* of the highway. But this ownership is subject to the right of the public to use the highway. Any use of the soil of the highway other than the legitimate use of it for the purposes of a highway is a trespass upon that soil as against the owner to whom it still belongs. These propositions are amply established by judicial decisions. The only difficulty in applying them is in determining whether the particular act complained of is or is not a user of the soil as a highway.

The legitimate use of a highway is generally de-

introduce the procedure of the Court of Chancery into an ordinary common law action. I think it is mischievous, except in very special cases, to introduce it. This is a trespass committed by an obstinate man. There was no possible damage. If he repeated the act the jury would probably mark their sense of it by giving substantial damages. If an injunction were granted, and the plaintiff disobeyed it, he would have to go to prison. That would bring into a mere common law action the very severe procedure of the Court of Chancery. When before this court the defendants did not press for an injunction, but asked for a declaration that the plaintiff was a trespasser upon the occasion in question. Of what possible use can it be? The judge would have to direct the jury as to the law, and the declaration would be wholly misplaced in such a case after the direction of the judge laying down the law. In equity a declaration is useful in working out a decree. I think, therefore, that the verdict and judgment on the counter-claim should be entered for the defendants for nominal damages, but I differ from my brothers in thinking that there should be no declaration.

LOPES, L.J., read the following judgment:—This to my mind is a case of great importance, which must be my excuse for delivering a somewhat lengthy judgment. This is an action of trespass to the person brought by the plaintiff against the defendants claiming damages and an injunction. The defendants justified, amongst other defences, the alleged trespass on the ground that the plaintiff was trespassing upon the soil of the defendant, the Duke of Rutland, for the purpose of interfering with the legal right of shooting belonging to the said duke, which by his friends and keepers duly authorized in that behalf he was then exercising, and alleging the use of no greater force than was necessary for the purpose of abating such trespass. The defendant, the Duke of Rutland, also counter-claimed against the plaintiff in respect of a trespass by the plaintiff to the soil of the said duke, and for his interference with the exercise by the said duke of his legal right of sporting over the said lands, alleging threats to continue and repeat such unlawful interference, and claiming an injunction and damages. Alternately the defendants brought into court the sum of 5s. in satisfaction of all the causes of action of the plaintiff. The plaintiff joined issue on the defendants' defence, and denied the allegations in the counter-claim.

The case came on to be tried before the Lord Chief Justice. So far as material, the facts may be stated as follows:—At the times in question the Duke of Rutland was lawfully exercising sporting rights over certain moors belonging to him. These moors were in certain parts intersected by certain highways; the soil of such highways, subject only the easement of passing and repassing, which belonged to the public, was vested in the said duke, he being the owner of the lands on each side adjoining the said highways. Butts were erected at some places near the said highways, at other places at a distance of 200 yards from the highways, for the purpose of the sportsmen concealing themselves from the grouse which were to be driven towards them. The vision of the grouse is signally acute, and very little will induce them to shy away from the butts and follow a course which would be out of reach of the guns of the sportsmen occupying the butts. The plaintiff, knowing this and believing that he had cause of annoyance with the duke or with his predecessor in title, placed himself, avowedly and admittedly, on the highway in such a position and so acted as to prevent the grouse from approaching the butts. The plaintiff had done this on former occasions, and had threatened to continue so to act whenever the duke drove his moors. Some years before the moors had been let to a tenant. During that time the plaintiff, who had been paid by the tenant, had desisted from any interference with the shooting on the moors; but so soon as the duke resumed the shooting on his moors so soon did the plaintiff renew his interference with the sport. It was an undisputed fact in the case that the plaintiff did not use the soil of the highway as one of the public for passing and repassing, or for the legitimate purpose of travel, but was at the times in question using it for the purpose of interfering with and obstructing the legal right of the duke to exercise sporting rights over the said moors. There was a conflict of evidence as to the amount of force used by the defendants in their attempts to prevent the plaintiff interfering with the sport. In these circumstances the Lord Chief Justice directed the jury that the plaintiff was not a trespasser, and that therefore what the defendants did could not be justified; that the defendants had no cause of action on their counter-claim; and that the only question which they would have to consider was whether 5s. was enough to compensate the plaintiff for the acts of the defendants. The Lord Chief Justice said: "I do not think the plaintiff was a trespasser. I do not think, therefore, that what was done to him was lawful"; and again, "The trespass is hardly denied, and is attempted to be justified on grounds that, in my judgment, fail. The trespass, therefore, remains a trespass, not a lawful act. It is an unlawful act; 5s. has been paid in respect of that unlawful act. In your judgment is 5s. enough; if 5s. is enough, verdict for the defendants; if 5s. is not enough, then verdict for the plaintiff, with such an addition to the 5s. as you think on the whole necessary." The jury thereupon found a verdict for the defendants on the claim, thinking 5s. enough, and the Lord Chief Justice ordered judgment to be entered for the defendants on the claim, and for the plaintiff on the counter-claim and pleas justifying the trespass. The result is that, while the defendants succeed on the issue raised as to the 5s. paid into court, the plaintiff has had entered for him the issues raised by the pleas of justification, and has judgment on the counter-claim. This arises from the holding of the Lord Chief Justice that the plaintiff was not, under the circumstances, a trespasser. The plaintiff and defendants have both appealed to the court, the plaintiff seeking judgment for him on the claim so far as the issue with regard to 5s. being enough to satisfy the claim is concerned, alleging the 5s. to be contemptuous and inadequate; and the defendants seeking to have judgment entered for them on the pleas justifying the trespass and on the counter-claim.

I am of opinion the Lord Chief Justice was wrong in directing the jury that on the facts as admitted the plaintiff was not a trespasser. In my opinion the Lord Chief Justice ought to have told the jury that the plaintiff, on the admitted facts, was a trespasser, and that the pleas justifying the trespass and the counter-claim must be found for the defendants, and that the only question they had to consider was whether there had been an excess of force used in abating the trespass, and, if so, whether 5s. was enough to compensate the plaintiff for such excess. The Lord Chief Justice ought further to have told the jury that if there was no excess then they must find everything for the defendants; but if there was an excess, then if 5s. was enough they ought still to find everything for the defendants; but if, on the other hand, they thought 5s. was not enough, then they should find for the plaintiff for such sum as in their opinion he was entitled to beyond the 5s. The jury were of opinion that 5s. was enough to cover every-

thing to which the plaintiff was entitled. Their finding on that issue is therefore conclusive, and the verdict and judgment in that respect must stand. But ought the Lord Chief Justice to have told the jury that the plaintiff was not a trespasser?

The interest of the public in a highway consists solely in the right of passage; the soil and freehold over which that right of way is exercised is vested in the owner or owners of the adjoining land, who may maintain actions of trespass against persons infringing his or their rights therein; as, for instance, by permitting cattle to depasture thereon: *Dovaston v. Payne*, 2 H. Bl. 527. Buller, J., says: "Whether the plaintiff was a trespasser or not depends on the fact whether he was passing and repassing and using the road as a highway, or whether his cattle were in the road as trespassers." Again, Heath, J., says: "If it be a way, he must show that he was lawfully using the way; for the property is in the owner of the soil subject to an easement for the benefit of the public." In the case of *Reg. v. Pratt* Pratt had been convicted by justices under 1 & 2 Will. 4, c. 32, s. 30, of committing a trespass by being in the daytime on land in the occupation of B. in search of game. On appeal, a case was reserved by the sessions for the opinion of the court, and the facts appeared to be that Pratt was in the daytime on a public road (the soil of which as well as the land on both sides belonged to B.) carrying a gun and accompanied by a dog, that Pratt sent the dog into a cover by the roadside which was in the actual occupation of B., and that a pheasant flew across the road from the cover and was fired at by Pratt, who was still standing upon the road. Upon these facts the court held that the conviction was right, the road being land in the occupation of B. subject only to the right of way of the public; and the evidence showed that Pratt was not on the road in the exercise of the right of way, but for another purpose—namely, the search for game—and that thus he was a trespasser. "On these facts," said Lord Campbell, C.J., "I think the magistrates were perfectly justified in concluding that Pratt was trespassing on land in the occupation of B. in search of game. He was, beyond all controversy, on land the soil and freehold of which was in the owner of the adjoining land—that is, B. It is true the public had a right of way there, but subject to that right the soil and every right incident to the ownership of the soil was in B. The road, therefore, must be considered as B.'s land. Then Pratt, being on that land, was undoubtedly a trespasser if he went there, not in exercise of the right of way, but for the purpose of seeking game and that only. If he did go there for that purpose only, he committed the offence named in the Act; he trespassed by being on the land in pursuit of game. The evidence of his being there for that purpose is ample. He waved his hand to his dog; the dog entered the cover and drove out a pheasant, and Pratt fired at it. The magistrates were fully justified in drawing the conclusion that he went there, not as a passenger on the road, but in search of game." Erle, J., in the same case, says: "There can be no doubt, in fact, that Pratt was on the land, and that he was in search of game; but it is said he could not be a trespasser because it was a highway. But I take it to be clear law that, if in fact a man be on land where the public have a right to pass and repass, not for the purpose of passing and repassing, but for other and different purposes, he is in law a trespasser, like the cattle in *Dovaston v. Payne*." Crompton, J., in the same case, says: "I take it to be clear law that if a man use the land, over which there is a right of way, for any purpose lawful or unlawful other than that of passing and repassing, he is a trespasser." I do not think the language used by the learned judges in that case too large or that it in any way impeaches the legitimate use of highways by the public. The Lord Chief Justice, however, appears to have thought that this decision was founded on the fact that Pratt was committing an offence on the highway. The Lord Chief Justice says —I quote his own words—"As he was using the highway not to pass and repass, but to be guilty of a criminal offence, the judges held that his being on the highway for the purpose of committing that criminal offence, he was none the less doing that criminal offence because he was on the highway; but they could not take exception and say he had a right to be there, as he had for all purposes, and try to make that a defence for being there for a criminal purpose."

In my opinion that is not the ground of the decision. The ground of the decision is that Pratt was using the highway for purposes other than those of legitimate travel, and was, therefore, a trespasser on the soil and freehold of the adjoining owner; he could not have been convicted unless he had been a trespasser. The conclusion which I draw from the authorities is that if a person uses the soil of the highway for any purpose other than that in respect of which the dedication was made and the easement acquired he is a trespasser. The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose, whether lawful or unlawful, is an infringement of the rights of the owner of the soil, who has, subject to the easement, precisely the same estate in the soil as he had previously to any easement being acquired by the public. If this is the law, the plaintiff, on the admitted facts, was a trespasser. He was using the soil of the highway, not for the purpose of passing and repassing, but for the purpose of interfering with the exercise of a legal right by the defendant, the Duke of Rutland. In these circumstances the defendants are entitled to judgment on the pleas of justification, and also on their counter-claim for nominal damages. The plaintiff's appeal will, therefore, be dismissed, and the defendants' appeal be allowed with costs. Sir H. James, on the part of the duke, does not press for an injunction; if he had I should have thought it ought to be granted; but he asks for a declaration that the plaintiff, on the facts appearing, was, at the time when he interfered with the legal right of the duke, a trespasser. This I think he ought to have. An injunction is constantly granted by the Queen's Bench Division for trespasses threatened to be repeated. It is the effect of the Judicature Act, and a most wholesome remedy. This action might have been brought in the Court of Chancery, and an injunction on the facts appearing would, in my opinion, have been readily granted; and under ord. 25, r. 5, there is full power to make a declaration such as we make.

KAY, L.J., read the following judgment:—The soil of a highway belongs, *primâ facie*, to the owner of the land adjoining it. If the land on either side is the property of different owners, each is owner of the soil on his side *ad medium filum* of the highway. But this ownership is subject to the right of the public to use the highway. Any use of the soil of the highway other than the legitimate use of it for the purposes of a highway is a trespass upon that soil as against the owner to whom it still belongs. These propositions are amply established by judicial decisions. The only difficulty in applying them is in determining whether the particular act complained of is or is not a user of the soil as a highway.

The legitimate use of a highway is generally de-

scribed as a "right of passage" or a "right of passing and repassing." In 1 Rolle's Abridg. 392, B, pl. 1, 2, referred to and adopted by Lord Mansfield in *Goodtitle* v. *Alker*, 1 Burr. 133, at p. 143, the law as to highways is thus stated: "The king has nothing but the passage for himself and his people, but the freehold and all profits belong to the owner of the soil." In the last-mentioned case it was held that trespass would lie for any interference with the owner's rights in the soil of a highway, and that he may maintain ejectment for an exclusion as by a building upon the soil of the highway. In *Sir John Lade* v. *Shepherd*, 2 Str. 1004, an action of trespass was brought by the owners of the soil for building a bridge across a ditch, "the end whereof rested on the highway." The plaintiff had judgment, the court saying: "It is certainly a dedication to the public so far as the public has occasion for it, which is only for a right of passage. But it never was understood to be a transfer of the absolute property in the soil." Following these decisions, the grass or trees growing on the sides of the highway are held to be the property of the owners of the soil: *Turner* v. *Ringwood Highway Board*, 18 W. R. 424, L. R. 9 Eq. 418; *Curtis* v. *Kesteven County Council*, 39 W. R. 199, 45 Ch. D. 504.

The right of the public upon a highway is, in the language of the judges which I have quoted, described as a right of passage. In other cases it is defined as a right of passing and repassing. Probably this is sufficiently accurate and precise to enable anyone to determine what, in each particular instance, is an improper use of the soil. Many of such instances may be too trivial to justify any action or prosecution. That is so in the case of every trespass. If a man walks into the field of another without permission he is a trespasser; but an action for such a trespass, unless it were in assertion of a fancied right, would not be very likely to succeed. So, if by the side of a highway an artist set up his easel and made a sketch, he might be a trespasser; but no one in his senses would bring an action against him for an occasional trespass of that kind. There is no more danger of abuse of the law in the one case than in the other, and it is no argument against this well-settled law relating to highways to say that it is capable of such abuse. The answer is that the law of trespass, whether on the soil of a highway or on land over which the public have no rights at all, may be pushed to an extreme in certain cases. But the discretion of a court of justice is as capable of controlling any excessive assertion of right in the case of a highway as in any other case.

In *Dovaston* v. *Payne* cattle were taken by the defendant damage feasant on his land, which adjoined a highway. It was pleaded that, being on the highway, they had escaped into the land by reason of the owner not having kept the fence which divided it from the road in repair. The plea was held bad because it did not aver distinctly that the cattle were using the highway for the purpose of passing and repassing. So that they might have been trespassing upon it, and an escape from land on which they were trespassing would not be a defence. Heath, J., said that it was no excuse that the fences were out of repair if the cattle were trespassers, and it was necessary to show that they were lawfully using the road; for "the property is in the owner of the soil subject to an easement for the benefit of the public," and on the plea it did not appear "whether the cattle were passing and repassing, or whether they were trespassing on the highway." In *Stevens* v. *Whistler*, 11 East, 51, it was held by the Court of King's Bench that depasturing cattle upon a highway on one side of which the plaintiff had land was a trespass on that part of the soil of the highway which belonged to the plaintiff. In *Reg.* v. *Pratt* it was decided that a person who went upon the high road with a gun and attempted to shoot a pheasant which flew over it was properly convicted of a trespass in search of game under 1 & 2 Will. 4, c. 32, s. 30, upon the soil of the highway, which belonged to the owner of the close adjoining such highway. "He was on land," said Lord Campbell, C.J., "the soil and freehold of which was in the owner of the adjoining land. It is true the public had a right of way there, but subject to that right the soil and every right incident to the ownership of the soil was in" the owner of the adjoining land. Wightman, J., said: "Though the public have a right to pass and repass on land which is a highway they have no right to use the land for any other purpose than as a highway; and the appellant, being on such land in pursuit of game, was *primâ facie* a trespasser." Erle, J., said: "It is said he could not be a trespasser because it was a highway. But I take it to be clear law that if in fact a man be on land where the public have a right to pass and repass, not for the purpose of passing and repassing, but for other and different purposes, he is in law a trespasser like the cattle in *Dovaston* v. *Payne*." Crompton, J., said: "If a man use the land over which there is a right of way for any purpose, lawful or unlawful, other than that of passing and repassing he is a trespasser." These authorities were considered and followed by the Court of Queen's Bench in *St. Mary, Newington* v. *Jacobs*, 20 W. R. 249, L. R. 7 Q. B. 47, where the law is stated thus: "The owner who dedicates to public use as a highway a portion of his land parts with no other right than a right of passage to the public over the land so dedicated, and may exercise all other rights of ownership not inconsistent therewith." Mellor, J., who delivered the judgment of the court, comments thus on *Reg.* v. *Pratt*: "Whether or not that case is open to doubt as to the construction put upon the Game Act, it truly expresses, as we think, the true limit of the public rights over a highway." The court held that the owner of premises adjoining a highway, who had offered to take up the flags of a footpath and replace them by hard materials to enable him to cart heavy machinery into his yard, was not liable for damage done to the flags by carting the machinery over them, when his offer had been refused. According to these authorities the right of the public upon a highway is that of passing and repassing over land the soil of which may be owned by a private person. Using that soil for any other purpose, lawful or unlawful, is a trespass. I understand those words to mean that the purpose need not be unlawful in itself; as, for example, to commit an assault or a felony upon the high road. It is enough that it should be a user of the soil of the high road for a purpose other than that which is the proper use of a highway, namely, that of passing and repassing along it.

The peculiarity of the decision of *Reg.* v. *Pratt* is that the trespasser was passing along the highway, but his purpose in doing so made that passing a trespass. The purpose, however, was to do an act upon the highway itself which was beyond his right merely to pass and repass. If he had gone along the highway with the purpose of reaching a covert near the highway and taking game in that covert, though he might be a trespasser in that covert, I should not think he was a trespasser upon the highway. But if a man goes along a highway for the purpose of cutting down the trees or bushes which grow along the side of it, or taking the grass, or setting up a show upon the highway, or doing upon the highway itself—in the words of Crompton, J.—any act, "lawful or unlawful, other than that of passing and repass-

ing, he is a trespasser." The words must be read with the obvious qualification that the "purpose" they refer to must be a purpose of using the soil of the highway itself otherwise than by merely passing and repassing.

In this case the highway was a cart or carriage-road across a moor. The Duke of Rutland had a right of sporting over the moor. The soil in it and in the highway, I understand, belonged to him. He had butts in which people stood to shoot grouse driven over them from the moor. These butts were some 200 yards from the road, so that shooting from them would not infringe the provisions of section 72 of 5 & 6 Will. 4, c. 50, which prohibits any person from wantonly firing off any gun within fifty feet of the centre of any carriageway or cartway. Some old butts were within the prohibited distance. It was proved that the plaintiff went upon this high road during a grouse drive for the express purpose of preventing the grouse from flying towards the butts, and thus interfering with the right of sporting which was being exercised by the duke and his friends. On this point the evidence was so conclusive that we are told that the Lord Chief Justice said it was superfluous to produce any more witnesses to prove it. The keepers seized the plaintiff, threw him upon the road, and held him there during the grouse drive to prevent his further interference. The Lord Chief Justice directed the jury that the plaintiff was not trespassing. Under that ruling they found that a nominal sum of 5s. paid into court was sufficient damages for the assault upon him. Counsel then said that, after his lordship's ruling, he could hardly press the counter-claim, which asserted that the act of the plaintiff was a trespass and sought for an injunction to restrain him from repeating it. This counter-claim is, in fact, an equitable cross-action, which may now be brought in the Queen's Bench Division: see section 24, sub-section 3, of the Judicature Act, 1873. Where a trespass is committed in assertion of a fancied right, and it is shown that it will be repeated unless prevented, the Court of Chancery has constantly granted injunctions to prevent a repetition of the trespass.

Upon this point there is now before us a cross-appeal by the defendants. They asked for an injunction; but upon being pressed by me on that point, counsel said he would not insist upon the injunction, but desired the decision of this court by declaration whether or not the act of the plaintiff was a misuse of the soil of the highway which amounted to a trespass. It is not unusual in the Chancery Division to make such a declaration without going on to grant an injunction. It clearly may be done under ord. 25, r. 5. Whatever may be thought of the so-called sport of standing in a butt and shooting at grouse driven over, it is not prohibited by law; and, subject to the provisions of the statute to which I have referred for the protection of wayfarers upon the high road, it is a not unlawful exercise of the right of the owner of the land. The plaintiff went upon this highway, not for the purpose of exercising as one of the public his right of passage, but of interfering with the grouse drive by placing himself upon the soil of the highway so as to prevent the grouse from flying over the butts. In his own language, taken from his evidence, he says: "I certainly meant to take up my position in front of the butts." "I went there to defend the public right." With great deference I am unable to agree that this was a use of the right of passing along the highway. I think it was an abuse of that right. In other words, it was a use of the soil of the highway for another purpose, which use interfered with, and was intended to interfere with, a right which was then being exercised by the owner of the soil, and was incident to that ownership. Such a misuse of the soil of a highway is a trespass. There seems to have been sufficient evidence that the plaintiff was not only asserting a right to do what he did, but also that his intention was to repeat his interference. This strictly would entitle the defendants to the assistance of the court by injunction to prevent a repitition of the act. But this is not pressed for; and I think that the defendants are entitled at any rate to a declaration under ord. 25, r. 5, upon their counter-claim, that under the circumstances the plaintiff upon October 8, 1890, when stopped by the duke's keepers, was trespassing upon the soil of the highway. I am not so much impressed with the consequences of granting an injunction. The court exercises the power of enforcing such an order by imprisonment with very great care and caution. The damages given to the plaintiff for the alleged assault upon him by the keepers on the assumption that he was not a trespasser were only 5s. They would not be more on the ruling that he was a trespasser, and the defendants do not ask to alter the amount. The plaintiff's appeal fails, and must be dismissed. The defendants' appeal succeeds. The plaintiff's claim is dismissed with costs. The defendants' counter-claim is allowed with costs.

Judgment accordingly.

Solicitors for the plaintiff, *Hood Barrs & Co.*

Solicitors for the defendants, *G. L. P. Eyre & Co.*

From Prob. Div. & Adm. Div. (Lord Esher, M.R., and Lopes and Kay, L.JJ.) — Dec. 9.

"THE LANCASHIRE." (*a*.)

Shipping—Admiralty—Collision—Fog—Regulations for Preventing Collisions at Sea, art. 18.

By article 18 *of the Regulations for Preventing Collisions at Sea, "Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or stop and reverse if necessary."*

During a fog the whistle of the steamship A., *bound eastward, was first heard by the master of the steamship* L., *bound westward, a point or a point and a half on his starboard bow, and the sound of the whistle gradually broadened until it reached two and a half to three points on that bow. As the next whistle did not seem to broaden, the master of* The L. *stopped his engines. The next whistle satisfied him that* A. *was porting and closing on his starboard bow, and he thereupon reversed his engines. The two vessels came into collision; but if* A. *had not ported, they would have passed starboard to starboard on nearly parallel and opposite courses.*

Held, by the Court of Appeal (*affirming the judgment of* Barnes, J.), *in an action of damage, that* The L. *was to blame for the collision as well as* The A.

The Ceto, 14 *App. Cas.* 670, *followed.*

Appeal by the owners of the steamship *Lancashire* from the judgment of Barnes, J., in an action by the owners of the steamship *Ariel* against the owners of *The Lancashire*, arising out of a collision between the two ships which took place on the 10th of June, 1892.

The following statement of the facts is taken from the judgment of Barnes, J.:—*The Ariel* was a steamer of 1,452 tons net and 2,020 tons gross register. At the time of the collision she was on a voyage from Varna to Hamburg with a cargo of wheat. *The Lancashire* was a larger vessel of 2,712

(*a*.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

tons net and 4,193 tons gross register, and her cargo was about 3,500 tons of dead weight. She was on a voyage from London to Liverpool. The collision took place in the neighbourhood of *The Owers* lightship in the English Channel shortly after 8 p.m. on the 10th of June. The evidence of the master of *The Ariel* was that about 3.40 p.m. she passed St. Catherine's light, that her course was about E. by S.; that about 4.30 it came on foggy and her engines were reduced to half-speed; and at 4.50, when the fog became denser, the engines were reduced to dead slow. Shortly after 7 p.m. *The Ariel* was in the neighbourhood of *The Owers* lightship. At 8 p.m. the captain gave the order to proceed as slow as possible, and after that the speed was only two knots an hour. The master of *The Ariel* stated that at five minutes past eight he heard a steam whistle, apparently right ahead a long way off, that that whistle was heard from time to time and his own whistle was sounded in answer to it, and after listening for about ten minutes he ported to about E.S.E. After porting, as the vessels were getting close, he heard the whistle of *The Lancashire* on his port bow. He steadied at E.S.E. and the whistle did not get any broader. About five minutes after he had steadied on the E.S.E. course he saw the steamer about two points on his port bow a length or two off, and he thereupon reversed his engines and put his helm hard aport, but was struck about 15 feet abaft the stern on the port bow, the time of the collision being about 8.20 p.m. *The Ariel* was so much damaged that she sank early the next morning. The account given by the master of *The Lancashire* was that at 5.7 p.m. his ship was abeam of Beachy Head, proceeding on a course of N. 82° W. magnetic. At 6.15 fog ahead was noticed. At 6.30 he ordered the engines to be slowed, and at 6.35 he proceeded dead slow. At 7.46 he heard a steam whistle a point or a point and a half on his starboard bow. He continued to hear this whistle, and it gradually broadened on his starboard bow. He repeated the order dead slow, and the last blast before his suspicions were aroused was from two and a half to three points on his starboard bow. He then heard a whistle which aroused his suspicions because it seemed to come from the same direction as the previous whistle, and not to be continuing to broaden. He thereupon stopped his engines, his speed up to that time being about three and a half knots through the water. The next whistle satisfied him that *The Ariel* was porting and closing on his starboard bow, and he therefore reversed his engines full speed. He heard two more blasts, and as the last one was dying away *The Ariel* come into sight, crossing him at an angle of about forty degrees. When first seen, *The Ariel* was about 150 yards off, two and a half to three points on *The Lancashire's* starboard bow. According to the evidence of the captain of *The Lancashire* the collision took place at seven minutes past eight.

Article 18 of the Regulations for the Prevention of Collisions at Sea provides that "every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or stop and reverse if necessary." The learned judge found that *The Ariel* was to blame for porting, and not slacking; with reference to *The Lancashire* he put the following question to the nautical assessors:—"Were the indications by the whistle from *The Ariel*, under the circumstances, such as to convey distinctly to a master of reasonable skill in the locality in which the vessels were that the two vessels were so approaching that they would pass well clear of each other without risk of each other, until *The Ariel* ported?" The nautical assessors answered that question in the negative. The learned judge was therefore of opinion that *The Lancashire*, in not having slackened speed sooner than she actually did, had not complied with article 18, and he held that *The Lancashire*, as well as *The Ariel*, was to blame for the collision.

The owners of *The Lancashire* appealed.

Sir Richard Webster, Q.C., and *Bucknill, Q.C.* (*A. D. Bateson* with them), for the owners of *The Lancashire*.—The learned judge in the court below was wrong in holding that *The Lancashire* was to blame. The evidence shows that the master of *The Lancashire* complied with article 18 of the Regulations for Preventing Collisions at Sea. He stopped his engines as soon as there was any indication of risk of collision, and reversed them when it became necessary. The question asked by the learned judge of the nautical assessors ought to have been put affirmatively in the terms of article 18; put as it was in the negative form, it places the test too high. [KAY, L.J., referred to the *dictum* of Lord Watson in *The Ceto*, 14 App. Cas. 670, 38 W. R. Dig. 187.] That case is distinguishable, because there both vessels were at the material time on crossing courses, and both vessels had indications of risk of collision. [Lord ESHER, M.R.—The question put by the learned judge seems to have been taken from the judgment of Lord Herschell in *The Ceto*, who said: "I think that when a steamship is approaching another vessel in a dense fog, she ought to stop, unless there be such indications as to convey to a seaman of reasonable skill that the two vessels are so approaching that they will pass well clear of one another."] Two duties are imposed by article 18, first, to slacken speed when the vessels are approaching so as to involve risk of collision; and, secondly, to reverse if necessary. The evidence shows that the master of *The Lancashire* fulfilled both these duties. There is no hard and fast rule in these cases, but each case must depend on its own circumstances: *The Vindomora*, [1891] A. C. 1, 39 W. R. Dig. 211.

Pyke, Q.C., and *T. F. Dawson Miller* (*Sir Walter Phillimore* with them), for the owner of *The Ariel*, were not called upon.

Lord ESHER, M.R.—I think we are bound in this case by the decision of the House of Lords in *The Ceto*. It is clear that the second whistle, heard on the same bearing as the one before showed, considering the way in which the vessels were approaching, that *The Ariel* had ported. We have asked our assessors this question, "When *The Lancashire* stopped, were the indications such as to show to the captain of *The Lancashire* distinctly and equivocally that if both vessels continued to do what it appeared they were doing (that is, the one proceeding slowly on and the other porting towards the other), they would pass clear without risk of collision?" The answer is, "No." I think, therefore, that, in obedience to the decision of the House of Lords, the learned judge was right in holding that *The Lancashire* was to blame as well as *The Ariel*. I think, however, that this construction of the rule, so far as it relates to steamers approaching each other in a fog, is a new one, but it is binding on this court.

LOPES, L.J.—I am of the same opinion.

KAY, L.J.—I agree. There are two alternatives prescribed by the rule, and in the circumstances, according to the construction put upon the rule in *The Ceto*, the captain of *The Lancashire* ought to have stopped and reversed. He did not reverse, but only stopped. He is, therefore, to blame for not obeying the rule.

Appeal dismissed.

Solicitors for the appellants, *Pritchard & Sons*, for *Bateson, Warr, & Bateson*, Liverpool.

Solicitors for the respondent, *Crump & Son*.

High Court of Justice.

Chan. Div. } North, J. } June 1; Dec. 20.

In re ADAMS.
ADAMS *v.* ADAMS. (*a.*)

Infants — Contingent interest — Intermediate income — Maintenance — Conveyancing Act, 1881 (44 & 45 *Vict.* c. 41), *s.* 43.

Infant contingently entitled to a share of residue can be allowed maintenance out of the income thereof until one of them attains a vested interest.

In re Jeffery, 39 *W. R.* 234, [1891] 1 *Ch.* 671, *and* In re Burton, Banks *v.* Heaven, [1892] 2 *Ch.* 38, 40 *W. R. Dig.* 97, *considered.*

Adjourned summons.

The testator, J. G. Adams, who died in 1890, by his will, dated March 22, 1887, devised and bequeathed the residue of his real and personal estate upon trust for sale and conversion, and directed his trustees, after payment of his funeral and testamentary expenses, to stand possessed of the proceeds of sale of his residuary estate in trust, as to one-third part thereof, in equal shares for all the children of the testator's brother, Thomas Adams, who should survive him, the testator, and, being sons, should attain the age of twenty-one years, or, being daughters, should attain that age or marry.

Thomas Adams died before the date of the will leaving six children, all of whom survived the testator. None of them had attained as yet a vested interest, the eldest being eighteen years of age.

This was an originating summons on behalf of the six infant children of Thomas Adams as plaintiffs, to which the trustees of the will and the next of kin of the testator were made defendants, asking for a declaration that, under the Conveyancing Act, 1881, s. 43, the trustees of the will might be authorized to apply the income of one-third of the residue for the maintenance of the plaintiffs.

W. F. Webster, for the plaintiffs.—The infants are entitled to maintenance under the Conveyancing Act, 1881, s. 43. Chitty, J.'s decision in *In re Burton, Bankes* v. *Heaven*, [1892] 2 Ch. 38, 40 W. R. Dig. 97, was correct.

He also referred to *In re Cotton*, 24 W. R. 243, 1 Ch. D. 232; *Furneaux* v. *Rucker*, W. N., 1879, p. 135; *In re Jeffery*, 39 W. R. 234, [1891] 1 Ch. 671; *Shepherd* v. *Ingram*, Amb. 448; *Mills* v. *Norris*, 5 Ves. 335; *Scott* v. *Earl of Scarborough*, 1 Beav. 154; *Rochford* v. *Hackman*, 9 Hare, 475; *Brandon* v. *Aston*, 2 Y. & C. Ch. 30; *Green* v. *Ekins*, 2 Atk. 473; *Kidman* v. *Kidman*, 40 L. J. Ch. 259, 19 W. R. Dig. 4.

Southall, for the next of kin.—The infants are not entitled to the income accruing during their infancy.

He relied on *In re Jeffery*, and *In re Dickson, Hill* v. *Grant*, 33 W. R. 511, 29 Ch. D. 331.

Disturnal, for the trustees.

Dec. 20.—NORTH, J. [after reading the will as above set out].—Now what is the effect of this gift? Who takes the income of the one-third share of the residue? Can it be used for the infants' maintenance? It is said that *In re Jeffery* was not rightly decided, and I am asked to follow the decision of Chitty, J., in *In re Burton, Banks* v. *Heaven*. I have very fully reconsidered my decision in *In re Jeffery*, and I see no reason for departing from the view I then took. The distinction, however, between that case and the present is that here no child has attained a vested interest. As regards the case of *Furneaux* v. *Rucker*, which I referred to in *In re Jeffery*, I then thought it was a gift of residue, but I find, on referring to the registrar's books, that it was a specific gift. There it was decided that the income of the property fell into the residue until the eldest child attained twenty-one, when he would be entitled to it, the other children becoming successively entitled as they attained vested interests. The other case I wish to refer to is *Shepherd* v. *Ingram*. A testator gave his residue to such children as his daughter, who was then unmarried, should have of her body lawfully begotten. The income was directed to be accumulated. The daughter married and had three children. *Shepherd* v. *Ingram* was a bill by two of the children, the third being defendant, all of them being infants, to have it decided who was entitled to the accumulation, and prayed for an account of the income and a declaration that so much of it as became due from the birth of the first child till the second was born belonged to the first, and so much of it as became due from the birth of the second child till the third was born belonged to the first and second, and so on. There Northington, C., said he was very clear that the infants took a defeasible interest in the residue—defeasible in this sense, that other children might be born and diminish their shares—and decreed according to the prayer of the bill. That case seems to me very like the present. But it is said the vesting there took place at birth. Whether the vesting takes place on birth, subject to being divested on death under twenty-one, or whether it takes place only on the attainment of twenty-one, seems to me a matter of detail and not of principle. Suppose that in the present case Thomas had been alive, and the gift had been to all the children of Thomas; if Thomas had had one child at the testator's death, that child would clearly have taken a vested interest in the whole share of the residue left; if a second child was born after the testator's death, the vested interest of the first child in the whole would have been divested according to *Shepherd* v. *Ingram*, and he would have only been entitled to a vested interest in one-half, and so on. That is very like this case. I considered *Shepherd* v. *Ingram* in point in *In re Jeffery*, and I still consider that it is binding on me. Now with regard to the income. It is said the children take an interest in that also; but it is wrong to say they take it *quâ* income of the capital in which they have an interest. It is undisposed of income, and as such becomes part of the residue; but, being part of the residue, the income belongs contingently to the infants in the same way as the capital belongs contingently to them. That being so, in my opinion the income is income to which the infants are contingently entitled, and of property to which they are contingently entitled, and may be applied for their maintenance under the Conveyancing Act, 1881, s. 43, and I agree with Chitty, J., in *In re Burton, Banks* v. *Heaven* to this extent, that the income is applicable for the maintenance of the infants until a vested interest comes into existence. But I do not see my way to go beyond that point. While there is no vested interest then I hold that the income is applicable for maintenance of the infants. That will carry them on till about 1895. I will not decide what will happen then, and I declare that the income is applicable to the maintenance of all the children till one of them attains twenty-one, or, being a daughter, marries.

Solicitors for all parties, *Ingle, Cooper, & Holmes.*

(*a.*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

Chan. Div.
Kekewich, J. } Feb. 14, 15.

HOPE v. D'HÉDOUVILLE. (a.)

Tenant for life and remainderman—Lands settled on trust for sale—No power of postponement—Enjoyment of income in specie.

Where lands are vested in trustees upon trust for sale and investment of the proceeds, and payment of the income of the investments to a tenant for life, with remainders over, and without any power of postponement, the tenant for life is entitled to receive the net rents and profits until such conversion.

Further consideration.

By an indenture dated the 31st of October, 1854, the Comtesse d'Hédouville assigned to trustees the moiety of one-third of certain leasehold lands and hereditaments held under lease periodically renewable, upon trust during the lifetime of the Comtesse, to pay the annual profits unto her or her appointees for her separate use and with restraint on anticipation, and immediately after her decease upon trust to sell and convert into money the whole of the said moiety of one-third, and out of the clear moneys to arise from such sale to pay the sum of £4,000 to her husband, the Comte d'Hédouville, and invest the surplus in stocks or funds therein authorized, and to pay to the Comte, if he should survive her, the annual dividends and profits of the trust stock during his life, and subject thereto in trust for such persons as she should by deed or will appoint. In the year 1870 the freehold reversion of part of the leasehold premises was conveyed by the Ecclesiastical Commissioners to the trustees in exchange for the surrender of another part of the premises comprised in the lease. The plaintiffs are the present trustees of the said indenture of the 31st of October, 1854.

By a deed poll dated the 3rd of August, 1880, the Comtesse exercised her power of appointment after the life estate of her husband in favour of the various defendants.

The Comtesse died on the 5th of March, 1889, and the Comte, her husband, died on the 28th of February, 1890, and the defendant, Louis Comte d'Hédouville, is his legal personal representative.

Hopkinson, Q.C., and *Dauney*, for the plaintiffs.

Warmington, Q.C., and *Warrington*, for the defendant Louis Comte d'Hédouville and François d'Hédouville.—The only question is whether the late Comte d'Hédouville took a share of the rents and profits, and whether the present comte is also entitled to a share. The trustees have received the rents while waiting to realize the property. Is the capital or income to benefit by it? There is no intestacy. Neither *corpus* nor income should gain by the non-conversion. The deed of appointment deals with *corpus*. Why should the tenant for life be deprived of the actual income in order to increase the capital? *In re Thomas, Wood* v. *Thomas*, 40 W. R. 75, [1891] 3 Ch. 482.

Marten, Q.C., and *Yardley*, for the defendant Mrs. Harris, one of the appointees.—We contend the deed of appointment sweeps up all that does not go to the tenant for life. The rents do not go as income for this period, but as capital. We are entitled *in specie*, or no one is, as there is no gift of the income.

Ashton Cross, for the defendants, the Contessa di Quigini Puliga and her infant children, who were also appointees, urged that this was a clear case of equitable conversion.

McSwinney, for another appointee, Miss Sansom.—The trustees are bound to make the fund as large as possible, to sell at once and invest. The tenant for life is not entitled to the intermediate rents.

Norton, for a mortgagee of Contessa di Puliga's share.

Warmington replied.

KEKEWICH, J.—The point I have to decide is one of novelty. It is closely connected with the point decided in *In re Thomas, Wood* v. *Thomas*, but essentially different. In that case there was an express authority to postpone conversion; here the question is how far the tenant for life can claim to enjoy *in specie* without any such express direction. In that case I held some direction must be found for such enjoyment. Here I find there is one thing wanting, namely, no power of postponement and no indication that any party contemplated any postponement. It is conceded that there has been no wilful delay. Under these circumstances what ought to be done? If the delay had been blameworthy, another question would arise; but I assume that conversion has been effected as soon as circumstances would permit. Putting aside the £4,000, it is simpler to treat the Comte as tenant for life. He is to have the proceeds of authorized investments, but there is nothing to suggest that anyone else should take any income which he does not.

The Comtesse has purported to appoint more than she could: there is no power for her to appoint more than the proceeds of sale. If I cannot extract from the documents a gift of the rents to some one, they are undisposed of and revert back to the settlor. Now as the object of conversion is to turn land into invested money, so long as that is not defeated there is nothing inconsistent in holding that the tenant for life is to receive the rents. I am driven to the conclusion that the settlor intends that the income shall belong to the donee. The alternative is a notional conversion as an investment in Consols or in a 4 per cent. security, in either case taking away something from the *cestui que trust*, taking out of capital to give to the tenant for life. This does not solve the difficulty. It really works a disadvantage to the remaindermen, who may or may not get the rents to compensate them. I hold that the intention is for the tenant for life to take the income, whatever it may consist of.

Solicitors, *Shoubridge & May; Caprons, Dalton Hitchins, & Brabant; Denton, Hall, & Burgin; Lawrence, Graham, & Co.*

(a.) Reported by FRANCIS T. DUKA, Esq., Barrister-at-Law.

Chan. Div.
Vaughan Williams, J. } Feb. 17.

LISTER v. HENRY LISTER & SON (LIMITED). (a.)

Company—Debenture—First and second issue—Priority—Reissue—"Outstanding"—Series of debentures.

A limited company had power under its memorandum to raise money by the issue of debentures secured by mortgage or otherwise upon all or any part of its property. The company shortly after its incorporation issued a series of debentures headed "Issue of £10,000 Six per Cent. Mortgage Debentures." Each debenture was to secure £100, and the company charged all its property,

(a.) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

subject to the conditions indorsed thereon. The conditions stated that the debenture was one of a series issued or about to be issued by the company upon and subject to the like conditions for securing an aggregate sum and interest, and that the debentures as and when respectively issued should operate as creating continuously-overriding floating charges upon the undertaking and property of the company, subject to a certain mortgage for securing to the holders rateably and equally inter se, *and without any preference or priority one over another, but in priority to all other debts for the time being owing by the company (save as aforesaid), of the principal moneys and interest owing upon the debentures, and as precluding the company, whilst any of the debentures should remain in force, from creating or making any further mortgage, charge, incumbrance, or security upon or over its undertaking or its property, in competition with or otherwise than subject or in subordination to the debentures then outstanding. Subsequently the company issued a second series of debentures in similar form to the first, except that the conditions stated that these latter debentures were "subject and in subordination to the debentures which have already been issued by the company for securing an aggregate principal sum of £10,000 and interest at the rate of £6 per cent. per annum, or such of them as are now outstanding." Neither series of debentures was secured by a trust deed. Some of the first series of debentures were issued before the date of the second charge, and others of the first series were issued subsequently to the second charge.*

Held, that the words "debentures already issued" meant the series of, and not the particular debentures already issued, and that the words "or such of them as are now outstanding" meant such of them as, having been issued, had not been paid off, and that, consequently, all the second debentures were postponed to all the first debentures, whenever issued, except such of them as had been reissued.

Debenture-holders' action.

Henry Lister & Co. (Limited) (hereafter called the company) was incorporated in 1890 under the Companies Acts, 1862 to 1886, as a company limited by shares.

The memorandum of association of the company gave power to borrow or raise money by the issue of debentures secured by mortgage or otherwise upon all or any part of the property of the company. The company commenced in 1890 to raise a sum of £10,000 by the issue of a series of mortgage debentures for that amount. These debentures were headed:—"Issue of £10,000 Six per Cent. Mortgage Debentures." Each debenture was for £100, and the company thereby acknowledged itself to owe, and bound itself to pay, to the registered holder the sum of £100 and interest at £6 per cent. per annum, and charged with such payment the undertaking of the company and all its property, real and personal, both present and future (including its uncalled capital for the time being), subject to indorsed conditions. The conditions stated, among other things, that the debenture was one of a series issued, or about to be issued, by the company upon and subject to the like conditions for securing an aggregate sum of £10,000 and interest at £6 per cent. per annum. The conditions also provided (condition 2) that "the debentures as and when respectively issued shall operate as creating continuously overriding floating charges upon the undertaking of the company, and all the within-mentioned property" (subject to a certain mortgage), "for securing and providing for the payment to the registered debenture-holders, rateably and equally *inter se*, and without any preference or priority one over another, but in priority to all other debts for the time being owing by the company (save as aforesaid), of the principal moneys and interest owing upon the debentures, and as precluding the company, whilst any of the debentures shall remain in force, from creating or making any further mortgage, charge, incumbrance, or security upon or over its undertaking or its property in competition with or otherwise than subject and in subordination to the debentures then outstanding."

The company commenced to issue debentures of this issue on the 25th of July, 1890, on which date they issued twenty debentures, numbered 1 to 20 inclusively, to some of the plaintiffs. On the same day the company issued six debentures, numbered 21 to 26 inclusively, to Messrs. Clayton, Marsden, & Co., and five debentures, numbered 27 to 31 inclusively, to Mr. Joseph Law. On the 30th of September, 1890, the company issued to Messrs. William Arnold & Son three debentures, numbered respectively 82, 83, and 84. These debentures all remained unpaid. On the 30th of September, 1890, the company issued to Messrs. Broadbent & Sons ten debentures, numbered 85 to 94 inclusively. These debentures (85 to 94) were repaid on the 2nd of June, 1891; and on the 1st of October, 1891, seven new debentures, numbered 85 to 91, were issued to another of the plaintiffs, and three, numbered 92, 93, and 94, were issued on the 24th of December, 1891, to Mr. Jessop. These ten new debentures also remained unpaid. The company, on the 13th of November, 1891, issued to Mr. Joseph Boden five debentures, numbered 95 to 99 inclusively. On the 24th of December, 1891, the company also issued to Mr. Jessop the debenture numbered 100. These debentures also remained unpaid.

In 1891 the company raised money on a "second issue of £10,000 six per cent. mortgage debentures" of £100 each. These debentures were in a form similar to that of the prior series, except that condition 2 contained these words: "And also subject and in subordination to the debentures which have been already issued by the company for securing an aggregate principal sum of £10,000 and interest at the rate of £6 per cent. per annum, or such of them as are now outstanding."

The facts with reference to this second issue of debentures were as follows:—On the 19th of January, 1891, the company issued six of the second debentures to Mr. Joseph Boden. These debentures were numbered through inadvertence 100 to 105 inclusively, instead of 101 to 106. These debentures were still unpaid, and there were, therefore, two debentures numbered 100, one being of the first issue and held by Jessop, and the other of the second issue and held by Boden. On the 9th of March, 1891, the company issued fifty second debentures, numbered 106 to 155 inclusively, to Messrs. F. Heilborn & Co., and on the 15th of September, 1891, four second debentures, numbered 156 to 159, were issued to Mr. Joseph Law. On the same date two second debentures, numbered 160 and 161 respectively, were issued to one of the plaintiffs. All these debentures remained unpaid. On the 10th of October, 1891, nineteen debentures of the second issue, numbered 162 to 180 inclusively, were issued by the company to Mr. Joseph Law, and on the same date nineteen second debentures, numbered 181 to 199, were issued to Mr. William Blackburn. These debentures also remained unpaid. The company had issued no debentures save those mentioned. Neither series of debentures was covered by a trust deed.

This was a debenture-holders' action, and the question was raised as to the priorities *inter se* of the second debentures and the first debentures which had been issued in the place of paid-off first debentures.

This case had been argued in chambers on the above facts, and his lordship now delivered judgment in court.

Alexander Young, for the first debenture-holders.

Arthur Young, for the second debenture-holders.

VAUGHAN WILLIAMS, J.—I have come to the conclusion that all the first debentures have priority over any of the second debentures. By the terms of the first debentures the holders are to have priority over all debts of the company, except a certain mortgage debt. This priority will prevail in favour of all the first debentures issued before the company had given a fresh charge or mortgage secured on the same property as that charged by the first debentures. So soon as that is done each first debenture subsequently issued would be postponed to any fresh charge or mortgage of earlier date, unless such fresh charge or mortgage was expressly made subject to further debentures of the first series still to be issued. It follows that the real question which I have to determine is whether the second debentures have in fact been made expressly subject to further first debentures still to be issued, and I have arrived at the conclusion that the second debentures are expressly made so subject. It is true that the words of condition 2 of the second debentures are somewhat ambiguous. These words are "in subordination to the debentures which have already been issued by the company for securing an aggregate principal sum of £10,000, or such of them as are now outstanding."

Now "debentures already issued" may mean the series of debentures already issued, or it may mean the individual debentures already issued. It is said that the words "or such of them as are now outstanding" show that the word "debentures" means the individual debentures which are now outstanding, or, in other words, which have already been individually issued, but I think not. I think that the words "or such of them as are now outstanding" mean "or such of them as, having been issued, have not been paid off." In other words, I think that these words are directed against a reissue of debentures which have been paid off. I am led to this construction because any other construction would be inconsistent with the second debentures being paid "rateably and equally *inter se*, and without any preference or priority one over another"; for it is plain that, as there is no assignment here to a trustee for the second debenture-holders, the only tenable claim which the second debentures could make would be that each debenture, whether of the first or second series, should rank according to its individual date. But in such case it is plain that, if the dates of individual first debentures interposed between the dates of individual second debentures, the second debentures would not get payment rateably and equally *inter se*, and without any preference or priority over one another. For these reasons I have come to the conclusion that the condition of the second debentures, according to its true construction, postpones the whole of the second debentures to the whole of the first debentures, whenever issued, provided they are not reissued.

Solicitors, *Ramsden, Radcliffe, & Co.*, for *Ramsden, Sykes, & Ramsden*, Huddersfield; *Henry*.

C. C. R.
(Lord Coleridge, C.J., and Hawkins, Cave, Day, and Collins, JJ.) Jan. 17.

REG. v. WILLIAMS. (*a*.)

Criminal law—Offences against the person—Male under the age of fourteen—Indictment for carnal knowledge of girl under the age of thirteen—Acquittal—Conviction for indecent assault—Criminal Law Amendment Act, 1885 (48 & 49 *Vict. c.* 69), *ss.* 4, 9.

A boy under the age of fourteen years, who has been put on his trial under section 4 *of the Criminal Law Amendment Act*, 1885, *for carnally knowing a girl under the age of thirteen years, although, by reason of his age, he is entitled to be acquitted of that offence, may yet, under section* 9 *of the same Act, be convicted of an indecent assault.*

Case stated by Vaughan Williams, J., as follows:—

Robert John Williams was indicted for having, at the parish of Holywell, on the 30th day of November, 1891, feloniously, unlawfully, and carnally known a girl under the age of thirteen years, to wit, one Mary Hannah Jones, of the age of nine years.

The case came to be tried before me at Mold at the Spring Assizes, 1892.

It was suggested on behalf of the prisoner that he was under fourteen years of age, and I, after hearing the evidence, put the question to the jury, who found that the prisoner was under fourteen.

I directed the jury that the prisoner could not be convicted of the felony charged, or of an attempt to commit such felony.

The prosecution insisted that, under section 9 of the Criminal Law Amendment Act, 1885, the prisoner was liable on the indictment for felony to be tried for indecent assault. I so held, and left the case to the jury, who found the prisoner guilty of indecent assault. I reserved this case on the question of law which arose at the trial whether a male under the age of fourteen years, indicted for an offence under section 4 of the Criminal Law Amendment Act, 1885, who by reason of his age cannot be tried or convicted for such offence, can, under the provisions of section 9 of the said Act, be found guilty of an indecent assault, and I ordered the prisoner to be released on bail until this point should be decided.

The Criminal Law Amendment Act, 1885, provides: Section 4. "Any person who unlawfully and carnally knows any girl under the age of thirteen years shall be guilty of felony." Section 9. "If, upon the trial of any indictment for rape or any offence made felony by section 4 of this Act, the jury shall be satisfied that the defendant is guilty . . . of an indecent assault, but are not satisfied that the defendant is guilty of the felony charged in such indictment, or of an attempt to commit the same, then, and in every such case, the jury may acquit the defendant of such felony and find him guilty of . . . an indecent assault."

No counsel appeared.

Lord COLERIDGE, C.J.—In this case the prisoner was indicted under section 4 of the Criminal Law Amendment Act, 1885, for the carnal knowledge of a girl under the age of thirteen years. It was proved that he was under the age at which, by the law of England, he can be convicted of that offence, and he was, therefore, very properly acquitted; nor could he, in my opinion, have been properly convicted of an attempt to do what by our law he must be deemed to have been physically incapable of doing. But I am of opinion that section 9 of the same Act says that under these circumstances a prisoner may properly be found guilty of an indecent assault. I think, therefore, that the conviction ought to be affirmed.

HAWKINS, J.—I also think that this conviction ought to be affirmed. But I cannot agree that a boy cannot be convicted of an attempt to commit an offence which, according to a presumption of law, he is incapable of completing. But this case is free from

(*a*.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

any such question. The prisoner was indicted under section 4 of the Criminal Law Amendment Act for having carnally known a girl under the age of thirteen years. It was proved that he was under the age of fourteen years, and therefore he could not have been found guilty of the crime of rape. The offence created by section 4 is of the same character as that of rape, and a recent case (*Reg.* v. *Waite*, *ante*, p. 80, [1892] 2 Q. B. 600) has decided that a boy under the age of fourteen years cannot be convicted under section 4 of carnally knowing a girl under the age of thirteen years. Therefore the learned judge was right in allowing the objection on the ground of the prisoner's age to prevail. The prisoner, however, was rightly upon his trial for the felony under section 4. Then there is section 9. [His lordship read the section, and continued:—] I am of opinion that the jury, although not satisfied that the prisoner was guilty of the main offence charged under the earlier section, could find him guilty under section 9 of having committed an indecent assault.

CAVE, J.—I am of the same opinion. I think that, for the reasons given by my lord and my brother Hawkins, the prisoner was properly convicted of an indecent assault. The question of whether a person can be convicted of an attempt to do what he is by law deemed to be incapable of doing has not yet been settled, and does not arise here. I will not deal with it until it does arise, but I am very much inclined to agree with the opinion expressed by my brother Hawkins.

DAY, J.—I agree that the conviction should be affirmed. It is unnecessary for me to repeat the reasons which have been given by the Lord Chief Justice and my brother Hawkins. I agree also with what my brother Cave has said.

COLLINS, J.—I agree.

Conviction affirmed.

House of Lords.

From C. A. (England). July 25, 1892.

BARNARDO *v.* FORD.
GOSSAGE'S CASE. (*a.*)

Habeas corpus—*Appeal against issue of writ—Excuse for non-compliance with writ—Judicature Act*, 1873, *s.* 19.

An appeal lies to the Court of Appeal against an order for the issue of a writ of habeas corpus, *but the order should not be set aside unless, in the opinion of the court, there are unquestionably no grounds for its issue.*

The appellant, without authority from the parent, who had placed her child in his institution, handed over the child to a gentleman to be taken to Canada. This, it appeared, had taken place before the application by the parent for a writ of habeas corpus, *and the appellant alleged that it was impossible for him to find the child.*

Held, affirming the decision of the Court of Appeal (reported 38 W. R. 315, 24 Q. B. D. 283), *that the writ ought to issue, so that the facts might be further inquired into.*

The law as laid down in Reg. *v.* Barnardo, Tye's case, 37 *W. R.* 789, 23 *Q. B. D.* 305, *as to what is a valid excuse for not producing a person in obedience to a writ of* habeas corpus, *discussed and disapproved by* Lord Halsbury, L.C., *and by* Lords Watson, Herschell, *and* Hannen.

This was an appeal from an order of the Court of Appeal (Lord Esher, M.R., and Fry, L.J.), reported as *Reg.* v. *Barnardo, Gossage's case*, 38 W. R. 315, 24 Q. B. D. 283, affirming an order of the Queen's Bench Division, whereby it was ordered that a writ of *habeas corpus* should issue directed to the appellant commanding him to have the body of Harry Gossage before the court.

The facts and the whole course of the proceedings are set out in Lord Herschell's judgment.

They are shortly as follows:—The respondent, who is the mother by a former marriage of the boy Harry Gossage, in the autumn of 1888 intrusted him to the care of an organ grinder, by whom he was left destitute in the streets of Folkestone. By the intervention of a local clergyman he was received into a home belonging to the appellant. The mother was informed of the arrangement and expressed her satisfaction with it, but she declined to sign the usual agreement authorizing the removal of the boy to one of the colonies. Subsequently, in the same year, a Roman Catholic gentleman intervened, and with the mother's consent it was arranged that the boy should be placed in the St. Vincent's Home, Harrow-road, a Catholic institution. On the 16th of November application was made at Dr. Barnardo's Home for the transfer of the boy. Previously to that date Dr. Barnardo had accepted an offer made by Mr. Norton, a Canadian gentleman, to adopt the boy, and the boy was delivered to him on the 16th of November. For the purpose of avoiding interference on the part of the boy's relatives Mr. Norton had stipulated that he should leave no address. Correspondence followed between the appellant or his representatives and the persons interested in securing the transfer of the boy to the St. Vincent's Home, and at length an application was made for a writ of *habeas corpus* against Dr. Barnardo. In an affidavit filed by Dr. Barnardo he he stated that he had delivered the boy to Mr. Norton before any application was made to him by the mother, and that he did not know where Mr. Norton or the boy was and had no means of communicating with either of them.

The application came on for hearing before Mathew, J., on the 14th of March, 1889, when the learned judge, having read the affidavits filed, and heard the cross-examination of the appellant, refused to order the writ to issue. No further steps were taken till the 23rd of November, 1889, when a rule *nisi* was granted for a writ of *habeas corpus* by the Divisional Court of the Queen's Bench.

The Queen's Bench Division made absolute the order for the issue of the writ, and this order was affirmed by the Court of Appeal.

Dr. Barnardo appealed.

The appeal was heard in the first instance before Lord Halsbury, L.C., and Lords Bramwell, Herschell, Field, and Hannen, when a preliminary objection was taken that the order made by the High Court that a writ of *habeas corpus* should issue was not a "judgment or order" within section 19 of the Judicature Act, 1873, and consequently that there was no right of appeal, and the argument was confined to this point at the hearing on the 24th of April, 1891.

Sir W. Phillimore (*Joseph Walton* and *Forbes Lankester* with him), for the respondent.—There is no right of appeal to the Court of Appeal.

They referred to *Wade's case*, reported in a note to *Blake's case*, 2 M. & S. 428; *The Hottentot Venus*, 13 East, 195; *Guérin* v. *Bank of France*, 5 Times L. R. 160; *Bell-Cox* v. *Hakes*, 39 W. R. 145, 15 App. Cas. 506.

(*a.*) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

Rigby, Q.C. (*Finlay, Q.C., Cock, Q.C.*, and *W. Baker* with him), for the appellant.—Section 19 of the Judicature Act, 1873, extends the right of appeal: *Overseers of Walsall* v. *London and North-Western Railway Co.*, 27 W. R. 189, 4 App. Cas. 30; *Julius* v. *Bishop of Oxford*, 28 W. R. 726, 5 App. Cas. 214; *Allcroft* v. *Bishop of London*, [1891] A. C. 666.

Sir W. Phillimore replied.

The HOUSE took time for consideration as to the preliminary objection.

The appeal was afterwards heard on the 4th and 5th of April and 6th of May, 1892, upon the merits before Lord Halsbury, L.C., and Lords Watson, Herschell, Macnaghten, Morris, and Hannen.

Rigby, Q.C., and *Cock, Q.C.* (*Finlay, Q.C.*, and *W. Baker* with them), for the appellant.

Joseph Walton and *Forbes Lankester* (*Sir W. Phillimore* with them), for the respondent.

R. v. *Viner*, 2 Lev. 128; *Reg.* v. *Roberts*, 2 F. & F. 272; *In re Matthews*, 12 Ir. C. L. Rep. 233; 56 Geo. 3, c. 100, s. 3; *Reg.* v. *Barnardo, Tye's case*, 37 W. R. 789, 23 Q. B. D. 305, were referred to.

Lord HALSBURY, L.C.—As to the preliminary point in this case I have entertained grave doubts, and I cannot say that even now those doubts have been entirely removed; but it does not seem to me a question upon which I should insist so strongly on my own opinion that I should differ from the rest of your lordships.

As to the merits I was for a considerable time under the impression that both parties were arguing this question upon the view that the facts were already ascertained and that whatever the form of procedure, it was upon a substantially agreed state of the evidence, though, of course, they differed upon the question what inference should be drawn from the state of the evidence so already ascertained. Very late in the argument it turned out that the parties (at least, one of them) did not acquiesce in that view, but desired a return to the writ, so that upon the return further questions of evidence might be raised.

I think it was unfortunate that some indication of that contention did not earlier appear, either before your lordships or in the courts below.

Of course it is true to say that the respondents, when they found the court was in their favour upon the state of the evidence as it then appeared, were not bound to raise the further question as to what might appear on the return, and what might happen when the return was made. I do not, therefore, think that they have prejudiced their right to a return.

As, therefore, there is to be a return, and more evidence may be adduced to show what is the real state of the facts, I designedly abstain from saying anything which may preclude me from forming a perfectly unbiassed judgment when all the facts have been finally ascertained. But it is of importance, I think, to say, since it may tend to shorten the inquiry which the respondents suggest that they propose to make, that I cannot acquiesce in the view that some of the learned judges below seem to have entertained—that if a court is satisfied that illegal detention has ceased before application for the writ has been made, nevertheless the writ might issue in order to vindicate the authority of the court against a person who has once, though not at the time of the issue of the writ, unlawfully detained another or wrongfully parted with the custody of another. This is a view that I cannot agree to. I think, under such circumstances, the writ ought not to issue at all, as it is not the appropriate procedure for punishing such conduct.

Of course, where a counterfeited release has taken place, and a pretended ignorance of the place of custody or of the identity of the custodian is insisted on, a court may, and ought, to examine into the facts by the writ of *habeas corpus*, because the detention is, in fact, being continued by someone who is really the agent of the original wrongdoer to continue and persist in the unlawful detention. But assume the fact that the detention has ceased, then the writ of *habeas corpus* is, in my judgment, inapplicable.

For the reasons I have given I say nothing about the facts in this case; but, treating the facts as still open to inquiry, I think this appeal should be dismissed, upon the ground that the respondents have a right to the return, and I so move your lordships.

Lord WATSON.—I concur in the judgment which has been proposed by the Lord Chancellor. Seeing that the writ must go, and that the appellant will have the opportunity of making further explanations, I refrain from comment upon the facts already in in evidence; but I wish to make it clear that my reasons for agreeing with the judgment moved are not quite the same with those by which some of the learned judges in the court below were influenced.

The remedy of *habeas corpus* is, in my opinion, intended to facilitate the release of persons actually detained in unlawful custody, and was not meant to afford the means of inflicting penalties upon those persons by whom they were at some time or other illegally detained. Accordingly, the writ invariably sets forth that the individual whose release is sought, whether adult or infant, is taken and detained in the custody of the person to whom it is addressed, and rightly so, because it is the fact of detention, and nothing else, which gives the court its jurisdiction.

I find that in *The Queen* v. *Barnardo, Tye's case*, Lindley, L.J., said: "As a matter of law, I think that it is no valid excuse for not producing a child or other person in obedience to a writ of *habeas corpus* to state inability to obey, if such inability is the result of the previous illegal conduct of the person to whom the writ is addressed." His lordship added: "Persons who illegally put a child out of their power do so at their peril, and if they are ordered to produce the child, no excuse founded on their own inability to comply with the order will be held a sufficient answer to the writ." The circumstances of that case were not altogether the same with those with which your lordships have to deal. The Master of the Rolls does not appear to have differed in opinion from Lindley, L.J., whilst Cotton, L.J., seems to have treated the case as one of contempt in parting with the custody of the child. In the present case Lord Esher has adopted and repeated, in forcible language, the view expressed by Lindley, L.J., in *The Queen* v. *Barnardo*, although his lordship's observations are mainly directed to the case of a child. I venture to doubt whether the law laid down by Lindley, L.J., in these broad terms is sound. If it be so, then the writ may be used as a convenient process for punishing a gaoler who has connived at the escape of one of the prisoners under his charge. I see no difference in principle between the case of a gaoler so misconducting himself and the case of a man who unlawfully parts with the custody of an infant. To order the latter to recover the custody of the child, and to place its person at the disposal of the court, may, and probably will, necessitate the employment by him of agents and detectives, and application for the assistance of foreign courts, which, in my opinion, are neither more nor less than penalties imposed in respect of his breach of duty. I do not for a moment suggest that there is not a legal wrong committed in both cases; but that wrong

is the very reverse of illegal detention, for which alone the writ of *habeas corpus* was meant to give a remedy. If there be no other remedy in such cases, I am satisfied that it is for the Legislature, and not for any court, either of law or equity, to provide one; and I cannot see the propriety of the court applying to these cases a remedy which was enacted for a totally different purpose. It is, in my opinion, a grave objection to the use of *habeas corpus* for punitive purposes that the prosecutor would have the unusual privilege of hunting the offender from court to court until he found a tribunal willing to convict. Although that privilege has, with much propriety, been conceded in all cases where there is actual detention, I can hardly conceive that the Legislature would tolerate it in cases where detention has ceased.

Where it is shown to the satisfaction of the court that the person charged with unlawfully detaining a child or adult had *de facto* ceased to have any custody or control, I am of opinion that the writ ought not to issue. A man who parts with the custody of a child after he is served with the process of the court, or who evades service in order that he may get rid of such custody, commits a plain contempt, for which he is answerable to the court. Even in that case I doubt whether it is competent, and I do not doubt that it is inexpedient, to enforce the writ *de plano*. The case ought to be dealt with, in such circumstances, as one of contempt; and the court has power to pronounce an order which will compel the *quondam* custodian to choose between placing himself in a position which will make him liable to the writ, and bearing the consequences of his contumacy. I think it right to add that, in my opinion, no contempt is committed by a person who, lawfully or unlawfully, absolutely gives up the custody and control of a child from the mere apprehension that, by retaining it, he may became liable to a writ of *habeas corpus*, and without any notice that such a proceeding will be taken.

In March, 1889, eight months before this proceeding commenced, a similar application was made to Mathew, J., who, after hearing the cross-examination of the appellant by counsel on behalf of the respondent, came to the conclusion that he had ceased to have the custody or control of the boy, Harry Gossage, in November, 1888. In these circumstances the learned judge, taking what I conceive to be the right view of the law, refused to issue the writ. Four months afterwards the decision of the Court of Appeal was given in *The Queen* v. *Barnardo, Tye's case;* and it is difficult to resist the impression that the present proceedings were brought in order to get the benefit of the novel doctrine laid down in that case, which had found no favour with Mathew, J. Had there been no other reasons for sustaining it I should not have hesitated to reverse the judgment appealed from. But I willingly defer to those of your lordships who are of opinion that the case may be more conveniently disposed of after a return has been made to the writ, although I am not inclined to prolong litigation of this kind, which is little calculated to advance the interests of institutions engaged in the useful work of reclaiming children from the streets. When a waif has been taken up and cared for by one of them, he apparently becomes an object of interest and competition; and funds are wasted in litigation which would be better employed in the rescue of children who are still uncared for.

Lord HERSCHELL.—At the hearing of this appeal the preliminary objection was taken that no appeal lay from an order that a writ of *habeas corpus* should issue. It was pointed out that a rule or order calling on a person to show cause why a writ of *habeas corpus* should not issue is of modern origin, that application for the writ was formerly made *ex parte*, and that the service of the writ was the first step which affected the party alleged to be detaining another in illegal custody; and it was contended that the order made by a court or judge that a writ of *habeas corpus* should issue was not a "judgment or order" within the meaning of the appeal section of the Judicature Act. It was urged that it was merely a direction by the court or a judge that a process of the court should issue, and that from such an order or direction no appeal could lie. At the close of the argument I was disposed, in common, I believe, with those of your lordships who heard the appeal to accede to this view, but subsequent consideration has led me to the conclusion that it cannot be sustained.

The appeal section is very general in its terms, and it has received a wide interpretation in this House in the case of *The Overseers of Walsall* v. *The London and North-Western Railway Co.* I see no safe ground for holding that it is inapplicable to the issue of a writ of *habeas corpus* except that suggested; namely, that such an order merely directs the issue of a process of the court. But it seems to me that if on this ground it were held that no appeal lay, the decision must logically have a much wider scope. An order for the issue of a writ of *mandamus* might equally be said to be a direction for the issue of the process of the court. Before the Judicature Act no appeal lay from such an order, but it has been held that under the appeal section of the Judicature Act such an order may now be made the subject of an appeal.

I am unable to see on what basis the decision that the order now under consideration was not within the appeal section could be rested which would not logically apply to a writ of *mandamus*, and, indeed, to a writ of prohibition, and to other cases which might be mentioned. I think that the House would hesitate before arriving at the conclusion that no appeal lay in the class of cases to which I have referred, the view that they were within the appeal section having long been acted upon, and being obviously convenient, as tending often to expedite litigation, and to diminish its cost. On the other hand, I do not think there is any difficulty in holding that an order for the issue of a writ of *habeas corpus*, even when made *ex parte*, is an "order" within the purview of the appeal section of the Judicature Act. It is to be observed that in the Act of George III., where duties were imposed on the judge in relation to writs of *habeas corpus*, the language used is that the judge is to "award" a writ of *habeas corpus*. And it is certain that the practice of proceeding by a rule or order *nisi* on the application for a *habeas corpus* was well established at the time the Judicature Act was passed. An "order" absolute for a *habeas corpus* was then a common order. I would further point out that if an appeal from such an order as this were held to be incompetent, considerable injustice might often result. The Court of Appeal, when entertaining an appeal, which, of course, they would, in general, be competent to do, from the order made by the court below on the return of the writ, might reverse that order on the ground that the writ ought never to have been issued, but they would be unable to deal with the costs incured in relation to the order for the writ, which would have to be borne by the party against whom the application for the writ had improperly been made.

Upon the whole I have come to the conclusion that this appeal must be held to be competent.

I now proceed to deal with the merits of the appeal.

The appellant is the founder and director of certain institutions, comprising homes for destitute children. The respondent is the mother, by a former marriage,

of a boy named Harry Gossage. In the autumn of 1888 a clergyman residing at Folkestone wrote to the appellant, requesting him to receive into his home the boy Harry Gossage, whom he had found in Folkestone destitute and homeless. The boy accordingly became an inmate of the appellant's homes. One of the officials of the homes wrote to the mother of the boy, and on the 29th of September received a letter from her, in which she said: "I shall be very pleased if you will keep my son Henry Gossage in Doctor Barnardo's Home, as I cannot afford to keep him myself." On the 11th of November Mr. Newdigate, a gentleman residing at Leamington, but who was a stranger to the appellant, wrote a letter to him, stating that Mrs. Gossage had called upon him to express her desire for a Catholic home for her boy, and informing him that St. Vincent's Home, Harrow-road, was prepared to receive him, and that he was writing to the Rev. D. Hope to arrange the transfer. On the 16th of November Mr. Hope accordingly wrote to Dr. Barnardo that he proposed sending for the boy, and inquiring what time of day he should send. Some correspondence followed between the appellant or his representatives and Mr. Newdigate, in which the appellant declined to consent to the transfer of the boy to the Roman Catholic institution. On the 1st of January, 1889, Mr. Newdigate enclosed a document signed by the mother, expressing her desire that her son should at once be transferred by Dr. Barnardo to Mr. Hope, who had undertaken to place him in St. Vincent's Home, Harrow-road, London. The letter informed Dr. Barnardo that unless the mother's order was complied with within seven days he should instruct his solicitor to take out a writ of *habeas corpus*. A letter followed from Mr. Hope, which was answered on the 8th of January by the secretary of the appellant's homes in these terms: "I am instructed to inform you that it is not possible to comply with your request, as the boy in question is not, and has not been for a considerable time, an inmate or under the control of these institutions." On the 1st of March following the appellant was served with a summons to attend a judge of the Queen's Bench Division to show cause why a writ of *habeas corpus*, commanding him to produce the body of the said Harry Gossage, should not be issued. Several affidavits were filed before the summons came on for hearing. In one filed by Dr. Barnardo he stated that before he received any application from the mother for the return of the child, he, on the 16th of November, 1888, transferred him to the care of a Mr. William Norton, an American gentleman, who was at that time on a visit to this country, and that he believed that the boy was taken by Mr. Norton to Canada a few days later. He further deposed that he had not, since he handed over the boy, heard either from him or Mr. Norton, that he did not know where he or Mr. Norton was, that he had no means of communicating with either of them. He further stated that before handing over the boy he satisfied himself that Mr. Norton was a fit and proper person to have the custody of the child. In an affidavit sworn a few days subsequently he deposed that the said Harry Gossage was not then, and since the 16th of November, 1888, when he transferred him to the care of Mr. Norton, had not been, in his custody or power.

The summons came on for hearing before Mathew, J., on the 14th of March, 1889, when the learned judge, having read the affidavits filed, and heard the cross-examination of the appellant, refused to order the writ to issue. No further steps were taken till the 23rd of November, 1889, when a rule *nisi* was granted for a writ of *habeas corpus* by the Divisional Court of the Queen's Bench. In the meantime the case of *The Queen* v. *Barnardo, Tye's case*, had been decided in the Court of Appeal. This was a decision affirming an order of the Queen's Bench Division quashing a return to a *habeas corpus* and granting an attachment against the defendant for contempt.

It was in consequence of the judgments given in the Court of Appeal, which laid down that it was not an excuse for non-compliance with a writ that the defendant had parted with the custody of the child to another person, if he had done so wrongfully, that the application was again made for a writ of *habeas corpus* in the present case. In addition to the affidavits used on the former application further affidavits were filed. I do not think it necessary, for reasons which I will state presently, to enter upon an examination of any of the affidavits.

It will be sufficient to state that Dr. Barnardo deposed that it was on the 10th of November, 1888, that he first made the acquaintance of Mr. Norton, into whose custody he delivered the boy, that Mr. Norton showed him letters of introduction from well-known people in Canada, and stated that his object was to discover if Dr. Barnardo could place a little boy under his care; that he was anxious to find a boy who would not be interfered with by his relations, as he wished, if he liked the boy, to adopt him as his son. Dr. Barnardo accordingly brought five of the boys in his home to see Mr. Norton, amongst whom was Harry Gossage. After talking with him for some time Mr. Norton asked to be allowed to adopt him. Dr. Barnardo accordingly arranged that he should be ready on the 16th of November, and on that day, when Mr. Norton again came to the homes, he took the boy away with him. According to Dr. Barnardo's statement, Mr. Norton expressed himself as very anxious that there should not be any interference on the part of the child's relatives, and his affidavits stated that he did not know where Mr. Norton or the boy then was, nor did he know their or either of their addresses, and that he had no means of communicating with them or either of them.

After hearing argument the Queen's Bench Division made absolute the order for the issue of the writ, and this order was affirmed by the Court of Appeal.

If in order to support this judgment it were necessary to give my adhesion to the law laid down in the case of *The Queen* v. *Barnardo, Tye's case*, I should hesitate much before doing so.

Having regard to the nature of a writ of *habeas corpus*, and the purpose for which it was designed and has hitherto been employed, I cannot feel satisfied, as at present advised, that it is not a good return to the writ that the person to whom it relates was not at the time it was issued in the custody, power, or control of the person upon whom it is served. The doctrine that he must also show that before the writ was issued, or before he had notice of the application for its issue, he had not wrongfully parted with the custody of the person named in the writ is novel, and appears to me to involve great difficulty. A gaoler who has allowed a prisoner to escape has wrongfully parted with the custody of that person; could he be commanded by a writ of *habeas corpus* issued after the escape to produce him and be committed for contempt of court if he failed to do so? Other illustrations might be given to show the difficulty of assenting to the broad proposition laid down in the Court of Appeal. The question is not whether one who has parted with the custody of a person committed to his care can be made amenable to the law if he wrongfully parts with that custody, but whether the writ of *habeas corpus* is the appropriate remedy. The terms of the writ require the recipient to have the body of the person named in it "taken and de-

tained under your custody," as is said, "together with the day and cause of his being detained to undergo and receive all and singular such matters and things as the said court shall then and there consider of and concerning him in this behalf." This indicates that the very basis of the writ is the allegation, and the *primâ facie* evidence in support of it, that the person to whom the writ is directed is unlawfully detaining another in custody. To use it as a means of compelling one who has unlawfully parted with the custody of another person to regain that custody, or of punishing him for having parted with it, strikes me at present as being a use of the writ unknown to the law and not warranted by it.

But the question remains whether, even assuming that the decision in *Reg.* v. *Barnardo* was not well founded, the appellant is entitled to have the order that the writ should issue discharged. I have already given my reasons for thinking that this House cannot reject, as incompetent, an appeal against an order for the issue of a writ of *habeas corpus*, but I feel most strongly that such appeals are not to be encouraged. Where any tribunal believes that a person is or may be under detention in unlawful custody, and issues a writ of *habeas corpus* accordingly, no court of appeal ought lightly to interfere with the issue of the writ. The order for its issue ought only to be set aside if there be, beyond question, no ground for it. If, for example, in the present case it had been an admitted fact that before notice of the application for the writ the appellant had ceased to have the custody of, or any control over, the boy alleged to be detained, that might have been ground for reversing the order of the Queen's Bench Division. But where the court entertains a doubt whether this be the fact, it is unquestionably entitled to use the pressure of the writ to test the truth of the allegation and to require a return to be made to it. Now it is impossible to read the judgment of the Lord Chief Justice without seeing that he did entertain such a doubt, and that he was not prepared, upon the affidavits, to accept as conclusive the statements of the appellant. At your lordships' bar the counsel for the respondent contended that they had a right to cross-examine the appellant, and that the proper occasion on which to try the question was when he had returned to the writ that he was not detaining the child, and that it was not, at the time the writ was issued, in his custody, power, or control. I think this view is the correct one; the truth of the return may, no doubt, be put in issue, and I feel myself unable to advise your lordships that the Queen's Bench Division were not in point of law justified in issuing the writ. I must not be understood as indicating that I think the story told by the appellant is untrue. But, as the matter is to undergo further investigation, it would obviously be improper to enter upon any discussion of the statements contained in the affidavits, or to express any opinion upon them. I come to this conclusion with some regret, as the question intended to be raised by this appeal is one of no small importance. But in my opinion it was premature to raise it at the present stage, and I think it very important not to set a precedent which might prove prejudicial to the liberty of the subject, of which the writ of *habeas corpus* is the most effectual safeguard.

For these reasons I think the judgment appealed from must be affirmed.

Lord MACNAGHTEN.—I do not dissent from the motion which has been proposed. I cannot say that this is a case in which there ought not to be an opportunity of further inquiring into the circumstances under which Dr. Barnardo parted with the child, and ascertaining beyond all doubt whether the child is or is not still under Dr. Barnardo's control or within his reach. In a matter of this sort it would not, I think, be desirable to interfere with the discretion of the court below unless a stronger case for interference were made out than the one which the learned counsel for the appellant have been able to present.

Whether the child, if it can be got back, ought to be handed over to the mother or dealt with in accordance with her directions, or directions given in her name, is another question, upon which it would not be proper to intimate an opinion at present.

Whether or not Dr. Barnardo has rendered himself liable to an attachment may be a matter to be discussed hereafter. That question also ought, I think, to be left wholly unprejudiced by any comment upon facts or circumstances which have not as yet been thoroughly sifted or tested by cross-examination.

I desire, however, to state my concurrence with the opinion expressed by Sir Edward Fry. I entirely agree with him in thinking that the writ of *habeas corpus* ought not to be wrested from its proper purpose, and used as an instrument to punish a man for an illegal or unauthorized act complete before the jurisdiction of the court can be supposed to have attached. I will only add that it is very much to be regretted that the managers of a charitable institution, which has done and is, I have no doubt, doing an immense deal of good, should have tried to put off a troublesome correspondent by letters which, to say the least, were uncandid and misleading.

Lord MORRIS.—I concur in the judgment which has been moved, but I desire to say that in doing so I adopt the reasons assigned and the views given of the law, both in the Queen's Bench Division and in the Court of Appeal, as the foundation of my concurrence in the judgment.

Lord HANNEN.—I entirely concur in the conclusions at which your lordships have arrived, and I have only to add that the opinion expressed by my noble and learned friend, Lord Herschell, so exactly represents the view which I take of the case that I do not think it necessary to add anything to what has fallen from the noble and learned lord.

Solicitors for the appellant, *Nisbet & Daw.*

Solicitors for the respondent, *Leathley & Phipson.*

Court of Appeal.

App. Bankruptcy.
(Lord Esher, M.R., and Lindley and Bowen, L.JJ.) — Feb. 24.

In re POTTS.
Ex parte TAYLOR & SONS. (*a.*)

Bankruptcy — Judgment creditors — Appointment of receiver of equitable interest — Secured creditors — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 9, 45, 168.

In July, 1891, *judgment was obtained by the appellants in an action for* £316, *under which execution was issued against the debtor's goods with no effect. In January*, 1892, *the debtor became entitled, under the will of his mother, to a share in her residuary real and personal estate. In March*, 1892, *the appellants obtained on an* ex parte *ap-*

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

plication an order appointing a receiver in respect of such share. In May, 1892, the debtor was adjudged bankrupt. The appellants moved for a declaration that they were secured creditors in respect of the share to which the debtor was entitled in the residuary estate under his mother's will by virtue of the order appointing the receiver.

Held (affirming the decision of Vaughan Williams, J., ante, *p.* 255), *that the order did not constitute them secured creditors.*

Per Lindley *and* Bowen, L.JJ.—*An order appointing a receiver ought not to be made on an* ex parte *application to the judge in chambers.*

Appeal from a decision of Vaugham Williams, J. (*ante*, p. 255).

In July, 1891, the appellants recovered judgment against the debtor for £316 15s. and costs. The appellants issued a writ of *fi. fa.* under this judgment against the goods of the debtor, but failed to recover anything.

In January, 1892, the debtor became entitled under the will of his mother to a share in the residuary real and personal estate of the testatrix; and on the 31st of March, 1892, the appellants obtained from the judge in chambers on an *ex parte* application an order appointing a receiver of the share to which the debtor was entitled in the residuary estate of his mother. (The terms of this order are fully set out in the report of the case below).

On the 4th of April the appellants gave notice of this order to the executors of the will. On the 16th of May, 1892, a receiving order was made against the debtor on his own petition, upon which he was adjudicated bankrupt.

The executors were now in a position to distribute the estate to the beneficiaries under the mother's will, but no payment had been made either to the receiver or to the trustee in bankruptcy. The appellants applied to Vaughan Williams, J., for a declaration that by virtue of the appointment of the receiver they were secured creditors of the debtor of the share to which the debtor was entitled in the residuary estate under his mother's will.

Vaughan Williams, J., dismissed the application.

Herbert Reed, Q.C., and *Micklem*, for the appellants.—The effect of the order appointing the receiver was to deliver the debtor's share under the will of his mother to his creditors in equitable execution, and there has been a completion of execution as required by section 45 of the Bankruptcy Act, 1883: see Mitford on Pleadings in Chancery, 5th ed., p. 148; *Angell* v. *Draper*, 1 Vern. 399; *Davidson* v. *Foley*, 1 Vern. 399 (*a*); *Dillon* v. *Plaskett*, 2 Bli. N. S. 239; *Watts* v. *Jefferyes*, 3 Mac. & G. 422; *Smith* v. *Hurst*, 1 Coll. 705; *Thornton* v. *Finch*, 4 Giff. 515, 13 W. R. Ch. Dig. 414; *Macnicoll* v. *Parnell*, 35 W. R. 773; *In re Peace*, 31 W. R. 899, 24 Ch. D. 405; *Crowe* v. *Price*, 37 W. R. 424, 22 Q. B. D. 429; *Fuggle* v. *Brand*, 11 Q. B. D. 711, 32 W. R. Dig. 160; *Westhead* v. *Riley*, 32 W. R. 273, 25 Ch. D. 413; *Anglo-Italian Bank* v. *Davies*, 27 W. R. 3, 9 Ch. D. 275; *Tillett* v. *Pearson*, 22 W. R. 209; *In re Cooper*, 37 W. R. 330; *Rapier* v. *Wright*, 28 W. R. 827, 14 Ch. D. 638; *Brereton* v. *Edwards*, 37 W. R. 47, 21 Q. B. D. 226; *Ex parte Evans, In re Watkins*, 28 W. R. 127, 13 Ch. D. 252. [Lord ESHER, M.R.—You must show that this order is a "mortgage, charge, or lien" within section 168 of the Bankruptcy Act, 1883.] Section 168 is not exhaustive, for section 45 is required to limit the rights of execution creditors. The "equitable interest" in section 45 (2) is not intended to mean equitable interests in land only, for receivers are now appointed over other things besides land. Vaughan Williams, J., based his decision on *In re Dickenson, Ex parte Charrington & Co.*, 37 W. R. 130, 22 Q. B. D. 187, but that case does not apply here, for there the receiver was appointed in respect of goods only. That decision is no authority for saying that the appointment of a receiver can never make the judgment creditor a secured creditor.

Levasseur v. *Mason & Barry*, 39 W. R. 596, [1891] 2 Q. B. 73; *Smith* v. *Cowell*, 29 W. R. 227, 6 Q. B. D. 75; and *Booth* v. *Hutchinson*, 21 W. R. 116, L. R. 15 Eq. 30, were also referred to.

Muir Mackenzie, for the respondent.—Section 45 of the Bankruptcy Act, 1883, does not apply to this case. Under that section it is only in the case of an equitable interest in land that execution is completed by the appointment of a receiver. The appointment of this receiver merely amounted to an order directing to whom payment was to be made of the debtor's share in his mother's estate, and it did not effect a transfer of any interest in property which could make the creditor a secured creditor. The creditor has neither a mortgage, charge, or lien, and therefore the right of the trustee in bankruptcy prevails.

He cited *In re Dickenson, Ex parte Charrington; In re Shephard*, 38 W. R. 133, 43 Ch. D. 131; *Ex parte Evans, In re Watkins.*

Reed, Q.C., in reply, referred to *Scott* v. *Surman*, Willes, 400.

Lord ESHER, M.R.—In this case the appellants, Messrs. Taylor & Son, who are judgment creditors, are asking for a declaration that they are secured creditors in the bankruptcy of the judgment debtor. The judgment debtor, before he became bankrupt, became entitled under the will of his mother to a share of her residuary estate, and the appellants obtained *ex parte* an order appointing a receiver; and that order contained an order to the receiver that if the executors of the will should pay the money to him, he should not pay it to the judgment debtor, but to the appellants. There was nothing in the order requiring the executors to pay the money to the receiver, and it did not bind them; it would not have been just if it had, because they were not parties to the summons on which the order was made. Then, before anything else had been done, a receiving order was made against the judgment debtor, and the official receiver became his trustee in bankruptcy. The question now arises as to whether this money, to which the judgment debtor is entitled under his mother's will, passes to the trustee in bankruptcy or to the appellants.

It is a question of bankruptcy law, and the governing section is section 9 of the Bankruptcy Act, 1883. That section provides that "on the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the court and on such terms as the court may impose." Now in this case the appellants are seeking to enforce a remedy against the property of the debtor, and if that section stood alone it would be clear that all the property of the debtor is to pass to the official receiver, and no creditor is to have any remedy against it. But sub-section 2 of section 9 contains a proviso that section 9 shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if the section had not been passed. The definition of "secured creditor" is found in section 168, which says that "secured

creditor" means a person holding a mortgage, charge, or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor. The appellants have not got a mortgage or a common law lien on the debtor's property. Can it be said that this order appointing a receiver amounts to either an equitable lien or an equitable charge? A charge is a well-known thing; if a debtor has money owing to him by a third person, the creditor can charge the debt in the hands of the third person. If in the present case the order had charged the fund in the hands of the executors, and had been an order on them to pay the fund to the receiver, then, although that might not amount to a common law charge, it might possibly be an equitable charge. But suppose that the man who holds the money and who is obliged to pay it has no notice of the order charging the money, and has no opportunity of answering, it would in such a case be most unjust to say that a charge was created, and subsequent notice would not remedy the injustice. Even if the order in this case had been directed to the executors I do not think it would be binding on them. It does not, however, profess to be binding on them, and therefore it does not create a charge on the money in their hands, and the appellants do not bring themselves within the definition of "secured creditors" in section 168.

I think that in *In re Dickenson, Ex parte Charrington* the proper interpretation was placed on sections 9 and 168.

LINDLEY, L.J., after stating the facts, proceeded:—The question is, does this order appointing a receiver and the subsequent notice given to the executors of the will create an equitable charge on the share of the residuary estate to which the debtor was entitled, so as to make the appellants secured creditors? It is said that the effect of the order was to deliver to the appellants the debtor's interest under the will in equitable execution. There is in reality no such thing as equitable execution, it is only a short phrase for describing a certain procedure by means of which a judgment creditor can in some cases obtain payment. Under the old practice it was necessary to file a bill in chancery against the debtor, and also to join as a party the person who held the property which the judgment creditor wished to attach. What has been done in the present case is an incomplete process of obtaining payment, and no charge is created on the fund in the hands of the executors because there has been no order on them to pay the fund to the receiver. The appellants are in the position of having the right to obtain an equitable interest in the fund, but have not as yet actually obtained the equitable interest. I therefore agree that the appellants are not secured creditors, and I do not think that the judge in chambers, when making the order appointing the receiver, ever intended that a charge should be created. It was, moreover, very irregular for the appellants to get such an order on an *ex parte* application.

BOWEN, L.J.—I agree. This is an attempt to procure a charge in a way which was never intended by the Act of Parliament. As a matter of practice the order was improperly obtained, it having been obtained *ex parte*, but as between the appellants and their debtor it is a good order. It does not, however, amount to the creation of a charge on the fund in question. It is only one step in the proceedings, a direction to the receiver to receive the money and to pay it over to the judgment creditors. To create a charge it would have been necessary to make the persons in whose hands the fund was—that is, the executors—parties to the application. I cannot conceive the judge in chambers creating a charge on property in the hands of a third person without giving that third person an opportunity of appearing.

Appeal dismissed.

Solicitors for the appellants, *Leyton, Sons, & Lendon.*

Solicitor for the respondent, *Solicitor to the Board of Trade.*

From Chan. Div. (Lindley, Bowen, and A. L. Smith, L.JJ.) — Dec. 19; Jan. 14.

In re DENVER HOTEL CO. (LIMITED). (*a.*)

Company—Reduction of capital—Purchase by company of its own shares—Sale by company of assets for good consideration—Shares in excess of wants of company—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 9—*Companies Act,* 1877 (40 & 41 *Vict. c.* 26), *s.* 3.

A company was registered in 1889 *to carry on the business of hotel proprietors, with a capital of* £130,000, *divided into* 26,000 *shares of* £5 *each. In* 1891 *the company took on lease the M. Hotel, and increased their capital by creating* 5,000 *new shares of* £5 *each. Debentures to the amount of* £75,000 *were issued, all of which were outstanding, and there were very few other creditors. Upwards of* £23,000 *was expended on the M. Hotel, and it was worked at a loss. The company agreed with B., who was one of the lessors of the M. Hotel, to hand over the possession of the M. Hotel to B., who should pay the rent and carry on the hotel. The directors undertook to obtain, and obtained, from the shareholders the necessary resolutions for reducing the capital of the company by writing off* £23,710 *of fully-paid ordinary shares held by B. and his associates, and undertook to obtain the sanction of the High Court of Justice in England to such reduction, whereupon such shares should be extinguished. B. was to pay to the company, for stores and goodwill,* 15,000 *dols. The company had power, under its articles of association, to reduce its capital by cancelling capital.*

Held, that this transaction was not a purchase by the company of its own shares, but was a sale by the company of some of its assets for less than their cash value, in consideration of a release from heavy burdens and of a surrender of shares.

Held, also, that the sanction of the court to the transaction was only necessary for the permanent extinguishment of the shares, and that the court had jurisdiction to, and would, sanction the transaction.

Trevor *v.* Whitworth, 36 *W. R.* 145, 12 *App. Cas.* 409, *distinguished.*

This was an appeal by the company from a decision of North, J., refusing to sanction a scheme for the reduction of the company's capital. The company was registered in November, 1889, and was established for the purpose of carrying on the business of hotel proprietors, and in particular to purchase the Windsor Hotel at Denver, State of Colorado, United States of America. The original capital of the company was £130,000, divided into 26,000 shares of £5 each. The Windsor Hotel was accordingly purchased on the incorporation of the company, and carried on successfully by the company, which had paid substantial dividends until 1892. In May, 1891, the company took on lease a second hotel in Denver, called the Metropole Hotel, at a rental of £7,000 per annum. In order to meet the cost of fitting, furnishing, and establishing this hotel the company increased its

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

capital by the creation of 5,000 new ordinary shares of £5 each, of which 3,474 shares had been issued and fully paid up, making the total subscribed capital £147,370. Debentures to the amount of £65,000 to bearer, and of £10,000 to registered holder, had been issued by the company, all of which were outstanding, and beyond these there were very few other creditors. The outlay on the Metropole Hotel had been upwards of £23,000, and the fitting and furnishing of it had been placed in the hands of the company's managing director, Mr. Wm. Hy. Bush, who had largely exceeded the expenditure sanctioned by the directors. The Metropole Hotel was worked by the company at a loss. In consequence of this, differences arose between the company and its managing director, who was one of the lessors of the Metropole Hotel, and ultimately it was agreed that, upon the special resolution hereinafter stated being duly confirmed, he, and the holders of the shares mentioned in the resolution would take over the Metropole Hotel and furniture at cost price on having the shares held by them cancelled, and the capital paid up by them set off as against the purchase price. It was stated that this proposal, if carried out, would be a very beneficial one for the company, and would avoid a considerable loss, and that on relinquishing the Metropole Hotel the capital proposed to be extinguished would be in excess of the company's wants. The lease of the Metropole was an onerous one, and it was estimated that the furniture and fittings would not realize anything approaching £23,000 (the sum which the company had spent upon the hotel) if sold.

At general meetings of the company, held respectively on the 30th of March and the 14th of April, 1892, the following resolution was unanimously passed and confirmed as a special resolution:—"That the conditions contained in the memorandum of association of the company be modified by reducing the capital from £155,000, divided into 31,000 shares of £5 each, by paying off the capital represented by the following 4,742 ordinary shares of the company—that is to say, the shares numbered 17,531 to 20,080, 22,154 to 22,587, 25,001 to 26,000, and 28,046 to 28,803 inclusive (such capital being in excess of the wants of the company), and by extinguishing altogether the liability thereon, so that the capital may, as reduced, consist of £131,290, divided into 26,258 shares of £5 each." At the meeting of the 30th of March there were present, either personally or by proxy, holders of 19,995 shares of the company of the nominal value of £99,975, in addition to the 4,742 shares the subject of the special resolution, and together amounting to 24,737 shares of the nominal value of £123,685 out of a total sum of £147,370.

The agreement, dated the 8th of March, 1892, and made between the Denver Hotel Co. (Limited) of the one part, and W. H. Bush, of the other part, was in the following terms:—

(1) The company shall deliver over to the said W. H. Bush possession of the hotel, situate in the City of Denver, and known as the Metropole Hotel, together with the furniture, fittings, household effects, and other chattels of the company now being in or about the same. (2) The said W. H. Bush shall carry on the said hotel as heretofore as a first-class hotel on the English system, and shall keep the building and the said furniture and effects duly insured against fire, and will pay all rent, taxes, and other outgoings in respect of the said hotel, and all municipal and other taxes, and will pay all debts incurred in carrying on the same, and will not do or suffer anything to be done whereby the lease of the said hotel may become forfeitable or whereby any of the said furniture or effects may be liable to be taken in execution. (3) The directors of the company will forthwith take all necessary steps to obtain from the shareholders the necessary resolutions for reducing the capital of the company by writing off the £23,710 of fully-paid ordinary shares"—which were therein specified—"standing in the name of W. H. Bush and his associates, and, if and so soon as such reduction is confirmed by the High Court of Justice in England, will make over to the said W. H. Bush by bill of sale the fittings, furniture, and effects belonging to the company in or about the said Metropole Hotel, in full discharge of all money paid up upon and all other claims and demands whatsoever of the registered holders in respect of the shares above mentioned, which shall thereupon be extinguished, the said W. H. Bush procuring all proper discharges for the same. (4) If the said resolutions shall be confirmed as aforesaid, the said hotel shall be deemed to have been carried on as from the 1st of February, 1892, for and on account of the said W. H. Bush, and the accounts between him and the company shall be adjusted on that basis, he being debited with all rents, taxes, wages, and other outgoings, and being credited with all receipts, provided that the said W. H. Bush shall in that event pay to the company as and for the stores upon the said premises and the goodwill of the business the sum of 15,000 dols., such sum not being intended to be covered by the extinguishment of the said shares, and to be paid as to 5,000 dols. in cash, as to 5,000 dols. by note of the said W. H. Bush at six months' date, and carrying interest at 7 per cent. per annum, and as to the balance by a like note at twelve months' date, such notes to be acceptable for discount to the company's bankers in Colorado, without recourse upon the company."

The articles of association provided as follows:—4. The 13,000 shares of the original capital numbered 1 to 13,000 inclusive shall be preference shares, and the 13,000 shares numbered 13,001 to 26,000 inclusive shall be ordinary shares. In the event of the winding up of the company the holders of the preference shares shall be entitled to receive in full out of the assets of the company the amounts paid up on such shares in priority to the claims of the holders of the ordinary shares to be paid any amount in respect of such shares, and in the event of the capital being written off on a reduction of capital amounts paid or credited on the ordinary shares shall be written off before the amounts paid or credited on the preference shares. Each class of shares shall respectively be entitled to rank for the purposes of dividend in the manner hereinafter declared. 9. The funds of the company shall not be expended in the purchase of or lent upon the security of its own shares. 27. The directors may at any time accept a surrender of a share or shares on such terms and conditions as they may think fit. Any share or shares so surrendered may be disposed of in the same manner as a forfeited share. 45. The company may in general meeting reduce its capital by paying off capital, cancelling capital which has been lost or is unrepresented by available assets, reducing the liability on the shares, cancelling shares not taken or agreed to be taken by any person, or otherwise, as my seem expedient, and capital may be paid off upon the footing that it may be called up again or otherwise.

When the petition presented by the company for the confirmation of the special resolution came before the court, North, J., refused it, on the ground that he had no jurisdiction under the Companies Act, 1877, being of opinion that the arrangement amounted to a purchase by the company of its own shares, and an appreciable number of shareholders had not given their consent to the scheme.

The company appealed.

Cozens-Hardy, Q.C., and *Kirby*, for the company.—The shareholders unanimously approve of the scheme—that is, all who were present at the meeting, about six-sevenths of the whole number. If we bring ourselves within the provisions of the Companies Acts, 1867 and 1877, ss. 9 and 3 respectively, the court can sanction the reduction.

They relied upon the judgment of Lord Macnaghten in *Trevor* v. *Whitworth*, 36 W. R. 145, 12 App. Cas. 409, at p. 436. They also cited *In re Barrow Hæmatite Steel Co.*, 37 W. R. 249, 39 Ch. D. 582; *In re Union Plate Glass Co.*, 37 W. R. 792, 42 Ch. D. 513; *In re Quebrada Railway, Land, and Copper Co.*, 40 Ch. D. 363, 37 W. R. Dig. 34; *In re Gatling Gun (Limited)*, 38 W. R. 317, 43 Ch. D. 628; and *In re Agricultural Hotel Co.*, 39 W. R. 218, [1891] 1 Ch. 396.

Cur. adv. vult.

The judgment of the COURT was delivered by

LINDLEY, L.J.—This is an appeal from the refusal by North, J., to sanction a reduction of capital by a limited company, he being of opinion that he was precluded by decided cases from so doing. [His lordship referred to the company's memorandum and articles of association, the petition, and the agreement of the 8th of March, 1892, and continued:—] The arrangement referred to has been sanctioned by a special resolution of shareholders; all the shareholders were not present, but no shareholder has dissented. The debenture-holders and other creditors assent. The arrangement is deemed beneficial by every one. The substance of that arrangement, apart from the reduction of capital which the court is asked to sanction, is as follows—viz., that, in consideration of £3,000, to be paid by Mr. Bush to the company, and of his taking upon himself the obligations of the company under the lease, and of indemnifying the company against loss in respect of the Metropole Hotel since February, 1891, and in further consideration of his surrendering his shares to the company, the company will sell to him the lease and goodwill and furniture and stores of the hotel.

This appears to us to be a transaction which the company can carry out, with the consent of the debenture-holders, under the company's memorandum and articles of association, without the sanction of the court. The company can sell part of its assets, and it can accept a surrender of its shares under article 27. No doubt a surrender of shares in consideration of a payment in money or money's worth by the company is a purchase by it of its own shares, and is *ultrà vires*, as pointed out by Lord Macnaghten in *Trevor* v. *Whitworth*. But, as we understand this transaction, the company is giving nothing in the shape of money or other available assets for the shares which it acquires. The assets it parts with are the consideration for the release of the company from the heavy obligations and liabilities involved in the retention of the onerous lease of the hotel, and, on the other hand, the company is compromising a dispute with its managing director. The company might, no doubt, sell the stores and furniture for more than £3,000, but it would not in that way get rid of its liabilities under the lease. The bargain would be a good one for the company, even if the shares were not surrendered. The surrender of them is pure gain to the company. The buyer of the hotel no doubt hopes to make the hotel pay; he is himself one of the lessors, and may be able to make terms with the other lessors, and obtain a less onerous lease. His expectation of profit in some way induces him, not only to pay £3,000 in cash, but also to surrender his shares, and we see no reason why the company should not accept the surrender. The shares being fully paid up, their surrender involves no release by the company of any of its rights against the surrenderor. Under these circumstances the transaction is not really a purchase by the company of its own shares; the transaction is really a sale by the company of some of its assets for less than their cash value, in consideration of a release from heavy burdens and of a surrender of shares, for which, however, it is parting with no saleable assets whatever. The aid of the court is not wanted to sanction the transaction, except so far as the company desires to treat the shares when surrendered as permanently extinguished. Unless the capital is formally reduced the surrendered shares may be again issued; they will still be part of the company's nominal capital, and so affect the nominal rate of dividend.

The company will not want so large a nominal capital if the transaction is carried out. The case is thus brought within the Acts which authorize a reduction of capital with the sanction of the court (see 30 & 31 Vict. c. 131, ss. 9 *et seq.*; 40 & 41 Vict. c. 26, s. 3). If this transaction really was a purchase by the company of its own shares from one shareholder only, we are of opinion that the court could not sanction it. The purchase by the company involves the possession by the company of sufficient assets to pay for the shares bought, and the capital represented by such shares would not be lost, nor unrepresented by available assets. The capital might be in excess of the wants of the company within the words of section 3 of the Companies Act, 1877. But these words cannot, in our opinion, be construed so as to enable a company to prefer one shareholder to another of the same class as himself by buying up his shares, and we cannot regard Lord Macnaghten's judgment in *Trevor* v. *Whitworth* as intimating that any such transaction is within the statute. His remarks were made to enforce his view that, apart from the Companies Acts, 1867 and 1877, it is *ultrà vires* of a limited company to buy its own shares, even if its memorandum and articles expressly authorize it to do so. But he was not contemplating preferring one shareholder to another of the same class as himself. All that the court is asked to do in this case is to authorize the company to reduce its nominal capital to the extent of the shares which it will not want when the proposed sale of the hotel is carried out. This, we think, the court can do, the sale itself being one which the company can effect without invoking the aid of the court. The cases upon reduction of capital are not in a satisfactory state, but none of them conflict with our present decision, having regard to the peculiar facts with which we have to deal.

Appeal allowed.

Solicitors for the company, *Andrew, Mellor, & Smith.*

From Chan. Div. (Lindley, Lopes, and A. L. Smith, L.JJ.) — Aug. 1, 1892.

BARBER v. MACKRELL. (*a*.)

Bill of exchange—Renewal—Guarantee—Variation—Discharge of surety.

This was a claim in an administration action. The following letter was sent to the claimant's firm by the testator, dated the 24th of December, 1866:—"In reply to your letter of the 22nd inst., I hereby guarantee the payment by F. of two bills you intend to renew for him,

(*a*.) Reported by W. A. G. WOODS, Esq., Barrister-at-Law.

one for £1,048 10s. 5d. and the other for £462 6s. 6d., due respectively the 28th inst. and the 4th prox." Two bills were drawn by the claimant's firm on F. for three months, both dated the 22nd of December, 1866, one for £1,025 6s. 11d., and the other for £485 10s. These bills were not met.

North, J., *held that a "renewed" bill meant a bill between the same parties for the same amount for the same period as and commencing from the date of expiration of the original bill; and that, in this case, there was such a variation of the liability guaranteed that the guarantor's estate was released.*

Held, by the Court of Appeal, *that the word "renew" was not used in its technical sense by the testator, but that he meant to guarantee the payment of the amount of the old bills, and that nothing had happened to discharge him from his guarantee.*

Decision of North, J. (40 *W. R.* 618), *reversed.*

Appeal from the decision of North, J. (reported 40 W. R. 618).

This was a claim by the holder of two bills of exchange to prove in a suit for the administration of the estate of the late Mr. W. Mackrell, who died in 1867.

The firm of Messrs. Young, Sons, & Magnay were the holders of two bills of exchange for £1,048 10s. 5d. and £462 6s. 6d. respectively (amounting in the aggregate to £1,510 16s. 11d.), drawn by a Mr. Finch on and accepted by the London Quays, &c., Co. in favour of the said firm. The bills themselves having been lost, it did not appear for what period they had been drawn, but it was assumed to have been for three months.

On the 22nd of December, 1866, the said firm wrote as follows to Mackrell: "Dear sir,—We have received a . . . letter from our friend Mr. Finch to renew the bills for £1,048 10s. 5d. and £462 6s. 6d. due respectively on the 28th inst. and the 4th prox. He tells us you are quite willing to guarantee their payment, and as it is proposed that we draw on him solely in exchange for the above, which carry his draft and the acceptance of the London Quays, &c., Co., we must ask your confirmation of the assurance . . ." On the 24th of December Mackrell wrote: "Dear sirs,—In reply to your letter of the 22nd inst. I hereby guarantee the payment by Mr. Finch of two bills you intend to renew for his, one for £1,048 10s. 5d. and the other for £462 6s. 6d., due respectively the 28th inst. and the 4th prox.—Yours, WM. MACKRELL."

Two bills, both dated the 22nd of December, 1866, were then drawn by the firm upon and accepted by Finch for the respective sums of £1,025 6s. 11d. and £485 10s. (amounting together to £1,510 16s. 11d.), at three months in favour of the firm. These bills were not met, and there was no evidence that they were ever presented or that notice of dishonour was given to Mackrell. In July, 1868, Finch mortaged certain property to secure the repayment of £750, together with interest at 5 per cent., the balance then due on the bills. The claim in the suit was carried in in 1867, but the assets had in the first instance been swallowed up by specialty creditors, and an unexpected fund had subsequently become available, whereupon the chief clerk had disallowed the claim. There was a balance of £510 still due on the bills, and Finch was totally unable to pay. The claimant took out a summons to vary the chief clerk's certificate. North, J., dismissed the summons on the ground that by a "renewed" bill was meant a bill between the same parties for the same amount for the same period as and commencing from the date of the expiration of the original bill, and that there was such a variation of the liability guaranteed that Mackrell's estate was released. The claimant appealed.

Brice, Q.C., and *B. B. Rogers*, for the appellant.—These bills are renewals of the old ones, and were guaranteed by Mackrell, and his estate remains liable. If there is any variance in the liability it is immaterial: *Holme* v. *Brunskill*, 3 Q. B. D. 495, 26 W. R. Dig. 194; *Bonar* v. *McDonald*, 3 H. L. Cas. 226. Presentment was not necessary, nor notice of dishonour to Mackrell: *Walton* v. *Mascall*, 13 M. & W. 452.

Cozens-Hardy, Q.C., and *R. Whitehead*, for the respondents.—The arrangement is in writing, and is not a guarantee for an old debt, but for new bills to be accepted by Finch, and by him alone. The old bills were to be given up and we were to draw on Finch as acceptor. The liability on the new bills must depend on the determination of the old liability. If this were a guarantee of the debt, Mackrell might have been immediately called on to pay, although the bills fell due in March. There is therefore a material variation and a liability different from that agreed to. There is no authority as to the meaning of renewal in bills, although there is as to the renewal of leases: *Rickards* v. *Rickards*, 2 Y. & C. (Ch.) 426. The term renewal implies currency. The renewal of the bills was of the very essence of the contract, and the smallest alteration in its form is sufficient to release the surety: *Whitcher* v. *Hall*, 5 B. & C. 269; *Bonser* v. *Cox*, 4 Beav. 379, 6 Beav. 110.

LINDLEY, L.J.—The question in this case is, what is the meaning to be given to the word "renew" as used in two letters referring to certain bills of exchange? The position of affairs was this: Messrs. Young, Sons, & Magnay were in December, 1866, the holders of two bills of exchange drawn by Mr. Finch upon, and accepted by, the London Quays Co., one of them, for £1,048 10s. 5d., falling due on the 28th of December, 1886, and another, for £462 6s. 6d. falling due on the 4th of January, 1887.

Apparently, for some reason or other, the acceptor did not intend to pay. It is equally obvious that Finch could not pay. Messrs. Young & Co., the holders of the bills, wrote on the 22nd of December, 1886, to Mr. Mackrell as follows:—[His lordship read the letter.] What does that mean? There is an ambiguity as to the meaning of the word "renew" used there. A bill is renewed when another bill is taken in its place, the parties being the same and the amount being the same, though perhaps in some cases the interest due on the first bill is added. The bill which is renewed is the old bill. Nothing is more common than to talk of a bill given by way of renewal of an old bill as renewed.

You see by the context in this letter that renewal in the accurate sense of the word is not meant. You are not going to have the same acceptors; you are going to throw the holders of the bill upon Finch. The drawer is to accept this time, and these bills are to be taken in exchange for the old ones. This is the transaction disclosed by the letter. Mackrell is asked to guarantee payment. I think the letter shows that he was to guarantee the payment of the debt, which was the amount of the old bills, but for which new drafts were to be drawn. The letter does not say anything about the amount for which these drafts are to be drawn or the time for which credit is to be given to Finch. It leaves all that obscure. Finch is to be the only person to be drawn upon. Mackrell writes: [His lordship read the letter of the 24th of December, 1886.] What bills did Messrs. Young & Co. intend to renew? The old bills. Mackrell now knows how it is to be done. He knows that "renewed" does not mean "renewed" in the proper and technical sense, and that the new bills were to be in substitution for the old, and that

the parties were to be different. I think he was content that it should be so, provided the amount was the same. Can there be any doubt that it was a guarantee for the credit of the amount of these two bills? It does not appear that Mackrell made any demand on Finch when these bills became due. It is as old, at least, as the case of *Wright* v. *Simpson*, 6 Ves. 733, and it is apparent from the recent case of *Carter* v. *White*, 32 W. R. 692, 25 Ch. D. 666, that it was not essential that the holder of a bill should give notice of non-payment to the surety in order to recover the amount from him. There has been nothing to discharge Mackrell. It appears to me that North, J., put too narrow a construction on the letter of guarantee, and wrongly considered the new bills to be renewals of the old. I think, therefore, that the appeal must be allowed, and that this claim must be admitted to proof, with costs in the usual way.

LOPES, L.J.—I am of the same opinion. I put the same construction on these letters as Lindley, L.J. North, J., was misled by the use of the word "renewal." He thought it was used in the ordinary meaning when it is mentioned in this letter. I think the bills in question were not given by way of renewal, but in substitution for the old ones. I am of opinion that North, J.'s decision was wrong, and that nothing has happened which would relieve Mackrell from his suretyship.

A. L. SMITH, L.J.—I differ from North, J., in this, that I think he has read the word "renewal" in its technical sense, and not in the sense used in both these letters. I cannot see how these two letters are not to be treated as a guarantee of the old debt. It was a guarantee of a debt due, and represented by whatever bills might be drawn at that time by the parties. The claim ought, in my opinion, to be allowed.

Appeal allowed.

Solicitors for the appellant, *Tathams & Pym.*

Solicitors for the respondents, *Mason & Edwards.*

High Court of Justice.

Chan. Div. } Feb. 18.
North, J. }

In re STANLEY'S TRUSTS. (*a.*)

Trustee—Trustee Act, 1850, *s.* 9—*Vesting order—Service of petition on adult heir of sole trustee residing abroad.*

The trustees of a will conveyed all their beneficial interest in a certain property to a purchaser. The legal estate in the property was in the heir, who was abroad, of a deceased sole trustee to whom the legal estate had been conveyed to prevent merger. On petition for a vesting order,

Held, that, under the circumstances, service of the petition on the heir might be dispensed with.

By an indenture dated the 25th of June, 1858, the Crown Hotel in Leamington, of which John Stanley was lessee, was, to prevent merger of the lease, conveyed, subject to the lease, to and to the use of Joseph Stanley in fee in trust for John Stanley, his heirs and assigns. Joseph Stanley died on the 25th of February, 1870, intestate, and the legal estate in the property vested in his eldest son and heir-at-law, Joseph Bird Stanley. John Stanley, who died in 1876, by his will devised and bequeathed all his real and personal estate to trustees upon the trusts therein mentioned, and gave the trustees power to sell all or any part of the trust estate. Joseph Bird Stanley went to Queensland in 1873, and was last heard of in 1892, when he was living at Brisbane. In 1892 the trustees of the will sold the hotel and conveyed all their beneficial interest therein to the purchaser. This was a petition under the Trustee Act, 1850, s. 9, by the trustees of the will, the purchaser of the hotel, and the beneficiaries under the will, that the hotel might vest in the purchaser for the estate of Joseph Bird Stanley therein. The petition had not been served on anyone.

L. Field, for the petitioners.—The court will dispense with service of the petition on the heir. He is only a bare trustee.

He referred to *In re Little*, L. R. 7 Eq. 323, 17 W. R. Dig. 138; *Purvis* v. *Abraham*, W. N., 1866, p. 126; *In re Oxenham's Trusts*, W. N., 1875, p. 6.

NORTH, J.—Considering that the heir has been absent so long a time, and considering the nature of the trust, I think the chance of his having any claim as to costs is infinitesimal. I shall, therefore, dispense with service of the petition on him.

Solicitors, *Field, Roscoe, & Co.*

(*a.*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

Chan. Div. } Dec. 20.
North, J. }

EDWARDS v. STANDARD ROLLING STOCK SYNDICATE. (*a.*)

Company — Debenture — Debenture-holders' security in danger—Interest on debentures—Time for payment—Receiver and manager.

In a debenture-holders' action, where the security was endangered, but no interest was due on the debentures, and the time for payment had not arrived, the court, on the motion of the debenture-holders, made an order for the appointment of a receiver and manager.

The plaintiffs, who were holders of debentures, applied by motion for the appointment of a receiver and manager of the company's property.

The debentures in this case took the form of a warrant by the company to pay to the holder thereof on the 30th day of June, 1894, £100 with interest at £6 per cent. by half-yearly payments of £3 free from income tax, the first of such half-yearly payments to be made on the 1st of January next, and the company did "thereby charge with payment of the said sum, and interest, its undertaking, and all its property, real and personal, present and future, including book debts and its uncalled capital, if any, for the time being." This debenture was issued upon and subject to the conditions indorsed thereon.

These conditions, so far as the circumstances of the case were concerned, were as follows:—

This debenture is one of a series of fifty like debentures, numbered consecutively from 1 to 50 inclusive, issued by the company on the day of 18 for securing principal sums, amounting to £5,000, and registered in the books of the company.

The said debentures of the said series shall rank *pari passu* as a first charge upon the whole of the

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

undertaking and property of the company as within mentioned without any preference or priority one over the other.

The charge created by the debentures shall be a floating security, and accordingly the company may, in the course of its business, and for the purpose of carrying on the same, deal with the property hereby charged in such manner as the company shall think fit, and may lease the same and may pay and receive money and declare and pay dividends out of profits. But the powers hereby given shall cease if default is made in payment of any principal moneys secured by any of the series of debentures at the time when the same become payable, or if default is made in the payment of any interest payable on any of the said series of debentures at the time fixed for payment thereof, or if an order of some court of competent jurisdiction is made, or a special or extraordinary resolution is passed, for winding up the company. The debentures shall constitute and be a first charge on the undertaking and property of the company, and nothing herein contained shall be taken to authorize the creation of any mortgage or charge on the undertaking or any of the property for the time being of the company, in priority to the charge hereby created. If the company make default for a period of one calendar month in the payment of any interest hereby secured, the registered holder hereof may at any time thereafter, before such interest is paid, by notice in writing to the company, call in the principal moneys hereby secured, and if in case any such notice is clearly given, or if an order of some court of competent jurisdiction is made, or a special or extraordinary resolution is passed, for the winding up of the company, the principal moneys hereby secured shall immediately become payable.

There was, at this time, no interest due in respect of the debentures, nor had the time for payment arrived; there were judgments, however, against the company, and there was reason to believe that the security was endangered.

Macnaghten, for the motion.—We are entitled to protect our security, and it has been settled that we can have both a receiver and a manager. The question of a receiver is covered by the decision in *Wildy* v. *Mid Hants Railway*, a case reported only in 16 W. R., at p. 409. For a manager there is the decision of Kay, J., in *Makins* v. *Percy Ibotson & Sons*, 39 W. R. 73, [1891] 1 Ch. 133, which followed *Peek* v. *Trimsaran Iron Co.*, 24 W. R. 361, 2 Ch. D. 115.

He also referred to *Macmahon* v. *North Kent Iron Works*, 39 W. R. 349, [1891] 2 Ch. 148; *In re Opera (Limited)*, 39 W. R. 705.

Oswald, for the company, said he did not oppose.

NORTH, J.—I feel considerable difficulty in this case. I doubt whether I ought to give the debenture-holders priority over the creditors, and I doubt still more whether I have a right to do it. However, the decision in *Wildy* v. *Mid Hants Railway* is an authority that I must follow as to the appointment of a receiver; and following the decision of Kay, J., in *Makins* v. *Percy Ibotson & Sons*, I also will make an order for the appointment of a manager, although in doing so I must adopt the language used by the learned judge in that case, and say that I make the order with great hesitation.

Solicitors, *Bower, Cotton, & Bower; G. Weller.*

Chan. Div. } Jan. 19.
Stirling, J. }

LEAROYD v. HALIFAX JOINT-STOCK BANKING CO. (LIMITED). (a.)

Practice—Production of documents—Privilege—Bankruptcy—Examination by solicitor of trustee in bankruptcy—Transcript of notes of examination—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 27.

A trustee in bankruptcy had, under section 27 *of the Bankruptcy Act*, 1883, *obtained an order for the examination of certain persons, including the bankrupt and the manager of a bank with whom the bankrupt had entered into an arrangement in reference to his business, and had obtained a transcript of the shorthand notes of the examination by his solicitor of those persons. He subsequently brought an action against the bank to set aside the arrangement, and in that action he made the usual affidavit of documents, in which he objected to produce the transcript, on the ground that it had "come into existence for the purpose of furnishing to his solicitors evidence to be used in this litigation, or information which might lead to the obtaining of such evidence for the use of his solicitors, to enable them to conduct this litigation and advise him in reference thereto."*

Held, that the transcript was a privileged document.

Summons.

Cyrus Brook had up to July, 1891, carried on business at Halifax as a worsted manufacturer, but in that month the Halifax Bank, the defendants in the action, to whom Brook was largely indebted, and who held securities given by him, closed his account with them. An arrangement was thereupon entered into between Brook and his three sons, who had previously assisted him in the business, that he should retire from the business, and that it should be transferred to them, and the bank, to facilitate the arrangement, opened a fresh account with the sons. In March, 1892, Brook was adjudicated a bankrupt, and Learoyd, the plaintiff, was appointed trustee in the bankruptcy. In June, 1892, the plaintiff brought this action, in which he claimed that certain agreements, deeds, and documents by which the arrangement in June, 1891, was carried out, might be set aside as being fraudulent and void, on the alleged ground that such arrangement was made for the purpose of defeating, delaying, and defrauding creditors. Upon an order obtained by the bank the plaintiff made the usual affidavit of documents, and in it he objected to produce one document mentioned—namely, a transcript of the shorthand notes of the examination by his solicitor of Brook, two of his sons, and the manager of the bank under section 27 of the Bankruptcy Act, 1883—on the ground that the transcript had come into existence for the purpose of furnishing to the plaintiffs' solicitor evidence to be used in the litigation, or information which might lead to the obtaining of such evidence for the use of his solicitor to enable the solicitor to conduct the litigation and advise in reference thereto. Mr. Booth, the plaintiff's solicitor, stated in his affidavit that the examination took place on the 18th and 19th of May, 1892, in the private room of the district registrar at Halifax, with closed doors, and was of a strictly private character, and that no person was present except the witnesses and their solicitors, together with the plaintiff and the deponent as his solicitor and the shorthand writer. He further stated: "I then called the attention of the registrar to the decision of Chitty, J., in the case of *In re Grey's Brewery Co.*, 32 W. R. 381, 25 Ch. D. 405, 406, and objected to the

(a.) Reported by W. A. G. WOODS, Esq., Barrister-at-Law.

solicitors for the witnesses taking any notes, and intimated that I did not intend to file the evidence when taken. The said examination took place solely for the purpose of enabling me to ascertain the facts in connection with the assignment by the bankrupt to his sons of over £30,000 worth of property before advising the trustee to bring an action, so as to avoid incurring the expense of some hundreds of pounds in entering into litigation respecting the matter."

The bank then took out this summons for the determination by the court of the question whether the transcript was a privileged document.

Buckley, Q.C., and *Eyre*, for the applicants.—This document is not privileged. It was not obtained privately for the purpose of the action, but was the result of an examination by the court: *Anderson* v. *Bank of British Columbia*, 24 W. R. 724, 2 Ch. D. 644; *Wheeler* v. *Le Marchant*, 17 Ch. D. 675, 29 W. R. Dig. 72; *In re North Australian Territory Co.*, 38 W. R. 561, 45 Ch. D. 87. Although an examination under section 27 of the Bankruptcy Act is a private proceeding, yet if the trustee becomes a party to an action he cannot refuse to make discovery. Under rule 12 of the Bankruptcy Rules, 1886, the evidence taken at an examination by the trustee has to be filed: Yate-Lee and Wace on Bankruptcy, 3rd ed., p. 611. The *onus* is on the plaintiff to show that the document is privileged, and he has not done so. He does not say in what way it is privileged: *O'Shea* v. *Wood*, [1891] P. 286, 39 W. R. Dig. 184; *Gardner* v. *Irvin*, 27 W. R. 442, 4 Ex. D. 49.

Hastings, Q.C., and *Swinfen Eady*, for the plaintiff.—This document is clearly privileged. It came into existence after litigation for the purpose of obtaining advice as to it, or information which might lead to the obtaining of evidence to be used in the litigation, and therefore is within the definition of protected documents given by Jessel, M.R., in *Wheeler* v. *Le Marchant*. If the information had been given to the solicitors in their office as a proof of what the witnesses could say, it would have been privileged, and the fact that it was given upon an examination under section 27 makes no difference. Such an examination is a private proceeding, and the trustee has a discretion as to whether or not he will file the evidence: *The Palermo*, 32 W. R. 403, 9 P. D. 6; *In re Grey's Brewery Co.* As a matter of fact, it has not yet been filed. The plaintiff ought not to be compelled to disclose the information which he has obtained by means of what is a privileged communication: *Kennedy* v. *Lyell*, 31 W. R. 691, 32 W. R. 497, 23 Ch. D. 387, 9 App. Cas. 81.

Buckley, Q.C., in reply.—*In re Grey's Brewery Co.* merely shows that the examination is a private proceeding. The depositions in question in *The Palermo* were taken upon an inquiry under the Merchant Shipping Act, 1876 (39 & 40 Vict. c. 80), s. 32. The evidence there was obtained to form part of the brief. No doubt proofs of witnesses are privileged from production. The plaintiff cannot intend to call as witnesses all the persons whom he has examined, and how can it be said that the document came into existence for the purpose of giving the solicitor information to be used at the trial. [STIRLING, J.—*The Southwark and Vauxhall Water Co.* v. *Quick*, 26 W. R. 328, 3 Q. B. D. 315, is a better illustration of the principle than *Anderson* v. *Bank of British Columbia*, because in the former case some of the documents were never submitted to the solicitor at all.] The solicitor says in his affidavit that he asked the questions to get information, not with a view to advising his client, but before advising his client.

STIRLING, J., stated the facts and continued:—The affidavit of documents made by the plaintiff is not quite as clear as it might have been as to the grounds upon which privilege is claimed, but the court cannot say that it is insufficient. Upon the law applicable to the question, the authority most usually referred to is the case of *Anderson* v. *Bank of British Columbia*, which has been cited by counsel in his opening. In that case, before the action was actually commenced, but after litigation had become highly probable, the London manager of the bank had telegraphed to the manager in Oregon to send full particulars of the transaction in question, and on an application by the plaintiff for production of documents the bank resisted production of the letter sent in answer as being privileged. It was held that the letter was not a privileged document, as it had not been shown that the agent had been informed that the communication was to be a confidential one for the purpose of being laid before the solicitor for advice, or that the communication was in fact made with a view to his advice being obtained. The judgment of Jessel, M.R., in that case seems to me to be a clear and satisfactory exposition of the law, but the case which shows the length to which the principle has gone is *The Southwark and Vauxhall Water Co.* v. *Quick*. The head-note in that case is as follows:—"Documents prepared in relation to an intended action, whether at the request of a solicitor or not, and whether ultimately laid before the solicitor or not, are privileged if prepared with a *bonâ fide* intention of being laid before him for the purpose of taking his advice; and an inspection of such documents cannot be enforced." In that case Cotton, L.J., said the principle was that "if a document comes into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice or of enabling him either to prosecute or defend an action, then it is privileged, because it is something done for the purpose of serving as a communication between the client and the solicitor." That was a case where the document was obtained by the client, not the solicitor, and the case is *à fortiori* where (as is more usual) the document is obtained by the solicitor himself. I do not think that either Sir George Jessel or Cotton, L.J., who were members of the Court of Appeal which decided *Wheeler* v. *Le Marchant*, meant to depart from the principles which were laid down by them in the cases to which I have referred. That case is a peculiar one. In an action for specific performance of a building contract to take on lease building land from the defendants, they sought to protect from production letters which had passed between their solicitors and their surveyors, and it was held on appeal that the defendants must produce the letters, except such of them, if any, as the defendants should state by affidavit to have been prepared confidentially after dispute had arisen between the plaintiff and defendants, and for the purpose of obtaining information, evidence, or legal advice with reference to litigation existing or contemplated between the parties to the action. What was contended for there was that all communications to a solicitor for enabling him to advise his client were privileged. The Master of the Rolls said that it had never been decided that documents were protected merely because they were produced by a third party in answer to an inquiry made by the solicitor, and he repeated, in other words, what he had said in *Anderson* v. *Bank of British Columbia* were the grounds on which a communication to a solicitor may be protected from production. I do not think that the Court of Appeal intended in *Wheeler* v. *Le Marchant* to limit the rules of the court with regard to communications to solicitors in contemplation of litigation, or to obtain evidence with

reference to it. Let us look at the practical effect of that rule. A person apprehensive of an action goes to consult his solicitor. He says that before advising he should like an interview with a third party who is acquainted with the matter. That person is invited to come to the solicitor's office. He comes, and the solicitor writes down what he says, and that is preserved. Such a document would plainly fall within the rules laid down by the Master of the Rolls, and would be privileged against discovery.

In the present case the client is not an ordinary litigant; he is a trustee in bankruptcy, and he has power to compel information to be given which an ordinary litigant has not. In such a case as that which I have just referred to the client could only rely upon the voluntary statements by a person acquainted with the case. Trustees in bankruptcy and liquidators of companies have wider powers. Section 27 of the Bankruptcy Act, 1883, provides that the court may, on the application of the official receiver or trustee, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the court may deem capable of giving information respecting the debtor, his dealings or property, and the court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property, and may examine such person on oath. Official liquidators, as is well known, have similar powers in the winding up of insolvent companies. The nature of this section was explained by Chitty, J., in *In re Grey's Brewery Co.*, which was a case under section 115 of the Companies Act, 1862. That learned judge said that the object of all those sections was to enable the court to obtain information which might be useful in the conduct of the proceedings in the winding up, and, looking at the section and the purpose for which the provisions of that section were inserted, an examination of that kind must be considered in the nature of a secret proceeding. The client, then, in this case, having that power, goes to his solicitor and asks for his advice. The solictor says: "You have the power of getting information which I advise you to avail yourself of, so that I may have the means of advising you." The trustee then took out a summons, and got leave to examine certain persons named. His solicitor personally conducted the examination and got a transcript of the proceedings. That transcript is a private document. It is true that the Rules in Bankruptcy provide that the evidence so taken is to be filed, but they do not say that it was to be filed immediately. If that was done the main object of the examination might often be defeated. The point has often been considered by me and by other judges with reference to depositions taken under section 115 of the Companies Act, 1862. The practice under that section in all branches of the court is that the depositions, when taken, shall be returned to the chief clerk for use in the liquidation, but they are not filed until the court is satisfied through the chief clerk that no harm can be done by their publication. These depositions are accordingly regarded as private documents, and why should not a document obtained by a trustee in bankruptcy for his own information in order to enable his solicitor to advise him as to future proceedings be privileged? If, instead of putting the Court of Bankrupcy in motion under section 27, the trustee had, at the instance of his solicitor, written to the bank manager making inquiries, and had got a letter stating the facts, that would have been a privileged communication, and I fail to see why a document such as a transcript giving the information obtained at an examination for the same purpose should not be privileged likewise. This examination has been conducted by the solicitor himself, which makes the case stronger; and he has stated the purpose of it in his evidence. That statement amounts to this—that the examination has taken place with the view of enabling the solicitor in his professional capacity to advise the trustee in bankruptcy whether this action should be brought or not. So if privilege has been sufficiently claimed this document is one which is capable of being privileged. In my view privilege has been sufficiently claimed, and the application fails and must be refused with costs.

Application refused.

Solicitors for the applicants, *Jaques & Co.*, for *J. Norton Dickons*, Halifax.

Solicitors for the plaintiff, *Walter Helliwell*, for *Jubb, Booth, & Helliwell*, Halifax.

Q. B. Div.
(Day and Collins, JJ.) Jan. 17.

THAMES AND MERSEY MARINE INSURANCE CO. (LIMITED) v. PITT, SON, & KING. (a.)

Insurance — Marine insurance — Average damage — Stranding—Liability of insurer—Goods insured in ship and in craft—Policy—Construction—Valuation stated—"Included" advance on freight.

By a policy of insurance certain maize was insured, as to part, from San Nicolas, and, as to the remainder, from Buenos Ayres, for a voyage to the United Kingdom, free from particular average unless the ship or craft should be stranded, sunk, or burned.

The policy included all risks of steam navigation, and in craft, transhipment, or while waiting transit. The maize was valued in the policy at £7,940 "(included £1,361 6s. 6d. for advance on freight)." Between San Nicolas and Buenos Ayres the ship stranded, and a portion of the cargo was discharged into lighters, and part was wetted, and part lost. The ship got off, and at Buenos Ayres was surveyed, and was admitted by both parties to be seaworthy to continue her voyage, and thereupon the discharged cargo was reshipped, together with the Buenos Ayres portion of the maize, which had been awaiting the ship in lighters. On the voyage to Europe a large part of the cargo was lost and the remainder damaged owing to perils of the seas. In an action raising the question as to the amount of damage recoverable by the assured under the policy,

Held, that, the stranding having occurred before the Buenos Ayres portion of the maize was on board, the assured were not entitled to recover for particular average loss in respect of it, but only in respect of the maize shipped at San Nicolas.

Held, also, that the assured were entitled to have the particular average loss calculated on the valuation stated in the policy, without deduction of the amount of the freight advanced.

Special case.

The plaintiffs sued the defendants for money had and received, and the facts found by the special case were as follows:—

By a policy of insurance dated the 17th of September, 1890, the defendants insured with the plaintiffs and other insurers certain maize, valued at £7,940, by the steamship *Craigton* for a voyage at and from San Nicolas and Buenos Ayres to St. Vincent for orders to a port of the United Kingdom

(a.) Reported by JOHN P. MELLOR, Esq., Barrister-at-Law.

or Continent between Bordeaux and Hamburg, both inclusive. The subject-matter of the insurance was described in the policy to be

26,910 bags of maize from San Nicolas, £6,065 1 per cent.
8,299 ,, ,, Buenos Ayres, £1,875 ⅞ per cent.

and it was therein stated that the goods were by agreement to be valued at £7,940 (included £1,361 6s. 6d. for advance on freight). The policy included all risks of steam navigation and in craft or transhipment or while waiting transit, and it contained a warranty that the risk should be free from particular average unless the ship or craft should be stranded, sunk, or burnt, or in collision—the collision to be of such a nature as may be reasonably supposed to have caused the damage.

The Craigton had on the 2nd of April, 1890, been chartered to E. A. Bunge and J. Bern to load a cargo of wheat and (or) maize in bags (but not exceeding 2,550, ten per cent. more or less, tons English) to be loaded in the River Parana at not more than two safe loading ports to be named by the charterers, not higher than Rosario, all of the cargo with the exception of 550 tons, which were to be shipped in Buenos Ayres Roads. The freight was to be at the rate of 30s. for cargo loaded up the river, and at 22s. for cargo loaded at Buenos Ayres, all per ton of 2,240lbs. gross of maize, and was to be paid as follows:—viz., sufficient costs for ship's use at port of loading (if required by the master) at current rate of exchange, subject to 5 per cent. to cover insurance and other charges, and the balance on the right and true delivery of the cargo in cash.

The charterers shipped on board *The Craigton* at San Nicolas 26,910 bags of maize under the charter-party, and the vessel sailed for Buenos Ayres. On the 21st of July, 1890, while proceeding down the river, *The Craigton* stranded on the Don Hermanos bank. About 800 tons of the cargo was discharged into lighters, and she floated off on the 2nd of August, and arrived at Buenos Ayres the same day. Owing to the stranding, part of the cargo was lost and other portions were wetted and damaged. At Buenos Ayres *The Craigton* was surveyed and found to be seaworthy to continue her voyage, whereupon 8,299 bags of maize, which were at the time of the stranding awaiting her in lighters at Buenos Ayres, were shipped, together with the 800 tons previously discharged in consequence of the stranding, but no distinction or separation was made while storing the different lots, and there was consequently no means of distinguishing them. The bills of lading referring to the whole of the above cargo were assigned by Messrs. Bunge & Bern, the charterers, to the defendants. On the 13th of August *The Craigton* sailed for the United Kingdom, but on the voyage encountered severe weather, and a considerable portion of the cargo was lost and a large part of the remainder damaged by water owing to perils of the seas. *The Craigton* arrived at Plymouth on the 22nd of September, and a claim for damage to the cargo was made upon the plaintiffs. A considerable portion of the damage was attributed by the expert who examined the cargo directly to the effects of the stranding, and it was also stated that had it not been for the results of the stranding the water would not have got into the hold in the storm off Cape Finisterre.

The plaintiffs, on the 16th of December, without prejudice, paid to the defendants the sum of £250 in respect of the damage. Average statements were prepared and dated June 2, 1891, and September 25, 1891, by which it appeared that there had been a particular average loss on the whole of the maize, and that if the defendants were entitled to claim in respect of the cargo shipped at Buenos Ayres as well as that shipped at San Nicolas, the liability of the plaintiffs was £269 11s. 3d., but if on the latter portion only, it amounted to £217 13s. 10d. only.

The plaintiffs contended that the defendants were only entitled to claim in respect of the cargo shipped at San Nicolas, and claimed the difference between the latter amount and the £250 paid to the defendants. The defendants claimed in respect of both portions, and the question raised by the case was as to which of these contentions was correct.

The second question was raised upon the contention of the defendants that the above average statements did not correctly show the amounts they were entitled to claim, inasmuch as, in estimating the particular average loss the value of the cargo was taken under the policy at £7,940, less £1,361 6s. 6d., the freight advanced by the charterers at the ports of loading in accordance with the charter-party, whereas it should have been taken at the full amount of £7,940 stated in the policy. The second question, therefore, was whether the amount of freight advanced was so correctly deducted.

Joseph Walton, Q.C., and *Synnott*, for the plaintiffs.—(1) No liability attaches to the underwriters in respect of the goods shipped at Buenos Ayres. Independently of the clause in the policy covering the risk of craft, the claim for particular average is not let in by a stranding before the goods were on board, for if the policy did not cover risk of craft the adventure had not commenced. But the effect of the words "in craft" is to show that, in the contemplation of the parties, risk anterior to the time when the goods were on board was separately covered, and if the goods were at risk "of craft" at the time no damage arising from the stranding of the ship is recoverable. (2) Damage occasioned to the cargo through perils of the seas on the voyage from Buenos Ayres to Europe cannot here be related back to the effects of the stranding, inasmuch as both parties admitted that the ship was seaworthy to continue her voyage. (3) The average statements correctly estimate the particular average loss by deducting the amount of the advanced freight from the valuation in the policy. The effect of writing in "included £1,361 6s. 6d. for advance on freight" was to make the policy a separate insurance of the goods and of the advanced freight, though if the words had not been put in the valuation would have bound the parties. In an ordinary policy the assured gets no indemnity for having to pay the same freight on damaged goods as on those in sound condition, and in an open policy the result is the same, so that in both cases he gets no such indemnity unless he has covered it in his valuation. By paying advanced freight, therefore, he buys the right of putting his goods on board and an undertaking to have them carried, and as there may be a total loss on freight and not on cargo, as well as *vice versâ*, it is clearly to his interest to insure the advanced freight. This difference between the interests is illustrated in several events which may happen; for instance, the ship may be lost but the cargo landed, when there would be a total loss of the freight but none on the cargo; again, if the ship puts in to reload from perils of the seas the expense of reloading is charged against advanced freight, and, if that is insured, is recoverable.

Channell, Q.C., and *Carver*, for the defendants.—The doctrine of liability to average loss is that if the ship strands then the warranty is gone and the policy is construed as if the warranty was not in it; and although it may be proved that the damage did not arise from the stranding, it is recoverable. The reason

for the rule is the difficulty of saying how the damage arises, and the case was for convenience assumed by the underwriters. In order to apply the rule here the limit to that assumed liability must be ascertained, and it is submitted that the principle upon which it should be done is to limit to such "strandings" as might have caused the damage. The condition must, however, be construed strictly, and, the doctrine of proximate cause not applying, it is immaterial whether the stranding is connected with the actual loss, it must be a potential cause. Here a large part of the damage to the whole cargo was directly attributed, in fact, to the effects of the stranding; but for that there would have been no loss from perils of the seas. The text-books no doubt for the most part say that the goods are not at risk until actually on board, but the only authority for that is the case of *Roux* v. *Salvador*, 1 Bing. N. C. 526. One event is mentioned in the margin of this policy, and it ought not to be construed distributively to mean two policies. The only reason for the insertion of the words "in craft" was that in *Hoffman* v. *Marshall*, 2 Bing. N. C. 383, it was held that under the usual clause, unless the ship stranded, a partial loss in one of the lighters was not brought in. The calculation of the loss in the average statements is wrong. The assured are entitled to recover upon the whole valuation in the policy without deduction. The object of putting in "included £1,361 6s. 6d. for advance on freight" was to show how the value of the goods was arrived at. An advanced freight on particular goods stands on the same footing as commission or insurance of premiums, it is an element in the value of the goods: the assured has paid a sum down which he is not entitled to get back if the goods are lost, and the value of the goods is increased.

They cited *Usher* v. *Noble*, 12 East. 639.

DAY, J.—This is an action brought by underwriters to recover back money paid to the assured in respect of an alleged loss under a policy of insurance. Two questions are submitted to us by the special case:—first, whether the money so paid is recoverable by the plaintiffs on the ground that the goods were not on board the ship at the time of stranding, and, secondly, whether, on the construction of the policy, the advanced freight ought to be considered as separately insured, or whether it formed part of the value of the goods.

I deal first with the question as to the stranding. Now we have, under this policy, two different lots of maize, to be loaded at two different ports and at different rates of insurance. The facts are simple. On the passage down from San Nicolas to Buenos Ayres the ship, having on board some 26,910 bags of maize, stranded. She was got off and taken down to Buenos Ayres, where she took on board 8,299 bags and proceeded to Europe, and on the voyage the whole of the bags were damaged by perils of the seas. The assured thereupon claim against the underwriters in respect of the damage. The policy contained as usual a warranty against particular average, but with one exception—viz., unless the ship or craft be stranded. Now the ship was stranded. It is said that because she stranded the assured are entitled to recover, not only damages in respect of the goods on board, but also in respect of average loss sustained by the 8,299 bags not on board, but put on board after the ship had been surveyed and certified seaworthy. This maize was at the time of stranding lying on board lighters at Buenos Ayres, and was not damaged or affected there by delay or by stranding. This maize, however, being put on board, sustained damage by perils of the sea. Now the question therefore is this: is the claim of the assured to recover in respect of this quantity of maize well founded? I am of opinion that it is not. I have carefully considered the character of this policy. You have one paper, one assuring, one underwriter, but you have in a sense two voyages—one from San Nicolas to Buenos Ayres, and the second from Buenos Ayres to Europe—although in one sense the risks are the same, yet one extends from San Nicolas to Europe, while the other is a limited risk from Buenos Ayres to Europe only. Moreover, there are two different rates of assurance.

I suppose that hardly any argument would have been offered by the assured but for the words in the policy that it is to cover any loss "in craft." The insurance, no doubt, therefore does apply to maize in craft, and if any misfortune had happened to it while there, within the terms of the policy, it could have been recovered under the policy. But the two things, to my mind, must be consecutive: the maize is insured first in the craft, and then afterwards in the ship. While the goods are in the craft they are affected by policy risks to the craft, and while in the ship then by the risks which refer to the ship. But a stranding to affect goods in craft must be a stranding of the craft. To construe it otherwise, to my mind, would be to put an unreasonable and inconvenient construction upon the policy. It seems to me that the warranty and exception are incidental to the risk, and the principal thing to be considered is the risk. Here, in my judgment, there were two insurances, and the defendants, therefore are only entitled to take advantage of the stranding in respect of the bags of maize which were shipped at San Nicolas, and not in respect of the 8,999 taken on board at Buenos Ayres.

On the second question I am inclined to think that the defendants are right, and I agree with Mr. Channell's construction rather than with the ingenious alternative suggested by Mr. Walton. I think it is really an insurance on the value of the goods, and that it is not vitiated by the fact that *ex abundante cautelâ*, the merchant has shown to the underwriters how the valuation of the goods has been arrived at; that, desiring to get the profit on his speculation, he has valued them at the port of destination. I do not think he loses the benefit by stating that fact of the amount of the sum for the purposes of the valuation. I do not, therefore, consider this as a policy on the lesser amount, but really as a policy on the value of the goods explaining how it was made up. I think that the defendants, therefore, have made out their case as to that, and I desire to say how much we have been assisted by the able and interesting arguments on both sides.

COLLINS, J.—I am of the same opinion, and desire especially to concur in the last remark of my brother Day. The plaintiffs say that they are entitled to recover back money which they have overpaid in respect of a particular average loss caused by the stranding of the steamship *Craigton*.

The question is whether there has been such a stranding as renders them liable. I am of opinion that there was no such stranding. Now the claim arises in respect of the quantity of maize shipped at Buenos Ayres, and it is contended that, as might be the case in many policies of insurance, the stranding entitles the owner of the maize to recover with regard to that. The answer seems to me to depend on whether the stranding took place during the adventure. If it did, then it is clear that he can recover, although the actual mischief caused by it was nothing. But that is very different from saying that it is immaterial when the stranding took place. The principle by which parties agree in insurance to assume certain things within a certain time is sound sense and sound

law. And the principle upon which it rests was examined in the case of *Roux* v. *Salvador*, by Tindal, C.J., who said (at p. 536): "The general principle laid down in *Burnett* v. *Kensington*, that if the ship be stranded the insurer is liable for any average damage, though quite unconnected with the stranding, is not disputed. The policy, after the stranding, must be construed as if no such warranty had been written on the face of it. But the question is, within what limits of time a stranding must take place to produce such effect." When you read the rule it is obvious that it must be so. The question whether the particular damage is attributable to the stranding is a different question, and therefore the underwriters and shippers by convention have agreed upon the rule. The stranding must, then, take place during the course of the adventure. But Mr. Channell says it was so, because at the time the goods were at risk. Is that so? We must see what the parties contemplated as to that. To my mind, what they meant to provide in the policy was that the risk commenced when the goods were put on board, for the time anterior to that —viz., "in craft"—is separately covered. Mr. Channell does not contend that average loss in respect of an anterior stranding, if the goods were not at risk, by risk "of craft" would be recoverable.

Now this covers this case, but for the fact that it was said that part of the damage was caused as the result of the stranding antecedent to the putting of the goods on board. Mr. Walton answers that by saying that both sides admitted the ship to be seaworthy, and that really comes back to the first point, and is an attempt to introduce something into the adventure.

The second point is whether the claim should be allowed for particular average loss in respect of the whole value, or only after deducting the sum of £1,361 6s. 6d. for advance freight. I think it is a question of construction as to what the parties meant. Did they intend to insure the cargo at a certain value, or the cargo, plus the advanced freight? Now I think they intended the former—if the latter, then the underwriters might reply to any claim for insurance in respect of advanced freight under such a policy that it was agreed that it should be taken as part of the value of the goods. On that part of the case, therefore, I think the defendants must succeed.

Channell, Q.C.—I suggest that the order should be that the claim be readjusted by calculating the particular average loss for £6,065 without deduction for advanced freight.

Order accordingly.

Solicitors for the plaintiffs, *Waltons, Johnson, Bubb, & Whatton.*

Solicitors for the defendants, *Crowders & Vizard*, agents for *Shelly & Johns*, Plymouth.

House of Lords.

From C. A. (Ireland). Dec. 16.

MORGAN *v.* CASTLEGATE STEAMSHIP CO. (*a.*)

Ship — Charter-party — Disbursements by master on account of the ship—Maritime lien—Master's authority —Merchant Shipping Act, 1889 (52 *&* 53 *Vict. c.* 46), *s.* 1.

The appellant, as master of the steamship Castlegate, *and agent for the charterers, obtained cash advances and coals from W. & Co., for which he paid by bills drawn in their favour upon the charterers. The bills were dishonoured, and W. & Co. recovered judgment against the appellant as drawer, who thereupon applied to the High Court of Admiralty for a declaration that he had a valid lien for his disbursements, upon ship and freight. The charterers had undertaken to pay port dues, &c., and to provide and pay for coals, and the appellant had notice of these terms.*

Held, that the appellant had no maritime lien given him by the Merchant Shipping Act, 1889, *either on the ship or freight.*

The decision of the Court of Appeal in Ireland (29 *L. R. Ir.* 55) *affirmed.*

This was an appeal from an order of the Court of Appeal in Ireland (Lord Ashboune, L.C., Palles, C.B., and Barry, L.J.), reported 29 L. R. Ir. 55.

The facts are given very fully in Lord Herschell's judgment. By section 1 of the Merchant Shipping Act, 1889 (52 & 53 Vict. c. 46), "Every master of a ship . . . shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of disbursements properly made by him on account of the ship, and for liabilities properly incurred by him on account of the ship, as a master of a ship now has for the recovery of his wages. . . ."

Pyke, Q.C., and *Joseph Walton, Q.C.* (*Hollams* with them), for the appellant.—The disbursements intended by the Act of 1889 are all such obligations as the owner under like circumstances would himself enter into. The captain's lien does not depend on the contractual relations of third parties. If we can make out the absolute necessity of obtaining coals in this way, then there is a maritime lien. Here it was intended that the master should incur these liabilities in case the charterers would or could not obtain credit. The captain was really carrying out his owner's business: *The Sara*, 38 W. R. 129, 14 App. Cas. 209; The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), and the Admiralty Court Act, 1861 (24 Vict. c. 10); *The Edwin*, 12 W. R. 992, Br. & Lush. 281; *The Druid*, 1 W. Rob. 391, 399; *The Ticonderoga*, Swa. 215, 217; *The Lemington*, 23 W. R. 421, 2 Asp. M. C. (N. S.) 475. The decisions in *The Beeswing*, 5 Asp. M. C. 484; *The Turgot*, 34 W. R. 552, 11 P. D. 21; and *The Durham City*, 14 P. D. 85, 37 W. R. Dig. 162, are wrong. At any rate, the master has a lien on freight, which would not have been earned but for these disbursements: *Bristowe* v. *Whitmore*, 9 W. R. 621, 9 H. L. Cas. 391; *The Feronia*, 16 W. R. 585, L. R. 2 A. & E. 65.

Sir Walter Phillimore and *Aspinall, Q.C.* (*Satow* with them), for the respondents as to the claim of a lien on freight, to which counsel were requested to confine their argument.—If no lien on ship, then none on freight, which follows the possession of the ship: *Smith* v. *Plummer*, per Lord Ellenborough, 1 B. & Ald. 575, 582; *The Ringdove*, Swa. 310; *The Jonathan Goodhue*, Swa. 524; *The Edward Oliver*, L. R. 1 A. & E. 379, 15 W. R. Adm. Dig. 27; *The Orpheus*, L. R. 3 A. & E. 308, 19 W. R. Adm. Dig. 16; *The Dowthorpe*, 2 W. Rob. 73.

Pyke, Q.C., replied.

The House took time for consideration.

Lord HERSCHELL, L.C.—This appeal arises in a cause instituted in the High Court of Admiralty in Ireland by the master, or late master, of the steamship *Castlegate* against the vessel and freight, for disbursements made by him, or for which he was liable, to the amount of £1,391 11s. 9d.

On the 29th of November, 1889, a charter-party

(*a.*) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

was entered into between the Castlegate Steamship Co., as owners of the steamship *Castlegate*, and Douglas H. Morgan & Co., whereby the vessel was chartered to the latter firm for a term of six calendar months, at the rate of £930 per calendar month for the use and hire of the vessel. The charter-party contained a stipulation "that the charterers should provide and pay for all the coals, port charges, pilotages, agencies, commissions, and all other charges whatsoever except" certain charges with which I need not trouble your lordships. Of that charter-party the master of the vessel had notice.

The vessel sailed on a voyage to Buenos Ayres under that charter-party. In the course of her outward voyage certain coals were required for *The Castlegate*, and at the Port of St. Vincent those coals were supplied to the vessel by the firm of Wilson, Sons, & Co. (Limited), and in respect of those coals a bill was drawn by the plaintiff as master, upon Douglas H. Morgan & Co. for the amount of £313 1s. In the month of February, 1890, whilst still on her outward voyage, and in April, 1890, on her homeward voyage, *The Castlegate*, at the Port of Monte Video, needed further supplies of coals, and these, again, were procured from the same firm, and the captain gave his draft upon the firm of Douglas H. Morgan & Co., the charterers, for the sum of £1,078 10s. 9d., the total of those two drafts being £1,391 11s. 9d., in respect of which the action was brought.

Douglas H. Morgan & Co. effected a sub-charter-party of the steamer for the homeward voyage with the firm of Samson & Co. They were to pay a freight of 22s. 6d., and they again sub-chartered the vessel to the firm of Arning, Brauss, & Co. at an advanced freight.

When the vessel arrived in this country an attempt was made by Messrs. Wilson & Co. (Limited), the firm who had supplied these coals, to enforce their claim against the vessel. They instituted a cause of necessaries in the local Admiralty Court of the Borough of Cork against the vessel, cargo, and freight. Thereupon the assignees of the bill of lading paid into court the sum of £1,392, which was the balance of the freight after deducting the advanced freight and the cost of loading; and the owners, to save the ship from arrest, paid into court £1,500. The case was subsequently transferred to the High Court of Admiralty, and was there heard and dismissed by the judge of the Admiralty Court. These two sums which I have mentioned, representing the freight and ship, were transferred with the cause to the High Court of Admiralty.

Under these circumstances the master of *The Castlegate*, the present plaintiff, having been made liable, in an action brought against him by Wilson & Co. upon his drafts, for the amount thereof—the firm of Douglas H. Morgan & Co., the charterers, having become bankrupt—he in his turn instituted these proceedings with the view of making the ship and freight liable in respect of the disbursements. The learned judge of the Admiralty Court gave judgment in his favour, determining that he was entitled to the lien which he claimed, and directed that the sum which represented the freight should first be made available, and that if it did not prove sufficient he should enforce his lien against the ship or those representing the ship. This judgment was reversed by the Court of Appeal, and the question which your lordships have to determine is whether the judgment so reversing it was right.

The claim of the plaintiff to maritime lien was rested upon the 1st section of the Merchant Shipping Act, 1889, which provides that "every master of a ship and every person lawfully acting as master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of disbursements properly made by him on account of the ship, and for liabilities properly incurred by him on account of the ship, as a master of a ship now has for the recovery of his wages." The case on behalf of the appellant was that these were disbursements and liabilities properly incurred by him on account of the ship, inasmuch as they were incurred for the purpose of procuring coals, which were necessary to enable the vessel to prosecute her voyage as a steamer in the adventure in which she was engaged.

There can be no doubt that in a sense this expense may properly be said to have been incurred "on account of the ship" if you regard those words as including all disbursements which are necessary or desirable for the purpose of enabling the ship to be effectively used. But it is, in my judgment, impossible to treat the question of the construction of this section as if it had to be entered upon without any regard to previous legislation or decisions. The words to which I have called your lordships' attention were not new words; they had been used in legislation relating to the jurisdiction of the Admiralty Court and had received judicial construction. In the 10th section of the Admiralty Court Act, 1861, and the 33rd section of the Admiralty Court (Ireland) Act, 1867, it had been provided that "the Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship."

In *The Mary Anne*, 14 W. R. 136, L. R. 1 A. & E. 8, those words were held to give the master of the ship a maritime lien for disbursements made by him on account of the ship; and that decision remained unquestioned in this House, was treated as law, and had effect given to it for a considerable number of years. In *The Sara*, which came to your lordships' House, it was held that the decisions to which I have referred were erroneous, inasmuch as the Admiralty Court Act in England, to which I have alluded (and, of course, the decision applied equally to the Admiralty Court Act in Ireland), did not create any maritime lien which had not existed before, but merely conferred jurisdiction upon the Court of Admiralty in cases in which it did not possess jurisdiction before.

Immediately following the decision that the maritime lien which it was supposed had been created by the Act of 1861 did not exist, the statute upon which the appellant relies was passed. There can be no doubt that it was passed for the purpose of creating the lien which it had been supposed existed by virtue of the section which gave jurisdiction to the Court of Admiralty.

Whilst that lien was supposed to exist, the question arose in the courts within what limits the right was to be confined upon the true construction of the words to which I have called your lordships' attention, "disbursements made by the master on account of the ship." In *The Turgot* the question arose under circumstances almost precisely similar to those which have given rise to the present controversy. In that case the vessel was under charter. The charterers were bound (as in the present case) to provide, amongst other things, coals. The master had put his name to a draft in respect of the coals which had been provided, and he sought to enforce a maritime lien, in respect of that liability, against the ship and freight. The then President of the Probate and Admiralty Division held that he was not entitled to do so. Reliance was, of course, placed upon the very same

words which are relied upon here. This liability, it was said, arises in respect of, and may therefore be regarded as, a "disbursement in respect of goods supplied on account of the ship." The learned President, after calling attention to the fact that "by the charter-party," while "the owners were to provide and pay for provisions and wages," "the charterer was to provide and pay for coals," and "the captain was to be appointed by, and to follow the instructions of, the charterer," said: "After the coals and provisions were supplied, the captain proposed to pay for them by drawing on the charterer," but believing, from a statement made to him, that there were instructions from the owners to that effect, "the captain did draw on the owners for the coals and provisions." The learned President then proceeded:—"I am of opinion that the captain is not entitled to recover in respect of the coals, as by the terms of the charter-party he had no authority to pledge the owners' credit in respect of them. It was argued that the master had an implied authority to pledge the owners' credit as their agent *ex necessitate* in order to enable the ship to sail." "But the authority of the master depends on the facts; and as the charterers were bound to pay for the hire of the vessel during its detention, the owners had no interest in obtaining its immediate departure." And he accordingly held that the plaintiff, whilst entitled to recover for the disbursements which he had made, in so far as they were disbursements which the owners under the charter-party were liable to pay, had no right against the ship or freight in respect of the disbursements which he had made for the supply of coals, which the charterers were bound to provide and pay for. It was, therefore, a distinct decision that disbursements made by the master on account of the ship must be limited to disbursements which he had a right to make on the credit of the owners of the ship, and did not extend to disbursements made by him for purposes for which the charterers ought to have made provision, even though in a sense they might be said to have been made on account of the ship.

That decision did not stand alone. The same conclusion was arrived at in other cases; and it seems to me that it would be contrary to all sound principle not to bear those facts in mind when construing the statute which was passed after the decision in *The Sara*. In relation to this very matter there had been what may without impropriety be called a course of decision in the Court of Admiralty putting a construction upon those words "disbursements on account of the ship."

When the Legislature altered the law as this House determined it to exist in the case of *The Sara*, and restored the law which was supposed to exist before, it cannot for a moment be supposed that the Legislature was ignorant of the construction which had been consistently put upon the words in the former Admiralty Court Act, which was supposed to create a lien. I cannot conceive that if it had been intended to create a wider lien than had been held to exist under the previous words, which were supposed to create it, the Legislature would not have used different words to those upon which this construction had been put, so as to make that intention clear and unambiguous. I do not for a moment suggest a doubt as to those decisions which had been arrived at upon the construction of the words used in the previous Act being correct; but it seems to me that, even if they could be shown to be more doubtful than I think they have been shewn to be, I should still feel myself compelled, in construing the section on which this case depends in the Act of 1889, to say that I cannot think the Legislature intended these words to have the effect of creating a maritime lien extending at all beyond that lien which had been held to be created by exactly similar words in the previous legislation. For these reasons I entertain a clear opinion that the judgment of the court below in respect of the alleged maritime lien on the ship must be affirmed.

But it is said on behalf of the appellant, and I own with very considerable force, that if it be true that inasmuch as there was no power to pledge the owner's credit there ought not to be and cannot be a maritime lien upon this vessel, which is the property of the owners, yet as regards the freight, which was the charterers', inasmuch as there was authority to pledge the credit of the charterers for these coals, a maritime lien ought to be enforced against the freight. As a matter of equity no doubt there is much to be said for that contention; and certainly, speaking for myself, if I could have seen my way to do so, I should have given effect to the contention of the appellant. But there appear to me to be insuperable difficulties to taking such a course as that. In the first place, one would have to say that whilst these disbursements, when regarded as affecting the owners of the ship, were not "disbursements on account of the ship," the very same disbursements, when you were looking at the case as affecting the charterers, were "disbursements on account of the ship," because those are the words and the only words, which could give the right insisted upon under the statute; and that appears to me of itself to be a very great difficulty. But besides that, no authority has been cited in which the Court of Admiralty has ever granted process against freight for the purpose of enforcing a maritime lien upon it, except as consequential upon and in connection with process against the ship. No case was cited to us in which the one had not been connected with the other, or in which, where there was no power to arrest the ship because there was no maritime lien enforceable against the shipowner, there had nevertheless been held to be a power to arrest the freight, or that from which the freight arose, for the purpose of enforcing a lien against the freight.

Under these circumstances, having regard to the difficulties which arise upon the construction of the Act of Parliament which alone gives any such maritime lien, and to the practice of the Court of Admiralty with respect to lien upon ship and freight, I do not see my way to giving, even in respect of the freight, where I should be fully inclined to do so if I could, the relief to the plaintiff which he seeks in this action.

For these reasons I am of opinion that the decision appealed from must be affirmed and the appeal dismissed, with costs.

Lord Halsbury, who is unable to be present to-day, has asked me to state that he concurs in the opinion which I have expressed to your lordships.

Lord WATSON.—The appellant was master of the steamship *Castlegate* during the six months following the 14th of December, 1889, whilst she was chartered to Douglas H. Morgan & Co. at the rate of £930 per month. He, as well as the officers, engineers, firemen, and crew were employed by the respondents, the owners of the vessel, who were bound by the terms of the charter-party to provide and pay their wages, for insurance on ship and engine-room stores, and to maintain the ship and machinery in an efficient state. The charterers undertook to pay port dues and various other charges, and "to provide and pay for all her coals."

Whilst the owners continued, through the appellant, to retain possession of the ship, they parted with all control over her movements, which were placed under the direction of the charterers. The lump sums stipulated for her hire were not dependent upon the

freights which she might earn; and the charterers might have kept the vessel unemployed during the whole period covered by the charter-party if they had chosen to do so. In these circumstances the legal relations of the appellant to the owners and charterers respectively does not appear to me to admit of dispute. He was the agent of the owners in procuring necessaries which they were bound to supply, and the agent of the charterers only in providing coals or other necessaries for which they were responsible.

The charterers employed *The Castlegate* to carry a cargo, on their own account, from Antwerp to Buenos Ayres. They then sub-chartered to Samson & Co., at 22s. 6d. per ton, for a cargo of wheat or maize, to be carried from a port in the River Parana to certain ports on the Continent or in the United Kingdom. Samson & Co., by another sub-contract, parted with their right, at an increased freight of 24s. 6d. per ton, to Arning, Brauss, & Co., who directed the vessel to proceed to Cork Harbour, where she arrived on the 11th of May, 1890. Neither of these sub-charters affected the obligation of Douglas H. Morgan & Co. to provide coals for the use of the ship.

On the outward voyage the appellant obtained, as agent for the charterers, cash advances and coals from the firm of Wilson, Sons, & Co. (Limited), to the amount of £313 3s.; and on the homeward voyage he obtained from the same firm similar advances and a further supply of coal to the amount of £1,078 10s. 9d. For these sums he drew bills upon Douglas H. Morgan & Co., the first of which was dishonoured at maturity, and the second was not accepted. Wilson, Sons, & Co. (Limited), on the 19th of January, 1891, recovered judgment against the appellant as drawer for the amount of these bills, with interest.

On the arrival of *The Castlegate* at Cork both ship and cargo were attached, at the instance of Wilson, Sons, & Co. (Limited), under warrant of the local Court of Admiralty. The attachment was released upon payment into court of £1,500 as representing ship, and £1,392 as representing freight. The proceedings and the moneys paid into court were thereafter transferred to the High Court of Admiralty of Ireland, whereupon the appellant applied to that court for a declaration that he had a valid lien for his disbursements upon ship and freight, and for payment of these disbursements out of the funds brought into court.

The learned judge of the High Court of Admiralty affirmed both liens claimed, and directed that the appellant's disbursements should be paid in the first instance out of freight money; the balance, if any, to be paid out of money representing ship. By the order appealed from that decision was reversed, and the present appellant's application dismissed, with costs.

It was conceded in argument that the master of a ship has no maritime lien for necessary disbursements on account of ship except in those cases where it is given him by section 1 of the Merchant Shipping Act, 1889. The difficulty of applying the provisions of the Act of 1889 to the present case arises from the fact that the respondents, who are under no liability to pay for the appellant's disbursements, are owners of the ship, and that the charterers, who are clearly responsible for them, are the owners of the freight.

As regards the appellant's alleged lien upon ship, I have had no difficulty in coming to the same conclusion with the Court of Appeal. It had been held by Dr. Lushington, in *The Mary Anne*, that the Admiralty Court Act, 1861, gave the master a lien on ship for necessary disbursements, and that decision was followed, though not always approved of by the Admiralty Court, in a series of cases ending with *The Sara*, in which the judgment of Butt, J., was affirmed by the Court of Appeal, 35 W. R. 826, 12 P. D. 158. These cases established the principle that there could be no lien upon ship in respect of disbursements for which the master had not authority to bind the owner, or, in other words, that no maritime lien could attach to the *res* for any sum which was not a personal debt of its owner. On appeal your lordships held that the rule which had been accepted by the courts below in the case of *The Sara* (*Hamilton* v. *Baker*), was not warranted by the Act of 1861, and it is matter of common knowledge that the object of the Legislature in passing the Act of 1889 was to give shipmasters a statutory lien for disbursements in place of the right which had been erroneously accorded to them in the Admiralty Court. Whether, as the appellant maintains, it was the intention of the Legislature to establish a wider lien than that which had been given effect to in *The Mary Anne* and subsequent decisions depends upon the language of the Act.

The clause upon which the appellant relies provides that every master of a ship shall, "so far as the case permits," have the same rights, liens, and remedies for recovery of "disbursements properly made by him on account of the ship," as a master of a ship has for recovery of his wages. In the case of lien for wages of master and crew the Legislature has recognized the rule that it attaches to ships independently of any personal obligation of the owner, the sole condition required being that such wages shall have been earned on board the ship. But that rule, which is founded upon obvious considerations of public policy, constitutes an exception from the general principle of the maritime law, which I understand to be that, inasmuch as every proceeding *in rem* is in substance a proceeding against the owner of the ship, a proper maritime lien must have its root in his personal liability. It was argued that the case of lien for damages by collision furnishes another exception to the general rule, and there are decisions and *dicta* which point in that direction; but these authorities are hardly reconcilable with the judgment of Dr. Lushington in *The Druid*, or with the law laid down by the Appeal Court in *The Parlement Belge*, 28 W. R. 642, 5 P. D. 197, where Brett, L.J., with the assent of James and Baggallay, L.JJ., said: "In a claim made in respect of a collision the property is not treated as the delinquent *per se*, though the ship has been in collision, and has caused injury by reason of the negligence or want of skill of those in charge of her, yet she cannot be made the means of compensation if those in charge of her were not the servants of her then owner, as if she were in the charge of a compulsory pilot. That is conclusive to show that the liability to compensate must be fixed, not only on the property, but on the owner through the property."

The clause in question does not expressly, neither, in my opinion, does it by implication, enact that the master shall have a lien on ship, independently of the owners' personal liability. The qualifying words, "so far as the case permits," seem to indicate that, in the view of the Legislature, there might be cases in which master's disbursements, even if properly incurred in a question with some one or other, would not carry a statutory lien. Then the condition upon which a lien is given to the master is that the disbursements shall have been "properly incurred by him on account of the ship." The statute does not prescribe what disbursements shall be regarded as properly incurred on account of ship; it leaves that matter to be determined according to the existing law. Whether that reference relates to the general principles of the law maritime, or to the law as laid down by Sir James Hannen in *The Turgot*, one of the

cases which, in so far as it concerned the existence of a lien, was overruled by your lordships in *The Sara*, is immaterial to the result of this case; because, in either view, no liability capable of carrying a lien on ship can be properly incurred by a master on account of ship in the absence of express or implied authority from the owner.

I am, therefore, of opinion that the Act of 1889 does not empower the appellant to fix upon the respondents' ship a liability which he had not their authority to incur, or one which was not necessary for the protection of their interests. He had implied authority from the charterers because the disbursements were necessary in order to enable the vessel to prosecute her adventure, which was theirs; but he was at liberty to choose whether he would or would not pledge his personal credit for their debt. It was argued that the Legislature must presumably have meant to enforce the same policy in the case of disbursements as in the case of wages. It appears to me that any such presumption is excluded by the terms of the statute; and I can find no reasons, either of equity or of policy, for enabling the master of a vessel, who is not bound to incur a liability, to relieve himself, when he does choose to incur it, out of the property of his owners, although they may derive no benefit from it, and by the terms of his employment he is debarred from incurring it on their personal account.

The question whether the appellant has a statutory lien upon the freight brought into court is attended with more difficulty. If the respondents, instead of chartering, had themselves navigated *The Castlegate*, these disbursements, although made for the purpose of enabling her to earn freight, would have been properly incurred on account of ship, within the meaning of the Act, and the appellant would have had a statutory lien both upon ship and freight. Under the charter-party the interest which they previously had was divided, the respondents remaining owners of ship, whilst the charterers became the owners of any freight which she might earn. The appellant argued with much plausibility that, although the effect of that arrangement might be that he ceased to have a statutory lien on ship for disbursements which were not made in the respondents' interest, the charterers became *quoad* freight the owners of the vessel, and consequently that disbursements properly made in their interest were incurred "on account of ship" within the meaning of the Act, and must, therefore, carry a statutory lien upon freight.

If the Court of Admiralty were a court exercising equitable jurisdiction, in the sense of English law, the appellant would have a very strong equity to a lien upon the freight of *The Castlegate*. His disbursements were made in the interests of the charterers, and with their authority; and but for these disbursements the freight now in court would never have been earned. However cogent these considerations may be from an equitable point of view, it does not necessarily follow that the appellant is entitled to a maritime lien.

The difficulty which the appellant has to encounter, in this branch of his claim, is to be found in the fact that the Admiralty Court has never recognized the possibility of there being a proper maritime lien upon freight which is not associated with or founded upon a right to proceed *in rem* against the ship. No process having for its sole object the attachment of cargo in order to enforce a maritime lien for freight can issue from that court. The warrant to arrest cargo must apparently be accompanied by a warrant to arrest the *corpus* of the ship; an attachment of the ship being an essential preliminary to the courts exercising jurisdiction to enforce a proper lien on freight. These circumstances appear to me to necessitate the inference that no claim which cannot be enforced, either against the ship or her owners, can, according to the practice of the courts of admiralty, be attended with a maritime lien upon freight.

The absolute dependence of a lien on freight upon the liability of the ship to attachment for the same debt appears to me to have been recognized by the Court of Queen's Bench in *Smith* v. *Plummer*, where the captain of a vessel claimed a lien for wages upon ship and also upon freight. The court negatived both liens, the first on the authority of previous decisions, and the second for the reasons thus stated by Lord Ellenborough, C.J.: "Then if he has no lien on the ship, as appears from these cases, he can have no lien on freight, as the lien on the freight is consequential to the lien upon the ship."

I am, for these reasons, of opinion that the circumstances of this case do not permit of the appellant having a lien upon freight, and that the decision of the Court of Appeal on this point also must be affirmed. I have come to that conclusion with reluctance, because I feel that the appellant's claim for payment out of freight is supported by plain considerations of equity. But it rests with the Legislature to provide a remedy, should they deem it necessary, and not with the court, whose duty it is to administer the Act as it stands.

Lord MORRIS (whose opinion was read by Lord FIELD).—I concur; but on the question whether the appellant has a statutory lien on the freight brought into court I desire to add that the Court of Admiralty in Ireland for the present is not a part of the High Court of Justice in Ireland, and its jurisdiction in reference to the matters in controversy in this case is purely statutory, *vide* 30 & 31 Vict. c. 114, s. 33, which provides: "The Court of Admiralty shall have jurisdiction over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship." In my opinion, even if the disbursements claimed on account of freight, which were not on account of the ship, were a lien on the freight, such lien should be enforced in the High Court of Justice in Ireland, and not in the Admiralty Court, which court would have no jurisdiction to entertain the question whether there was a lien on the freight when there was no lien on the ship.

Lord FIELD.—I concur in the motion which has been made with regard to the alleged lien upon the ship. I have nothing to add; but with regard to that claimed upon freight I agree that the question is not so free from doubt. If the principle that the "*res*," whether ship or freight, is only available for the master's lien in cases in which he has incurred the liability in respect of which the lien is claimed with the authority of the owner of the "*res*" is adopted, it should seem that inasmuch as, first, the freight now sought to be attached was earned for the charterers under their sub-charter, and was, in the first instance, payable to them, and, secondly, the liability incurred for the coals was incurred with their authority, the two necessary elements to the existence of the maritime lien here claimed do concur. Moreover, without the coals the ship could not have earned the freight now sought to be attached; and "service done" is of the very essence of maritime lien. On the other hand, the freight could not have been earned without the ship and her wages and necessary expenses which were to be contributed by the respondents; and the master incurred the liability in question with full notice of the condition of the charter. There seem to me to be equitable considerations on

both sides, and I gladly take refuge in the conclusion arrived at by Lord Ellenborough, C.J., in *Smith* v. *Plummer*, that the freight is an incident of the ship, and cannot be got at unless the ship can also be attached.

Order appealed from affirmed, and appeal dismissed, with costs.

Solicitors for the appellant, *Ingledew, Ince, & Colt.*

Solicitors for the respondents, *Maples, Teesdale, & Co.*, for *Leitch, Dodd, Bramwell, & Bell*, Newcastle-on-Tyne.

Court of Appeal.

From Q. B. Div. (Lindley and Bowen, L.JJ.) March 9.

HOLMES *v.* MILLAGE. (*a.*)

Practice — Receiver — Equitable execution — Future salary or earnings — Judicature Act, 1873, *s.* 25, *sub-section* 8.

The court has no jurisdiction to appoint a receiver of the future salary or earnings of a judgment debtor.

Appeal from an order of the Queen's Bench Division reversing an order of the judge at chambers.

The plaintiff had recovered judgment against the defendant for £500 for money lent. The defendant resided in Paris, being the Paris correspondent of the *Daily Chronicle*, and had no assets in this country. He was paid by agreement a salary of £8 8s. a week, and this sum he drew each week from a Paris banker who was instructed by the newspaper proprietors to pay it weekly. The defendant was liable to dismissal on a week's notice. Upon the application of the plaintiff the Divisional Court (Day and Collins, JJ.), reversing the decision of Mathew, J., at chambers, made an order, which, so far as material, provided that a receiver be appointed to receive the moneys receivable in respect of the following property, that is, all sums due and payable or to become due and payable to the defendant by the proprietors of the *Daily Chronicle* newspaper, and that the proprietors of the *Daily Chronicle* newspaper do pay all sums due and payable or to become due and payable to the defendant to such receiver, and that the receiver do pay such sums in or towards satisfaction of what shall for the time being be due in respect of the judgment debt.

The defendant appealed.

Forman (*F. O. Robinson* with him), for the defendant.

Philbrick, Q.C. (*Arnold Herbert* with him), for the plaintiff.

Hamilton v. *Brogden*, 35 SOLICITORS' JOURNAL, 296, W. N., 1891, p. 36; *In re Mirams*, 39 W. R. 464, [1891] 1 Q. B. 594; and *In re Shine*, 40 W. R. 386, [1892] 1 Q. B. 522, were referred to in addition to some of the cases mentioned in the judgment.

Cur. adv. vult.

March 9.—The judgment of the COURT (LINDLEY and BOWEN, L.JJ.) was read by

LINDLEY, L.J.—This is an appeal from an order appointing a receiver of moneys to become payable to the defendant by third parties, in consideration of services to be performed by him for them. The action is for money lent, and on June 4, 1889, the plaintiff recovered judgment against the defendant for £500 and costs. The defendant has no assets in this country. He lives in Paris. He is the foreign correspondent of a London daily morning newspaper, and under an agreement between him and the proprietors of the newspaper he receives from them weekly a sum of £8 8s., which is paid to him through a Paris banker. The plaintiff being unable to obtain payment of her judgment debt first applied for a garnishee order; but as no weekly payments were in arrear no order could be made. It is plain that the defendant's earnings cannot be reached by that process. The plaintiff then applied by summons in chambers for the appointment of a receiver by way of equitable execution of all sums due and payable or to become due and payable to the defendant by the proprietors of the newspaper. The only party to whom the summons was addressed was the defendant. The proprietors of the newspaper were not parties to it. The judge at chambers dismissed the application with costs. The plaintiff appealed to the Divisional Court and that court reversed the order made in chambers and appointed a receiver in the following terms:—[His lordship read the order]. The present appeal is from this order.

The question raised by the appeal is one of great importance, not only to the parties immediately concerned, but to every wage-earning person in the country. The question to be considered in the appeal is whether a judgment creditor is entitled to a receiver of the future earnings of his judgment debtor.

Going back to the time before the Judicature Acts, it is clear that a judgment creditor had no such right. The common law writs of execution did not extend to future income. The garnishee process did not reach it; nor was the statutory process of charging orders applicable to wages or other remuneration for personal services. The courts of common law had no jurisdiction to appoint a receiver. The court of Chancery no doubt had; but the jurisdiction was confined to certain classes of cases within which such a case as the present cannot be brought. In considering the jurisdiction of the Court of Chancery to appoint a receiver we may dismiss from our minds all cases in which the court interfered to enforce its own decrees against property the subject-matter of a suit in equity. We have nothing to do here with a suit to enforce a charge created by the debtor; we have simply to deal with a case in which an ordinary judgment creditor sought the aid of a court of equity to enforce his judgment against property not capable of being reached by any common law process. The only cases of this kind in which the courts of equity ever interfered were cases in which the judgment debtor had an equitable interest in property which could have been reached at law if he had had the legal interest in it instead of an equitable interest only. This will be found explained by Sir George Jessel in *Salt* v. *Cooper*, 29 W. R. 553, 16 Ch. D. 544, and more recently by Chitty, J., in *Wills* v. *Luff*, 36 W. R. 571, 38 Ch. D. 197, and by the Court of Appeal in *In re Shephard*, 38 W. R. 133, 43 Ch. D. 131. It is an old mistake to suppose that because there is no effectual remedy at law there must be one in equity. But the mistake, although old, and often pointed out, is sometimes inadvertently made even now. Courts of equity proceed upon well-known principles capable of great expansion, but the principles themselves must not be lost sight of. The principle on which alone the order in this case could be supported before the Judicature Acts is well explained by Cotton, L.J., in *Anglo-Italian Bank* v. *Davies*, 27 W. R. 3, 9 Ch. D. 275; it is that courts of equity

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

gave relief where a legal right existed, and there were legal difficulties which prevented the enforcement of that right at law. But the existence of a legal right is essential to the exercise of this jurisdiction. The judgment creditor here has a legal right to be paid his debt, but not out of the future earnings of his debtor; and the Court of Chancery had no jurisdiction to prevent him from earning his living or from receiving his earnings unless he had himself assigned or charged them. The court could not restrain him from receiving them until his creditor could attach them under the process of garnishment, nor did the court even presume to enlarge a judgment creditor's rights, nor, under colour of assisting him to enforce those rights, did the Court of Chancery attempt to reach by its process a kind of property which was not liable to execution. Before debts and money were made liable to execution by statute, they could not be reached by an ordinary judgment creditor in equity any more than at law. If the earnings could have been reached under a writ of sequestration a receiver might have been appointed as in *Willcock* v. *Terrell*, 3 Ex. D. 323, 27 W. R. Dig. 168, but a writ of sequestration was never issued before the Judicature Acts in order to attach a man's personal earnings. Supposing, therefore, that the defendant were in this country, the plaintiff would have no right, upon any principle of equity, to a receiver of his earnings. The defendant's absence abroad is not a circumstance on which the plaintiff can rely for assistance. That circumstance might avail him if he had a right to the defendant's earnings and could not get them by reason of the defendant's absence; but such absence does not create a right to the earnings; and it is the non-existence of that right which prevents the plaintiff from obtaining relief. For these reasons we are of opinion that the present case cannot be brought under any principle applicable to the appointment of receivers by the Court of Chancery, before the passing of the Judicature Acts.

Passing now to those Acts: The only section expressly applicable to receivers is section 25, clause 8, of the Judicature Act, 1873, which says that a receiver may be "appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made." The order appealed from was made by the Divisional Court under the authority supposed to be conferred by this section.

There is no doubt that since the Judicature Acts receivers by way of equitable execution can be appointed in proper cases by all divisions of the High Court on a motion or summons without the necessity of a fresh action or suit on the judgment. This is plain from *Salt* v. *Cooper*; *Smith* v. *Cowell*, 29 W. R. 227, 6 Q. B. D. 75; *Anglo-Italian Bank* v. *Davies*; *In re Peace & Waller*, 31 W. R. 899, 24 Ch. D. 405. In *Smith* v. *Cowell* and some other cases the jurisdiction seems to have been rested on section 25, clause 8, of the Judicature Act, 1873. In *Salt* v. *Cooper* the jurisdiction was based on those sections which abolish the old courts and transfer their respective jurisdictions to the High Court and empower every division of that court to give complete relief in every case which comes before it. But accepting the construction put upon section 25, clause 8, of the Judicature Act, 1873, in *Smith* v. *Cowell* and later cases, according to which a receiver can be appointed in a proper case by way of equitable relief at the instance of a judgment creditor against his debtor, the question next arises whether it is "just or convenient" to appoint a receiver in a case of this description. The meaning of this phrase was considered in the *North London Railway* v. *Great Northern Railway*, 31 W. R. 490, 11 Q. B. D. 30, and it was there decided that the phrase did not justify the granting of an injunction in a case in which no injunction could have been granted by any court before the Judicature Act came into operation. The same reasoning obviously applies in the appointment of receivers, as well as to the grant of injunctions. Although injunctions are granted and receivers are appointed more readily than they were before the passing of the Judicature Acts, and some inconvenient rules formerly observed have been very properly relaxed, the principles on which the jurisdiction of the Court of Chancery rested have not been changed. This has been laid down in several cases decided since those Acts came into operation, notably in *The Manchester and Liverpool District Banking Co.* v. *Parkinson*, 37 W. R. 264, 22 Q. B. D. 173. In *Whittaker* v. *Whittaker*, 30 W. R. 431, 7 P. D. 15, an order *nisi* was made for the appointment of a receiver to get in a debt which might be attached under the garnishee order, but this case was disapproved in *The Manchester, &c., Banking Co.* v. *Parkinson*, and cannot be relied upon. In the last mentioned case an order for a receiver was discharged because there was no difficulty in enforcing payment of a judgment by the ordinary legal methods. In the present case there is such a difficulty; but it does not arise from any impediment which the old Court of Chancery had jurisdiction to remove. The difficulty arises from the fact that future earnings are not by law attachable by any process of execution, direct or indirect. In *Westhead* v. *Riley*, 32 W. R. 273, 25 Ch. D. 413, and in *In re Coney*, 33 W. R. 701, 29 Ch. D. 993, receivers were appointed of a debtor's interest in personal property, but the property there in question was of a kind which the execution creditors had a right to reach; and those cases fall far short of being authorities for such an order as that now before us. In a popular sense, almost any mode of making a man pay his debts may be just and convenient, at least to the creditor; and in that sense it may be just and convenient to appoint a receiver in a case like this. But even in a popular sense such an order may be anything but just or convenient to the newspaper affected by it. The appointment of a receiver is a serious interference with its business. We cannot judicially hold the appointment of a receiver in a case in which no court could grant a receiver before the Act, to be just or convenient within the true meaning of section 25, sub-section 8, of the Judicature Act, 1873. We cannot come to the conclusion that this section was intended to alter the law of debtor and creditor, and the relation of employer and employed, to such a very serious extent as the order appealed from, if upheld, would alter them.

We have carefully gone through the Judicature Acts and orders, including orders 42 to 46, relating to executions and similar matters, and we have examined the cases in the *Law Reports* in which receivers have been appointed since these Acts came into operation. But we can find no enactment, or rule, or authority on which the order appealed from can be supported. Ord. 42, r. 3, only enables a receiver to be appointed where one could be appointed before the Judicature Acts came into operation. The rules relating to sequestration have never been understood as extending to such a case as this. The Divisional Court did not allude to them, nor did counsel rely upon them. We only mention these to show that they have not been overlooked. Again, we have not to consider whether it would be possible to reach these earnings by proceedings under the Judgment Debtor Act, for no such proceedings have been taken.

The conclusion of the whole matter is that the order appealed from is not warranted either by the Judicature Acts and rules, or by any principle by which courts of law or equity were guided before these Acts were passed. It follows that there was no jurisdiction to make the order. Unless a man has assigned or charged his future earnings, or has made a sum payable out of them, they cannot be prospectively impounded by any of his creditors by any ordinary process of execution, whether legal or equitable. If the law in this respect is to be altered it must be done by the Legislature. But the law ought not to be altered by stretching what are called equitable executions, or, in other words, by appointing receivers in cases to which the equitable jurisdiction of the Court of Chancery had no application. Fry, L.J., was quite right when he warned the profession against supposing that the appointment of a receiver is a form of execution which can be obtained without showing to the court the existence of the circumstances creating the equity on which alone the jurisdiction arises (see *In re Shephard*, 43 Ch. D. 138). The order appealed from must be discharged, with costs both here and below.

Appeal allowed.

Solicitors for the plaintiff, *Dixon, Weld, & Dixon*, for *Sewell & Maugham*.

Solicitors for the defendant, *Colyer & Colyer*.

From Q. B. Div. (Lindley, Bowen, and A. L. Smith, L.JJ.) Dec. 16.

SAUNDERS *v.* WIEL. (*a.*)

Design—Infringement—View of Westminster Abbey—Registration—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 47, 60.

A design for the handles of spoons, consisting of a representation, taken from a photograph, of a particular view of Westminster Abbey, is properly registered under section 47 *of the Patents, Designs, and Trade-Marks Act*, 1883.

Adams *v.* Clementson, 27 *W. R.* 379, 12 *Ch. D.* 714, *discussed and questioned.*

The plaintiffs were the owners and registered proprietors of a design, No. 175,644, for the handles of spoons, and consisting of a representation, taken from a photograph, of Westminster Abbey as seen from a particular point of view. On the 18th of November, 1891, the plaintiffs commenced an action against the defendant, under section 58 of the Patents, Designs, and Trade-Marks Act, 1883, claiming £100 damages for alleged infringement. It was proved that the defendant had in at least two instances applied the plaintiffs' design to spoon handles, and sold spoons bearing that design.

The defendant contended that the plaintiffs' design was not one which could be registered under section 47 (1) of the Patents, Designs, and Trade-Marks Act, 1883, which enacts that "the comptroller may, on application by or on behalf of any person claiming to be the proprietor of any new or original design, not previously published in the United Kingdom, register the design under this part of this Act."

Cave, J., before whom the action was tried on the 3rd and 8th of August, 1892, held that the design was capable of registration, and gave judgment for the plaintiffs for 40s. (being 20s. in respect of each case of proved infringement), and costs.

The defendant appealed.

Aston, Q.C., and *Danckwerts*, for the appellant.—The plaintiffs ought to have registered a fine art photograph, not a design. The drawing was made from the photograph, and from the drawing the model, which serves as a mould, was carved. There are important differences between the plaintiffs' view and the defendant's. The plaintiffs must strictly prove their case, and are confined to their registered design, which has four pinnacles not visible in the defendant's. [They cited *Le May* v. *Welch*, 33 W. R. 33, 28 Ch. D. 24; *Lazarus* v. *Charles*, L. R. 16 Eq. 117, 21 W. R. Dig. 77; *Holdsworth* v. *M'Crea*, 14 W. R. 374, 16 *Ibid.* 226, L. R. 1 Q. B. 264, 2 H. L. 380; *Adams* v. *Clementson*, 27 W. R. 379, 12 Ch. D. 714; *In re Bach's Design*, 38 W. R. 174, 42 Ch. D. 661.] There was no invention in making this patent spoon. "Design" involves an idea. Views of public buildings have often been used for such purposes, and the substitution of one well-known public building for another is not enough. "Pattern" here means a public building with the idea of a souvenir, not necessarily Westminster Abbey. If the plaintiffs may claim the Abbey, nobody else can now use it as seen from other points of view.

Cozens-Hardy, Q.C. (*Morten* with him), for the plaintiffs.—Section 60 defines "design" as "any design applicable to any article of manufacture, or to any substance, artificial or natural." [He was stopped by the court.]

LINDLEY, L.J.—This is an appeal from Cave, J., and the question which is raised turns upon the true construction of that part of the Patents, Designs, and Trade-Marks Act, 1883, which relates to designs. The case is this: The plaintiffs have registered under Part III. of that Act a drawing numbered 175,644, which is a representation of one side of Westminster Abbey, and they applied to register it under section 47, sub-section (1). Their design is a representation of a particular view of Westminster Abbey, and this is what is registered. When you come to look at it you find that there is the shaft of a spoon or a fork and then on the top of it there is a drawing of Westminster Abbey seen from a particular point of view. You will find the Abbey towers and the four pinnacles on the top of each, and the transept. It takes a glass to see all that. There is something, therefore, which answers both to "shape" and to "pattern." Photographers have been making photographs of the Abbey, and one photographer has taken a photograph of the Abbey seen from the point of view of the plaintiffs' artist. The artist says that he made this drawing from a photograph, and he carved a die from the drawing, which die forms a mould in sand, and then the metal of the spoon is run into the mould. The plaintiffs are silversmiths, I suppose, and that is what they have done. As regards the defendant's case you have only to look at the two things to see that there is no substantial difference. The defendant has certainly infringed the plaintiffs' rights, if the plaintiffs have any substantial rights at all. It has been put in this way, that there is no substantial right in the plaintiffs. The two sections which are important are sections 47 and 60. [The Lord Justice read the sections, and continued:—] Taking these sections together, what we have to consider is, whether this design is a design applicable to articles of manufacture like forks and spoons, and whether it is a new or original design not previously published in the United Kingdom. Why is it not? Has such a design, applic-

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

able to metals, ever been seen before? If you ask that, you get the answer, Yes, if you mean by the design public buildings or cathedrals and churches; and therefore there is no novelty in the idea. But if you ask whether anybody has put this particular aspect of Westminster Abbey on any article of manufacture, the answer is, No. That answer seems to me to bring the plaintiffs' case within the Act of Parliament. I think the answer to the argument of counsel on behalf of the defendant is this: they go by steps; the Abbey is not a design within the meaning of this Act of Parliament, and yet the photograph is. The answer is the same as to the photograph: No, until you apply it to something the photograph is not a design. I do not think there is any case there which militates against anything I have said, or against the view which I think is right, unless it is *Adams* v. *Clementson*. That case turned on the older Act, 5 & 6 Vict. c. 100, s. 3, which was worded somewhat differently; and I strongly suspect that the point which was not brought out with sufficient prominence, as appears in the case of *Adams* v. *Clementson*, has led to a slight variation of the wording of this Act of Parliament. But, however that may be, the language of that Act was by no means so pointed as is the language of this, and I suspect that it has been made more pointed by reason of that decision. I am of opinion that the judgment in this case is right, and that the appeal must be dismissed.

BOWEN, L.J.—We have to begin by asking ourselves, what is the meaning of the term "a new and original design," which is the term used in section 47. What the Act requires is a novelty in the idea itself. It says there must be novelty in the design, that is, in the combination calculated to produce a special thing. When you come to section 60 it makes it even more clear, because the word "design" is defined as limited to designs which are applicable to any article of manufacture. When you come to the words of the clause as to copyright, you find that copyright in design is defined as the exclusive right to apply a design to any article of manufacture. You cannot, therefore, wander away from the sections, and consider whether an idea which is totally remote from that subject-matter is a novel idea or not. When you get thus far it is obvious that Westminster Abbey is not a design, and that the photograph is not a design, but only that from which the design is taken. If the artist had gone straight to the Abbey, and made his design from it, that would not have converted the Abbey into a design. Novelty and originality in a design is not destroyed by its being taken from a source common to mankind. The novelty must, then, consist in the applicability to an article of manufacture of an idea from a source to which all the world may resort. Otherwise it would be impossible to take any natural or artistic object and to reduce it into a design applicable to an article of manufacture without having this consequence follow, that you could not do it unless you were to alter the design so as not to represent exactly the original, because the thing from which it was taken was not "new." An illustration which it seems to me may fairly be taken is the "apostle spoon." The figures of the apostles are figures which have been used for centuries, and there is nothing new in the figure of an apostle; the novelty was in placing that on a spoon. It is not the natural object which is the design, nor is it the photograph. The novelty does not consist in your contriving a copy or mutation of a figure which itself may be common to the world, but in your employing the figure in such a manner as to be applicable to an article of manufacture. As to *Adams* v. *Clementson*, I can only say that unless there is some distinction between the two Acts I should doubt whether it is not wrongly decided, and I doubt whether in any case it can be right. It seems to me that section 60 makes the matter clear, and that the same might be made out from section 47 itself.

A. L. SMITH, L.J.—I agree, and have nothing to add.

Appeal dismissed.

Solicitors for the appellant, *Maddisons*.

Solicitors for the respondents, *Gresham, Davies, & Dallas*.

High Court of Justice.

Chan. Div. North, J. — Nov. 29.

In re PAGE.
JONES *v.* MORGAN. (*a.*)

Trustee—Breach of trust—Statute of Limitations—Trustee Act, 1888 (51 & 52 *Vict.* c. 59), *s.* 8.

A testatrix gave all her residuary estate to two trustees in trust for an infant, to be paid to him at twenty-one. He attained twenty-one in 1880. *In* 1892 *he took out a summons against the two trustees for administration of testatrix's estate. Only one of the defendants, who had been acting trustee, appeared. Plaintiff made no allegation of fraud. There was no evidence that defendant still retained any part of the trust funds, or had converted them to his own use. Defendant admitted that he had rendered no account to the plaintiff, but deposed that he had spent all the trust funds in maintaining the plaintiff during his infancy.*

Held, that the Trustee Act, 1888, *s.* 8, *applied, and that the summons must be dismissed, but, under the circumstances, without costs.*

Ann Page, who died in May, 1875, by her will gave all her real and personal estate to the defendants, Thomas Morgan and Richard Jones, her executors and trustees, upon trust for sale and conversion, and after payment of certain legacies to invest the residue and hold the same in trust for her nephew C. H. Jones, the plaintiff, to be paid and transferred to him on his attaining twenty-one. At her death the testatrix was entitled, as one of the next of kin, to one-third of the residuary estate of William Page, who died in 1861. The testatrix's will was proved by both her executors, whose account submitted to the Inland Revenue showed that her residuary estate amounted to £153. The plaintiff attained twenty-one in 1880.

This was an originating summons taken out by him on the 26th of May, 1892, which claimed an order for the administration of the real and personal estates of Ann Page and William Page. The defendant Jones did not appear. The plaintiff made an affidavit to the effect that after the death of Ann Page he resided with the defendant Morgan, at his request, for over three years, during which time he was maintained by Morgan. On attaining twenty-one he was informed by Morgan that, so far from anything being due to him under Ann Page's will, he was in Morgan's debt, and he therefore took no steps in the matter. Morgan never gave him any account. Morgan never told him that he was entitled to one-third of William Page's estate, which he only ascer-

(*a.*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

tained in March, 1892, when he at once instructed his solicitor to claim an account. Morgan had received the whole of the trust moneys and never consulted his co-trustee. There was no allegation of fraud against Morgan. In his affidavit in reply Morgan stated that about twelve months before the plaintiff came of age he explained to him the position of the trust estate, and of what it consisted, and told him there was a small sum due to himself, which the plaintiff promised to pay. The plaintiff then left him, as he had no further means of his wherewith to maintain him. The plaintiff had never raised any question about the estates of Ann or William Page for over eleven years. The whole of plaintiff's share in those estates had been expended in his maintenance and education; no part thereof had at any time since been in his (Morgan's) control, custody, or possession, and he claimed the benefit of the Statute of Limitations and the Trustee Act, 1888. Richard Jones was consulted by him and assisted him in managing the trusts. The plaintiff made a further affidavit denying that Morgan had given him any explanation or that he had expended on his maintenance even half the moneys due to him, and claimed to set off services rendered by him to Morgan.

L. Ryland, for the plaintiff, asked for an account.

Gatey, for the defendant Morgan.—The defendant has expended the whole of the plaintiff's interest in his maintenance and education, and no longer retains any part of the trust property. There is no allegation that he has converted any part of it to his own use or has been a party to any fraud: *In re Swain, Swain* v. *Bringeman*, [1891] 3 Ch. 233, 40 W. R. Dig. 269. He is, therefore, protected by the Trustee Act, 1888, s. 8.

Ryland, in reply.—The Act does not apply. Although there is no allegation of fraud the evidence shows that the defendant made fraudulent representations to the plaintiff. The defendant admits that he has received the trust property, and even if he did expend it on the plaintiff's maintenance it was a voluntary expenditure, as he was not the plaintiff's guardian, and he must be treated as having applied it to his own use. The Act does not relieve trustees from the necessity of accounting to their *cestuis que trust*, it only bars an application for payment.

NORTH, J.—In my opinion the Act applies. I repudiate the suggestion that the court could be justified in inferring that there has been fraud on the part of the defendant Morgan. There is no evidence nor is there any allegation of any fraudulent breach of trust to which Morgan was party or privy, and even if there had been it could not be dealt with on an originating summons. The plaintiff seeks to deprive Morgan of the protection of the Act by asserting that he still retains part of the trust fund, and that he has converted it to his own use, but there is no evidence to prove this; while Morgan swears that he has expended the whole of the trust funds in the maintenance and education of the plaintiff during his minority. In my opinion Morgan is entitled to the benefit of the protection given by section 8 of the Act. I shall, therefore, dismiss the summons, but without costs, because Morgan admits that he has received £150 of which he has given no account or explanation, except that while the plaintiff was an infant he told him how he had applied the fund.

Solicitors, *Woodcock, Ryland, & Parker*, for *Arthur Smith*, Birmingham; *Ellis, Munday, & Clarke*, for *Whatley & Lambert*, Great Malvern.

Chan. Div. North, J. } Dec. 21.

FURNIVALL v. HUDSON. (a.)

Bill of sale—Execution by attorney—Grantee of bill appointed attorney—Payment on demand—Bills of Sale Acts, 1878, *s.* 10, *sub-section* 1; 1882, *s.* 10.

Debtors covenanted, in case of default of payments, to execute such a bill of sale as their creditor's solicitor might reasonably require on its being tendered to them, and in case of non-execution appointed their creditor their attorney for the purpose. Creditor presented a bill in which the money owing was payable on demand.

Held (*following* Hetherington v. Groome, 33 *W. R.* 103, 13 *Q. B. D.* 789), *that the bill presented was invalid, as not in statutory form, but that the creditor was entitled to tender, and, if necessary, to execute, a proper bill of sale.*

Interlocutory injunction.

By an indenture dated the 12th of May, 1871, and made between the plaintiff, W. R. Truman, and his wife, and the defendant, W. C. Hudson, it was witnessed that Furnivall and Truman (the plaintiffs in this action), covenanted to pay to the defendant a principal sum of £1,957, with interest at 5 per cent., and a bonus of £1,000 owing to the defendant by the said W. G. Furnivall under an indenture which was expressed to be cancelled by the indenture now under recital. It was agreed that payment should be by instalments, but in the event of any default the whole sum should become payable. The same indenture witnessed that the principal, interest, and bonus were charged on the lease, goodwill, and other assets, other than furniture and chattels, of a club therein named, of which the plaintiffs were proprietors; and the said plaintiffs agreed with the said defendant that they would when called upon, so long as any part of the said principal and interest and bonus remained unpaid, execute to the said defendant a legal mortgage of the premises hereinbefore charged, and after failure in the payment of any instalments mentioned in the said indenture would execute a bill of sale or bills of sales of the furniture and all other chattels which now are, or shall at any time during the period aforesaid be, in, upon, or about the said club premises, or any other premises where the said club may be carried on, or used in connection with the business thereof; and such mortgage or mortgages, bill of sale or bills of sale to be in such form as the solicitors for the time being of the said W. C. Hudson may reasonably require; and should the said W. G. Furnivall and W. R. Truman neglect or refuse within seven days after notice in writing requiring them so to do, the indenture provided that the said W. G. Furnivall and W. R. Truman irrevocably appointed the said W. C. Hudson their attorney for the purpose.

Default having been made in payment, and two instalments being, it was stated, in arrear, the defendant, on the 2nd of December, 1892, sent a bill of sale to the plaintiffs' club for them to execute. The plaintiffs did not execute the bill, and the defendant's solicitor gave them notice that the defendant intended to execute it himself on the 10th of December, 1892, unless it was previously executed by them.

The bill of sale tendered provided, *inter alia*, that the plaintiffs should pay the principal sum, bonus, and interest on demand in writing.

The plaintiffs moved for an injunction to restrain the defendant from executing the bill as their attorney, and the question came before the court on an interlocutory motion for an injunction.

(a.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

Corner, for the plaintiffs.—The bill is bad for three reasons. In the first place, it is contrary to all the scope and purpose of the Bills of Sale Acts that a bill should be executed otherwise than by the grantor in person. The power professed to be given was a violation of the statute. By the Bills of Sale Act, 1878, s. 10, sub-section 1, it is enacted: "The execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill the effect thereof has been explained to the grantor by the attesting solicitor." Section 10 of the Act of 1882, which repeals so much of the clause of the Act of 1878 which requires attestation by a solicitor, would seem to imply that the bill must be executed by the grantor in person. In the second place, it is bad because it is unreasonable and contrary to the objects sought to be effected by the Bills of Sale Act that the grantee of the bill should have power to put himself in the shoes of the grantor. In the third place, it has been settled by authority that a bill of sale is invalid if by it money is made payable on demand: *Hetherington* v. *Groome*, 33 W. R. 103, 13 Q. B. D. 789.

After calling on counsel for defendants to reply to the third point,

NORTH, J., said: The bill before me is not, according to the decision in *Hetherington* v. *Groome*, in legal form. I must on that ground restrain the defendant from executing it.

Counsel for the plaintiffs requested that the other two objections might be also disposed of, as otherwise the defendant might tender to the plaintiffs another bill in which the sum due was not made payable on demand.

Cozens-Hardy, Q.C., and *Spence*, for the defendant.—In principle there is no reason why a bill of sale should not be executed by an attorney. It does not matter who executes deeds. By section 14 of the Judicature Act, 1884, when a person refuses or neglects to execute an instrument the court may nominate a person to execute it for him. Nor is there anything in the Bills of Sale Acts to prevent a bill being executed by an attorney, and there is no reason why the grantee of such bill should not himself be the attorney.

Corner, in reply.—The Bills of Sale Acts do not authorize the grantee of the bill to be the grantor's attorney. It is intended by the Acts that the grantor should exercise his discretion before executing the bill.

NORTH, J.—I am of opinion that the first two points are not well founded. The first point is that a bill of sale must be executed by the grantor and not by attorney; and the second point is that, even if the bill can be executed by attorney, the grantee of the bill cannot be that attorney. By the indenture now before me the principal sum advanced by the defendant to the plaintiff is charged on the lease, goodwill, and other assets belonging to the plaintiffs, and it is provided that the plaintiffs will, when requested, while any part of the principal, interest, and bonus remains unpaid, execute to the said defendant a proper legal mortgage of the said premises, and after default in the payment of any of the instalments therein mentioned, a bill of sale of the furniture or other chattels which are or shall be on the club premises, or other premises where the said club may be carried on, and such mortgage or bill of sale shall be in the form required by the solicitor of the defendant, and if the mortgage or bill is not executed the plaintiffs appoint the defendant their attorney for the purpose. A bill of sale is tendered to the grantors for their execution.

I have held that such bill of sale, if executed by the grantors, would be bad; but this decision, though stopping further proceedings on the present bill, would not prevent the grantee from tendering another bill in proper form to the grantors, and, if necessary, from executing it himself as their attorney. Now, as to the other two points, I do not find anything in the Bills of Sale Acts which says a bill of sale must be executed by the grantor in person. Section 10 of the Act of 1882 says: "The execution of every bill of sale by the grantor shall be attested by one or more credible witness or witnesses not being parties thereto." This is undoubtedly the strongest section on the subject, but it does not say that the bill must, unlike any other deed, be executed by the grantor in person, and not by attorney. Nor is there anything in the schedule to the Act that says the bill must be executed by the grantor in person. Under section 10 of the Act of 1878 the question would have been more difficult to decide, as under that section it was necessary that the meaning of the bill should be explained to the grantor; but that, section having been repealed, no argument drawn from it can apply here.

Then, on the second point, it is said that the grantee cannot be such attorney. But on this subject the instrument appointing him attorney must be considered. The instrument can only apply to a statutory bill of sale, for that is the only sort of bill the plaintiffs can be compelled to execute. It says also that it must be in such form as the grantee's solicitor may reasonably require; but it must also be presented to the grantor, and thus there is no danger of the grantee executing the bill behind the back of the grantor. Under section 14 of the Judicature Act of 1884 the defendant could come to the court and obtain an order to compel the plaintiffs to execute a bill, and in case of refusal the court could nominate a person to execute it for them. The arrangement between the parties merely renders such an application unnecessary, and I see nothing inequitable in it. I think, therefore, that neither to the first or second point do the objections hold.

Solicitors, *Saunders, Hawksford, Bennett, & Co.*; *Heather & Sons.*

Chan. Div. } Feb. 24.
Kekewich, J. }

CAVE v. CREW. (a.)

Practice—Pleadings—Striking out pleadings—Statement of claim seeking relief not asked by writ—R. S. C., 1883, *ord.* 19, *r.* 27; *ord.* 20, *r.* 4.

By the writ in a partnership action the plaintiff claimed an account of the partnership dealings between himself and the defendant, and an injunction restraining the defendant from dealing with the partnership assets. The plaintiff delivered a statement of claim, in which he alleged that the defendant had made certain representations to him, on the faith of which he paid to the defendant a premium of £1,500. He also alleged a course of conduct on the part of the defendant entitling him to damages, and claimed, in addition to the relief sought by the writ, the return of the said premium, and damages.

Held, that the statement of claim was irregular, inasmuch as it sought relief substantially different from that claimed by the writ, and operated to prevent a reference to arbitration; that it was not an alteration, modifica-

(a.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

tion, or extension of the writ within the meaning of ord. 20, r. 4; and that it must be struck out.

Motion.

The plaintiff and the defendant in this action were partners as secretaries to promoters of public companies under a deed of partnership dated the 17th of November, 1890. Disputes having arisen between them, this action was commenced.

By the indorsement on the writ the plaintiff claimed an account of the partnership dealings between himself and the defendant under the said articles of partnership, and an injunction restraining the defendant from disposing of, or charging, or otherwise dealing with any of the shares standing in the defendant's name in Gardner's Royal Hotel Co. (Limited), of Guernsey, or any other assets or effects of or belonging to the partnership business.

The plaintiff delivered a statement of claim which contained (*inter alia*) the following allegations:—

Paragraph 1 alleged that, "in order to induce the plaintiff to enter into partnership with him and to pay him a premium," the defendant had represented to the plaintiff that the business would be more remunerative than farming business, and had promised the plaintiff that the profits of the promotion of certain companies then proceeding should be regarded as partnership profits if the plaintiff should join the defendant in partnership.

Paragraph 2 alleged that, "on the faith of the representations, and relying on the promise aforesaid, the plaintiff sold his farming business and stock, and paid to the defendant a premium of £1,500, and entered into partnership as secretaries to promoters of public companies under a partnership deed dated the 17th of November, 1890."

Paragraph 7 alleged that the defendant refused to transfer certain shares to which he and the plaintiff had become entitled, and which he (the defendant) had wrongfully had transferred into his own name.

Paragraph 8 alleged that the defendant refused to account for various shares and sums of money representing remuneration for services rendered by the plaintiff and the defendant.

Paragraph 9 alleged that the defendant refused to have the name of the partnership firm on the partnership premises, but that he had kept his own name only on the door of the partnership office.

Paragraph 12 alleged that, "in consequence of such refusal as aforesaid, no proper books of account have been kept, and no annual or other accounts have been taken pursuant to the said partnership deed."

Paragraph 15 alleged that, "by reason of the conduct of the defendant, it has become impracticable to continue the partnership business, except for the purpose of winding up the same, and the consideration for which the plaintiff paid the same premium of £1,500 has failed, and the plaintiff has incurred considerable loss and damage."

By his statement of claim the plaintiff claimed: (1) dissolution; (2) accounts and inquiries; (3) a declaration that certain profits were partnership property; (4) return of the said premium; (5) a receiver; (6) an injunction to restrain the defendant from transferring shares belonging to the partnership; and (7) damages.

This was a motion by the defendant that the statement of claim delivered by the plaintiff might be struck out, or, in the alternative, that all allegations and claims contained in the same statement of claim which introduced or contained causes of action not mentioned in or made by the writ in the action might be struck out, and that the plaintiff might be ordered to pay to the defendant the costs of this motion.

The Rules of Court, 1883, ord. 20, r. 4, provide that "whenever a statement of claim is delivered, the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ."

Warmington, Q.C., and *J. W. Baines*, for the defendant, in support of the motion.—The statement of claim discloses a cause of action substantially different from that disclosed by the writ, and is therefore irregular: *United Telephone Co. (Limited)* v. *Tasker*, 59 L. T. N. S. 852, 37 W. R. Dig. 144. This dispute ought to be referred to arbitration, but the statement of claim prevents any such reference. A charge of fraud is now made against us of which there is not the slightest indication in the writ.

Renshaw, Q.C., and *H. Greenwood*, for the plaintiff.—The claim both in the writ and in the statement of claim is founded on the same subject-matter—the partnership deed—and the statement of claim is a mere alteration, modification or extension of the writ within the meaning of ord. 20, r. 4. *United Telephone Co. (Limited)* v. *Tasker* was decided under ord. 18, r. 1, and ord. 19, r. 27, without reference to ord. 20, r. 4.

Warmington, Q.C., replied.

KEKEWICH, J.—This is a question of some difficulty. On the one hand it is desirable that a liberal construction should be given to ord. 20, r. 4, and that the exactness of pleadings should not be too strongly insisted upon, but, on the other hand, if there are to be pleadings at all, they should define the points at issue so as to save the parties from being embarrassed. Then, again, though I am very unwilling to increase costs merely because the plaintiff is desirous of making some separate demand, it seems a pity to put obstacles in the way of a reference to arbitration. It is, therefore, difficult to steer clear of rocks on one side or the other.

The writ in this action is of the simplest character. It asks for partnership accounts and an injunction to restrain dealing with shares or other partnership assets. Upon this the defendant would have been entitled to a stay of execution, and I have before me now a motion to refer the whole matter to arbitration under an arbitration clause in the partnership deed. I think these accounts ought to be referred. The statement of claim, however, entirely prevents any such reference, and this point is important, as it seems to afford the solution of the difficulty.

In one sense, no doubt, the statement of claim is an alteration and an extension of the writ, but I do not think it is so within the meaning of ord. 20, r. 4. [His lordship read the paragraphs of the statement of claim recited above, and continued:—] The plaintiff here alleges representation and a course of conduct on the part of the defendant entitling him to a return of the premium and damages. Mr. Renshaw says that these allegations could not have supported an action of deceit. That may be so, but the inference is that they were improperly made. Now, there is no indication of all this in the writ, nor is it even adumbrated. The statement of claim is entirely hostile, and prevents the beneficial order for reference to arbitration which might otherwise have been made. Therefore I think the statement of claim is irregular.

That being so, what ought I do? I cannot settle the plaintiff's pleading for him. I think the proper order to make is that the statement of claim be struck out, liberty being given to the plaintiff within a reasonable time to deliver another in accordance with the indorsement on the writ. If he desires to amend his writ, I must give him leave to do so on paying the costs. The plaintiff must pay the costs of this motion and the costs thrown away by reason of the delivery of the statement of claim.

including the costs of the defendant's motion to refer.

Solicitors for the defendant, *Lovell, Son, & Pitfield*, for *Baskett & Son*, Evershot.

Solicitors for the plaintiff, *Howard & Shelton*.

Chan. Div. Kekewich, J. } Nov. 26; Dec. 3.

BRADBURY *v.* WILD. (*a.*)

Building society—Mortgage—Proviso for redemption—Advanced member—Subsequent alteration of rules—Contract of membership and of mortgage—Liability of mortgagor.

An advanced member of a building society executed a mortgage in favour of the society, the proviso for redemption being upon payment of "the several sums, whether consisting of monthly subscriptions, fines, interest, or other payments which, under the constitution of the said society and the rules and regulations thereof, ought to be by him paid in respect of the share or shares by virtue of which money is now or shall be hereafter advanced to him by the trustees of the said society." At the date of the mortgage the rules of the society did not provide for any contribution by advanced members in respect of losses; but after the date of the mortgage the rules were amended so as to give the directors power to direct a levy upon members to provide for contribution to losses. A levy was duly made under the rules as amended. The mortgagor claimed to redeem without paying any part of the levy.

Held, that the mortgagor's contract was one of membership and mortgage combined; that, by virtue of it, he was bound by the amended rules, although the mortgage deed did not refer to the rules "for the time being"; and that, therefore, he was not entitled to redeem except upon payment of the amount of the levy apportioned in respect of his shares.

Adjourned summons.

The defendants were the present trustees of the Clarendon Arms Benefit Building Society, which was established in 1871, and was not incorporated under the Building Societies Act, 1874.

Samuel Bradbury, the plaintiff, having become a member of the society, received an advance of £120 in respect of two shares, and executed in favour of the society a mortgage of freehold property as security for that sum and for further advances up to £2,500. By the mortgage deed it was provided that the mortgagor should be entitled to redeem if he should "from time to time duly pay the yearly rent to which the premises are liable, and also the several sums, whether consisting of monthly subscriptions, fines, interest, or other payments which, under the constitution of the said society and the rules and regulations thereof, ought to be . . . paid in respect of the share or shares by virtue of which money is or shall hereafter be advanced to him by the trustees of the said society." The mortgagor covenanted that he would "duly pay the several sums which, under the constitution of the said society and the rules and regulations thereof, and the provisions herein contained, ought to be paid by him." The plaintiff received further advances to the total amount of £2,490 in respect of 41½ shares.

At the date of the mortgage the following were among the rules of the society:—

"Rule 51. (Withdrawals). Any member who has not received any advance on his or her share or shares may, upon giving one lunar month's previous notice in writing to the secretary, within the first year from the date of his or her subscribing for such share or shares, to be withdrawn, receive back the net money by him or her subscribed, without interest; and after the expiration of the first year, any such member, upon giving notice as aforesaid, shall be entitled to withdraw his or her share or shares, with interest thereon after the rate of five pounds per annum compound interest commencing from the end of the first year of his or her subscribing for such share or shares as aforesaid, less one-twentieth part of such interest, and the sum of one shilling for each share. Half and quarter shares in proportion. The directors shall have full power, from time to time, to limit the number of shares to be withdrawn in any one month. All applications for advances shall have priority over notices of withdrawals; and if more than one member give notice, they shall be entitled to be paid in rotation, according to priority of notice. No member shall be entitled to receive back his or her subscription money and interest until all fines and forfeitures due from such member at the time he or she shall give notice to withdraw be paid, and if not paid shall be deducted from such member's money and interest. All fines to cease after notice given as aforesaid."

"52. (Power to Redeem.) If any member who shall have executed a mortgage to the society shall be desirous of paying off and redeeming the same, such member may do so after the expiration of fourteen days from the service upon the secretary of a notice in writing, signed by such member, of his or her intention so to do, by paying to the treasurer, in one sum, the whole of the moneys that may be due from him or her to the said society, subject to the same terms as contained or mentioned in rule 51."

"61. (New Rules.) The society shall have, from time to time, the power of making new rules, and of amending any of the rules, so as such new rules or amendments be made in accordance with 10 Geo. 4, c. 56, s. 9, and duly certified."

Subsequently to the mortgage the rules of the society were altered, and the alterations were duly certified. These alterations, so far as material were as follows:—

"Rule 51. Omit the words 'compound interest.' Rescind the portion commencing with the words, 'And if more than one member give notice'; and ending with the words, 'All fines to cease after notice given as aforesaid,' and substitute the following: 'Before any withdrawals can be made, if it shall appear that the profits of the society shall, from any cause, not be sufficient to meet the interest credited, or to be credited, to the shareholders as aforesaid, or if a loss shall have arisen, or be likely to arise, through any property or properties which the society holds as mortgagees, which the contingent fund is insufficient to make good, the directors shall have power to direct a levy of such sum, on or from any unadvanced share or shares, hereafter to be paid in advance, as will cover all deficiency. Withdrawals shall be paid in rotation, according to priority of notice, except in the case of the decease of a member, when payment shall be made as soon as possible after expiration of the notice of withdrawal, provided all shares or loans in respect of which notice for any advance or repayment has been received by the society shall have been advanced or paid off. Shares in course of withdrawal shall be subject to such deductions as the directors may require to meet any losses of the society.'"

"Rule 52. Add to the end of rule 52 the words 'as amended.'"

In accordance with the rules so altered the directors of the society resolved "that a levy of 1s. 1½d. in the

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

pound sterling be made on all shares at present in the society withdrawn or expiring."

Upon the plaintiff giving notice of his intention to pay off the mortgage he was furnished with an account which debited him with the sum of £58 15s. 2d., as the proportion due from him in respect of his shares under the said levy. The plaintiff then tendered to the society a sum of money which was insufficient upon the footing that this sum of £58 15s. 2d. was owing by him, and the society refused to accept such tender.

This was an originating summons by the plaintiff, asking for an order for redemption and for usual accounts and inquiries, and that directions might be given that the defendants were not entitled to debit the plaintiff with the said sum of £58 15s. 2d.

Renshaw, Q.C., and *Roby*, for the plaintiff.—The mortgagor is not bound by the rules made subsequent to his mortgage: *In re Norwich and Norfolk Permanent Benefit Building Society*, 24 W. R. 103, 1 Ch. D. 481. In *Wilson* v. *Miles Platting Building Society*, 37 W. R. 369n., 22 Q. B. D. 381n., and *Rosenberg* v. *Northumberland Building Society*, 37 W. R. 368, 22 Q. B. D. 373, there was a reference in the mortgages to the rules "for the time being," and these cases are therefore distinguishable.

They referred also to the following cases: *Tosh* v. *North British Building Society*, 35 W. R. 413, 11 App. Cas. 489; *Brownlie* v. *Russell*, 8 App. Cas. 235, 31 W. R. Dig. 28; *Buckle* v. *Lordonny*, 35 W. R. 360, 56 L. J. Ch. 437; *Bailes* v. *Sunderland Equitable Industrial Society*, 55 L. T. N. S. 808, 35 W. R. Dig. 100; *Durham* v. *Northumberland Building Society*, 61 L. J. Q. B. 473, 8 Times L. R. 428, 40 W. R. Dig. 29; *In re Britannia Building Society*, 65 L. T. N. S. 196, 40 W. R. Dig. 30.

Hopkinson, Q.C., and *O. L. Clare*, for the defendants.—The judgments of Cotton, L.J., in *Wilson* v. *Miles Platting Building Society* and Fry, L.J., in *Rosenberg* v. *Northumberland Building Society* show that their decision would have been the same if the words "for the time being" had not been used. The plaintiff's contract was one of membership as well as of mortgage, and therefore carried *in gremio* the right of the society to alter its rules: see the judgment of Fry, L.J., in *Rosenberg's case*.

They referred also to *Walton* v. *Edge*, 33 W. R. 417, 10 App. Cas. 33, and *In re West Riding of Yorkshire Permanent Benefit Building Society*, 38 W. R. 376, 43 Ch. D. 407.

Roby replied.

KEKEWICH, J.—The mortgage deed commences as though it were a mere contract between a mortgagor and mortgagees, and as though it had nothing to do with the society at all, except that the mortgagees are described as the trustees of the building society; but when the mere conveyance to the mortgagees is passed, and we come to those provisoes which declare what the equity of redemption is, then it is at once seen how membership of the society comes in. [His lordship read the proviso for redemption and the covenant set out above, and continued:—] This is neither an ordinary mortgage contract, nor an ordinary contract of a member with a building society, but it is an amalgamation of the two—a contract by a member of a building society, who is to receive an advance in respect of his membership, and of his conveyance to the society of his property. Apart from authority I should have thought that the rules referred to meant those which bind him as a member, and if there were, as in fact there is, a power on behalf of the society, subject to certain restrictions, to vary these rules from time to time, the varied rules would still be binding on him for the purposes of this contract, because it is an essential term of it that he enters into it as a member of the society. That was the opinion of Cotton, L.J., in the *Miles Platting case*, where he says: "One would expect, therefore, if the new rules were properly made, having regard to the laws regulating the society and to the original rules, that those new rules would regulate his position in regard to the security, it being, as was rightly contended for the appellant, not an ordinary mortgage to secure the payment in terms of a definite sum of money due and payable by the mortgagor to the society, but to secure the due payment by him of the periodical payments and fines, and any other moneys which he was bound to pay as a member of the society." That passage seems to me to indicate what would be the proper limit of the obligation of the new rules. New rules which alter the contract would not be binding on him; new rules inconsistent with the constitution of the society of which he was a member would not, or might not, be binding on him; but rules which are concerned with the periodical payments of fines, or any other sums, are rules which, so far from altering the contract or being inconsistent with it, seem to me to be according to the contract.

Then, again, Cotton, L.J., in the same case, says:—"It is true that those rules may throw a heavier burden on the plaintiff, by requiring him to pay a larger sum for the redemption of the mortgage than the old rules did, but that is not an alteration of his contract. His contract, as I read it, was that he would pay, not merely what the then existing rules required, it is not confined to that, but whatever the rules of the society for the time being might require him to pay as a member. To say that the new rules do not apply would, in my opinion, be to alter the contract." These passages of Cotton, L.J.'s judgment show that his view was, as mine certainly is, that you would expect in such a contract that the obligation of the new rules, properly made, would be thrown on the members, provided, of course, that the rules were fairly within what might be in the contemplation of the parties, and therefore not inconsistent with the contract or against the constitution of the society.

The plaintiff says he is not a withdrawing member, but the result of rule 52 is that, as far as possible, regulations affecting withdrawals shall be applied to cases of redemption, and a member who is redeeming, whether he be withdrawing or not, must have his account taken, as between himself and the society, on the same basis as the withdrawing member according to rule 51 as amended. Of course, he is entitled to say all the rules must be strictly observed, and that there must not be too large a sum deducted, but in this case there is no suggestion of want of *bona fides*. The directors have kept their accounts and have estimated the loss, the result being that the plaintiff, in respect of his 41½ shares, is debited with £58 15s. 2d.

Now with regard to *Rosenberg* v. *Northumberland Building Society* and *Wilson* v. *Miles Platting Building Society*, in each of these cases the words "for the time being" occur. The general principle, however, with which Cotton, L.J., commences in the passage which I first read from his judgment in the *Miles Platting case* points to rules either having or not having the words "for the time being." In *Rosenberg's case* the point came before the court again. That case was tried before Day, J., without a jury, and he gave judgment for the mortgagor. The Court of Appeal reversed the learned judge, on the ground of the decision in the *Miles Platting case*, which was not cited to Day, J. That is not unimportant, because we know that Day, J., came to a conclusion,

unfettered by authority, adverse to that which is here insisted on by the society as the right conclusion. Lord Esher, M.R., rested his decision entirely on the *Miles Platting case*, as also did Bowen, L.J. Fry, L.J., however, gave a judgment which certainly makes me think that he would not only have decided the *Miles Platting case* as it was decided on the words then before the court, but would have gone further, and have decided that the member was bound by the altered rules even without the words "for the time being." He said:—"It is obvious that the position of a mortgagor in the case of a mortgage to a building society is by no means the same as that of an ordinary mortgagor, and that his rights must be more or less affected by the contract of membership, as well as by the contract of mortgage. It is equally apparent, I think, that the contract of membership carries *in gremio* the right on the part of the society to alter the rules from time to time. That right is given by statute." The Lord Justice did not decide the point which is now before me, but he has given a strong indication of what he would have decided, and Cotton, L.J.'s mind tended, I think, in the same direction. My mind certainly goes very much in that direction. It seems to me that a member seeking an advance on the terms of his observing the rules of the society, and making a contract which, although one of mortgage, is also one of membership, must be held bound by the rules from time to time made, so long as they are consistent with his contract, and that, as Fry, L.J., said, the two things are so intertwined that you cannot separate the contract of membership from the contract of mortgage. The plaintiff, therefore, must be debited with this sum of £58 15s. 2d., and an account taken on that footing.

Solicitors, *L. Sykes*, Manchester, for *J. Cooke*, Hyde; *John Clayton*, Manchester, for *T. & G. F. Drinkwater*, Hyde.

Chan. Div.
Vaughan Williams, J. } Feb. 20.

In re BIDWELL BROTHERS (LIMITED). (a.)

Company—Winding up—Voting—Extraordinary resolution—Proxies—Companies Act, 1862, *ss.* 51, 129; *schedule I., Table A., clauses* 42, 43, 48, 51.

Where a company is governed by articles which provide that "votes may be given either personally or by proxy," proxies may be counted in ascertaining the three-fourths majority required for the passing an extraordinary resolution by section 51 *of the Companies Act*, 1862.

The Caloric Engine, &c., Co., 52 *L. T. N. S.* 846, *questioned.*

In re Horbury Bridge Coal, Iron, and Wagon Co., 27 *W. R.* 433, 11 *Ch. D.* 109, *distinguished.*

Petition.

This was a shareholder's petition that the abovenamed company might be wound up by the court, or in the alternative that the voluntary winding up might be continued subject to the supervision of the court.

The company was incorporated in 1889 under the Companies Acts, 1862 to 1886. The company was governed by Table A so far as the articles hereafter referred to were concerned.

On the 27th of January, 1893, a general meeting of the company was held and an extraordinary resolution passed that the company could not, by reason of its liabilities, continue its business, and that it was advisable to wind up the company voluntarily. The resolution was declared duly carried and entered in the minute-book, but the three-fourths majority required by section 51 of the Companies Act, 1862, could not be arrived at except by counting the votes of certain members who were not present in person but were represented by proxies. No poll was demanded.

This petition was presented on the 3rd of February, 1893, and the petitioners disputed the validity of the resolution for voluntary liquidation, on the ground that the votes of proxies had been admitted among the votes of those constituting the statutory majority.

The material clauses of Table A are the following:—

42. "At a general meeting, unless a poll is demanded by at least five members, a declaration of the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company, shall be sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution."

48. "Votes may be given either personally or by proxy."

Clause 43 provides for the case of a poll, and clause 51 gives the form of instrument to be used in appointing a proxy.

C. E. E. Jenkins, for the petition.—The resolution to wind up voluntarily was not validly carried, because it was only carried by means of proxies, and the regulations of the company did not allow members to vote by proxy except in the case of a poll. Where by the regulations of a company voting by proxy is allowed, proxies cannot be used on a show of hands, but a poll must first be taken: *Re Horbury Bridge Coal, Iron, and Wagon Co.*, 27 W. R. 433, 11 Ch. D. 109; Buckley on Companies, 6th ed., p. 483. [VAUGHAN WILLIAMS, J., referred to *The Caloric Engine, &c., Co.*, 52 L. T. N. S. 846, the headnote of which is: "At a general meeting of a company, where by its articles of association voting by proxy is allowed, proxies cannot be used upon a show of hands, but a poll must first be taken."]

Hansell, for the voluntary liquidator and a majority of the shareholders.—The resolution is perfectly valid. Clause 48 of Table A is general, and is not restricted in the way suggested. Clause 51 which gives the form of proxy, is also perfectly general in its language. Section 51 of the Companies Act, 1862, enables members to vote by proxy in cases where "by the regulations of the company proxies are allowed." That is the case here. In *The Caloric Engine, &c., Co.* the articles are not stated and the point does not seem to have been argued.

Pattisson, for shareholders who supported the petition.

Bramwell Davies and *Clydesdale*, for creditors supporting the petition.

Jenkins, in reply.—The case of *The Caloric Engine &c., Co.* is conclusive on this point.

He also referred to *In re Haven Gold Mining Co.*, 30 W. R. 389, 20 Ch. D. 151; *Reg.* v. *Government Stock Investment Co.*, 3 Q. B. D. 442, 26 W. R. Dig. 47; *In re Chillington Iron Co.*, 33 W. R. 442, 29 Ch. D. 159.

VAUGHAN WILLIAMS, J.—I have come to the conclusion that these votes of members who were present only by proxy can be taken into consideration, even though there is no poll. My attention has been called to a case of *The Caloric Engine, &c., Co.* decided by Kay, L.J. (then Kay, J.). I do not know what wer

(a.) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

the particular articles of association in that case, and the question now before me does not appear to have been argued. Though I should pay the greatest possible attention to any decision of Kay, L.J., I do not consider I am bound by that decision. My attention was also called to the case of *In re Horbury Bridge, &c., Co.*, but nobody has suggested that the point which I have now to decide was decided in that case. It is said that the principle laid down by Sir G. Jessel in that case is practically decisive of the matter which I have now to determine. I do not think so. All that was decided in that case was that that if you have a meeting of members present in person, the common law mode of ascertaining the votes applies - namely, by a show of hands. That case does not decide what is to be done in the case of persons present by proxy only.

In these circumstances I have to decide for the first time the proper mode of taking votes at such a meeting as that in the present case. I think the proper mode is for the chairman to count, not only the votes of the members present in person, but also those of members present by proxy. Clause 48 of Table A applies to this company. Clause 48 of Table A provides that "votes may be given either personally or by proxy." *Primâ facie* that means on all occasions when voting has to take place. Section 51 of the Companies Act, 1862, provides that the voting in the case of a special resolution shall be "by not less than three-fourths of such members of the company for the time being entitled, according to the regulations of the company, to vote as may be present in person or proxy (in case where by the regulations of the company proxies are allowed), at any general meeting," &c. This is a case where "by the regulations of the company" proxies are allowed. In these circumstances you cannot get a resolution passed unless there are present three-fourths of the members in person, or by proxy in cases where proxies are allowed.

It seems to me impossible to say that you are, by your mode of counting the votes, to exclude those persons who are present only by proxy. It is said that all persons present by proxy can be counted if a poll is demanded, and that that is the only way in which their voice is to be heard. It seems to me that that would be working a great injustice to members present by proxy only if their votes were only to be counted when there is a poll, because according to the decision in *Reg.* v. *The Government Stock Investment Co.* a member present by proxy only cannot demand a poll.

In these circumstances I hold that the chairman was right in counting the votes of those present by proxy only. I wish to add that each member present by proxy only had a right to be counted one by one as a member present, but not according to the number of shares he held.

His lordship made the usual supervision order.

Solicitors, *Sole, Turner, & Knight*, for *C. J. Brutton*, Ottery St. Mary's; *Sandilands & Co.; Chester & Co.; Coode, Kingdon, & Cotton*, for *Gould & Crompton*, Exeter.

Q. B. Div.
(Lord Coleridge, C.J., and Hawkins, J.) — Feb. 27.

ROBINSON *v.* CALDWELL AND ANOTHER. (*a.*)

Practice—Trial—Notice of trial—No reply delivered—Giving notice of trial before expiration of time for reply—Right of plaintiff to give such notice of trial—R. S. C., 1883, *ord.* 27, *r.* 13; *ord.* 36, *rr.* 11, 15.

A plaintiff who has not delivered a reply cannot give notice of trial of the action until the expiration of the time allowed for delivering a reply—that is, until the expiration of twenty-one days after the defence; because, no reply having been delivered under rule 13 *of order* 27, *the pleadings are not closed until the expiration of the time allowed for reply, and no notice of trial can be given until after that time.*

Plaintiff's appeal from an order of Kennedy, J., at chambers, affirming an order of Master Manley Smith, who had ordered that the notice of trial of the action, and the entry in pursuance thereof, should be struck out.

The statement of claim, which was indorsed on the writ, claimed the sum of £20,000 for 20,000 fully paid-up shares of £1 each in the Jacinto Estate (Limited), alleged to have been received by the defendants for and on behalf of the plaintiff.

The statement of defence was delivered on the 10th of January, 1892, and on the 16th of January the plaintiff, without delivering any reply or joinder of issue, gave notice of trial, and the action was entered for trial accordingly.

The defendants then took out a summons at chambers to "strike out the notice of trial and the entry in pursuance thereof as irregular, on the ground that no reply had been delivered, nor had the pleadings been closed when the notice of trial was given." The master struck out the notice of trial on the ground stated, and the learned judge upheld the master's order.

The plaintiff appealed.

Ord. 27, r. 13, provides: "If the plaintiff does not deliver a reply, or any party does not deliver any subsequent pleading, within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and all the material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue."

Ord. 36, r. 11, provides: "Notice of trial may be given in any cause or matter by the plaintiff. . . . Such notice may be given with the reply (if any) whether it closes the pleadings or not, or at any time after the issues of fact are ready for trial"; and rule 15 provides: "Notice of trial shall be given before entering the trial, and the trial may be entered notwithstanding that the pleadings are not closed, provided that notice of trial has been given."

E. U. Bullen, for the plaintiff.—The plaintiff was entitled to give this notice of trial without delivering a reply, for ord. 36, r. 11, says that notice of trial may be given with the reply (if any) whether it closes the pleadings or not. That shows that a notice of trial may be given, although no reply has been delivered—which is this case—and although the pleadings are not closed. Rule 15 of the same order is explicit on the point, and clearly shows that notice of trial may be given before the pleadings are closed. The notice of trial here given was, therefore, properly given, and the order striking it out was wrong.

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

T. T. Paine, for the defendants.—The order was properly made striking out this notice of trial. Ord. 36, r. 11, provides that notice of trial may be given with the reply (if any). Now, here, as no reply was delivered, that does not apply. Then the rule says, "or at any time after the issues of fact are ready for trial." Looking at ord. 27, r. 13, we see when the issues of fact are ready for trial. That is the rule applicable here, and under that rule the plaintiff, when he has delivered no reply, cannot give notice of trial until the pleadings are closed, and that, by the rule, is at the expiration of the period allowed for delivering a reply. The result is that any time after the defence has been delivered the plaintiff may deliver his reply, and with his reply, or at any time after, he may give notice of trial; but if he does not deliver any reply, then he cannot give any notice of trial until the expiration of the twenty-one days allowed for reply.

Lord COLERIDGE, C.J.—I think on the whole the master and judge were right. Here there is a proper statement of claim, and a proper statement of defence, and then a notice of trial. It is said that this notice of trial is not authorized; if authorized it must be by the rules, and the rules here applicable are rule 11 of order 36, and rule 13 of order 27. The rule which Mr. Bullen, for the plaintiff, relies on is rule 11 of order 36, which says, "such notice" (that is, notice of trial) "may be given with the reply (if any)." In this case there is no reply, so that that part of the rule does not apply, and the rule proceeds, "or at any time after the issues of fact are ready for trial." Are the issues of fact ready for trial without a joinder of issue having been given? It does not seem to me that they are so, for looking at ord. 27, r. 13, the rule says, "If the plaintiff does not deliver a reply within the period allowed for that purpose"—which is this case—"the pleadings shall be deemed to be closed at the expiration of that period," that is, at the expiration of the twenty-one days, "and all the material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue." Therefore, unless the plaintiff takes the very simple course of joining issue, which he may do at once after defence, and then deliver his notice of trial, he is driven to rule 13 of order 27, and if he have recourse to that, then he must wait until the expiration of the time allowed for delivering his reply before he can give notice of trial. I think, therefore, that both the master and judge were right, and that this appeal must be dismissed with costs.

HAWKINS, J.—I am of the same opinion.

Appeal dismissed.

Solicitor for the plaintiff, *W. H. Hudson.*

Solicitor for the defendants, *G. M. Folkard.*

Q. B. Div.
(Day and Collins, JJ.) } Jan. 16.

CARR *v.* FOWLE. (*a.*)

Tithes—Hop grounds or market gardens—Rent-charge in lieu of extraordinary charge—Liability to land tax—Extraordinary Tithe Redemption Act, 1886 (49 & 50 *Vict. c.* 54). *ss.* 3, 4, *sub-section* 5.

The annual rent-charge payable under the Extraordinary Tithe Redemption Act, 1886, *in lieu of the extraordinary charge previously levied under the Tithe Commutation Acts, is not liable to land tax.*

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Special case stated by order of the master in an action brought by the vicar of a parish against a collector of land tax to recover the sum of £17 10s. 4d.

The special case was as follows:—

1. The plaintiff is the vicar of the parish of Marden in Kent, and the defendant is the collector to the local commissioners for the land tax.

2. On the 5th of February, 1892, the defendant distrained upon certain goods in the vicarage of the plaintiff as a distress for non-payment of the land tax, and the plaintiff, to prevent the sale after seizure, paid £17 10s. 4d. under protest.

3. The said distress was levied in respect of land tax due, or alleged by the defendant to be due, in respect of the new rent-charge payable to the plaintiff, which was substituted by the Extraordinary Tithe Redemption Act, 1886, for the former extraordinary charge.

4. The plaintiff admits that the distress was legal and proper in all respects if the new rent-charge is not exempt from the land tax.

5. In 1886 the Extraordinary Tithe Redemption Act was passed, by which the old extraordinary tithe was abolished, and in place of it was substituted the said new rent-charge.

6. The plaintiff contends that upon the proper construction of the Act the new rent-charge is exempt from the land tax, and the defendant maintains the negative.

The question for the opinion of the court is, whether the new rent-charge is exempted from or liable to assessment to the land tax, and if the court shall be of opinion that the new rent-charge is exempted, then judgment shall be entered up for the plaintiff for £17 10s. 4d., but if the court shall be of opinion that the new rent-charge is liable to assessment, then judgment shall be for the defendant.

Stevenson Moore (*Meadows White, Q.C.*, with him), for the plaintiff.—This rent-charge is not subject to land tax, and the plaintiff is entitled to judgment. Previously to the Extraordinary Tithe Redemption Act, 1886, land tax was levied in respect of extraordinary tithe. By that Act a rent-charge is substituted for the extraordinary tithe, and the amount of this rent-charge is based on the capital value of the extraordinary tithe. That capital value is obtained by taking the net annual value, after deducting rates, taxes (except income tax), and other outgoings (section 3). Land tax is a tax, and is therefore included in the deductions; income tax is the only exception mentioned, and the maxim *expressio unius exclusio alterius* applies. By section 4, sub-section 5, the rent-charge is not to be subject to any parochial, county, or other rate, charge, or assessment. The word "other" covers land tax. The land tax having been deducted in arriving at the value of the rent-charge, it cannot have been intended that the rent-charge itself should be subject to the tax, for that would cause the tax to be paid twice over in respect of the same subject-matter.

Channell, Q.C., and *T. Willes Chitty*, for the defendant.—This rent-charge is by the original Land Tax Act, 38 Geo. 3, c. 5, subject to the land tax unless it is expressly exempted from payment by the statute which created it, and there is no such express exemption in the Act of 1886. There is in section 4, sub-section 5, an express exemption in the case of parochial and county rates. *Waterloo Bridge Co.* v. *Cull*, 7 W. R. 87, 1 E. & E. 213, shows that land tax is not a parochial or a county rate. It is a parliamentary rate, and does not come within the exemption in sec. 4, sub-section 5. Even if the land tax is to be deducted in estimating the annual value as provided

by section 3, it does not necessarily follow that the rent-charge is not to be subject to the tax.

Colchester v. *Kewney*, 15 W. R. 930, L. R. 2 Ex. 253, and *Metropolitan Railway Co.* v. *Fowler*, 40 W. R. 306, [1892] 1 Q. B. 165, were also cited.

Stevenson Moore replied.

DAY, J.—I am of opinion that this rent-charge is, under the Act of 1886, exempt from payment of land tax, and that, therefore, the plaintiff in this action is entitled to judgment for the amount claimed. I base my opinion mainly on section 3 of the Act, which must be considered, in logical order, before section 4, sub-section 5, the section relied on for the defendant; for before deciding how a particular subject is to be dealt with you must first ascertain what that subject is. In this case we are dealing with a tithe rent-charge which has by the Extraordinary Tithe Redemption Act, 1886, been substituted for the former extraordinary tithe. This tithe rent-charge is created by section 3, which provides for the calculation on which it is to be based.

The tithe rent-charge is based upon the capital value of the former extraordinary tithe, and in estimating the capital value the commissioners "shall take into consideration the net annual value of the same after allowing for the expenses of collection, rates, taxes (except income tax), and other outgoings." It is clear, therefore, that the method of obtaining the annual value is that, first of all, the expenses of collection are to be deducted, because in future the sum will be payable in a fixed manner, and there will be no expenses of collection; thus rates and taxes are to be deducted, but not the income tax, because the new rent-charge is to be subject to income tax. From the annual value thus obtained the capital value is arrived at, and on that the tithe rent-charge is based.

It is said that section 4, sub-section 5, is in favour of the defendant's contention; that section provides that the rent-charge shall not be subject to any parochial, county, or other rate, charge, or assessment. It is argued that the land tax is neither a parochial or county, but a parliamentary, rate, and that, therefore, the rent-charge is to be assessed to the land tax. I do not agree with that argument. I think the meaning of that sub-section is that the rent-charge is not to be assessed by parishes or counties, but that the right to do so is reserved to Parliament, and that it was not the intention of the Legislature to create a kind of property which Parliament should have no power to assess in the future if it should be thought desirable to do so. I do not think that the mere omission of the word "parliamentary" in that sub-section can make this rent-charge liable to the land tax, taking into consideration the precise words that are used in section 3. It would be a great injustice, and one which cannot have been intended by the Legislature, if, after first deducting the land tax in estimating the annual value of the extraordinary charge, the rent-charge was to be liable to be assessed to that tax. It would be making the owner of the rent-charge pay the tax twice over. It would require very clear words in the Act to attribute such injustice to the Legislature, but, for the reasons which I have given, it is not necessary to do so.

COLLINS, J.—I am of the same opinion. It is clear, when you consider the state of things for which this rent-charge was substituted by the Act of 1886, and the machinery provided by that Act for its assessment, that the holder of the rent-charge is not liable to pay land tax in respect of it. The Extraordinary Tithe Redemption Act, 1886, removed the obligation which had previously existed in the case of certain persons of paying extraordinary tithe, and the Act gave to the vicar, in the place of the extraordinary tithe, the interest in a capital sum. Section 3 provides the machinery for obtaining that capital sum, and it is clear from that section that when the new rent-charge comes into existence the land tax has already been deducted. That being so, is there anything in the remainder of the statute to superimpose the liability which has been removed? Mr. Channell says that the words of section 4, sub-section 5, are large enough to do so, and relies on the case of *Waterloo Bridge* v. *Cull* in support of his contention. The words in that case, "parochial rates whatsoever," are, however, quite different from the words in this section, which give three categories of charges from which the rent-charge is to be free—viz., parochial, county, or other rates. Therefore, in my opinion, that case is no authority for the present. Section 4, sub-section 5, relieves the rent-charge from certain burdens, but it cannot be argued that other burdens are not relieved from, by reason of their not being mentioned in the section, unless it can first be shown that they have been imposed on the rent-charge. But, as I have shown in the first part of my judgment, it is not the case that this burden has been imposed on the rent-charge. I am of opinion that the plaintiff is not liable to pay land tax in respect of this rent-charge, and is therefore entitled to judgment.

Judgment for the plaintiff.

Solicitor for the plaintiff, *Peterson*.

Solicitor for the defendant, *Kingsford, Dorman, & Co.*, for *Philpott & Callaway*, Cranbrook.

Q. B. Div.
(Lawrance and Collins, JJ.) Feb. 7.

GEORGE, *Appellant.*
CARPENTER, *Respondent.* (*a.*)

Fishery district—Definition of limits—River—Tributary—Reservoir formed by embankment across tributary.

The River Severn Fishery District included that river and all its tributaries. Under the provisions of the Liverpool Corporation Waterworks Act, 1880, *an embankment was constructed across the River Vyrnwy, a tributary of the River Severn, and a reservoir was formed for the purpose of supplying water to the town of Liverpool. The Act provided for a daily and monthly supply of "compensation" water from the reservoir into the part of the River Vyrnwy below the embankment.*

Held, that so much of the River Vyrnwy as was above the embankment had ceased to be a tributary of the River Severn, and therefore was not within the jurisdiction of the conservators of the Severn Fishery District.

Harbottle *v.* Terry, 31 *W. R.* 289, 10 *Q. B. D.* 131, *followed.*

Special case stated by two justices for the county of Montgomery.

At a petty sessions held at Llanfyllin on the 30th of September, 1892, an information was preferred by the appellant, the water bailiff of the Severn Fishery Board, against the respondent under section 35 of the Salmon Fishery Act, 1865, as amended by section 7 of the Freshwater Fishery Act, 1878, charging him with having on the 30th of July, 1892, unlawfully fished with a rod and line for trout without a proper licence at the parish of Llanwddyn, a place within

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

the Severn Fishery District. The justices dismissed the information, and stated this case for the opinion of the court.

By a certificate of a Secretary of State given in 1866 the limits of the fishery district of the River Severn were, in part, defined to include so much of the River Severn and of the Rivers Vyrnwy and Teme, and of all other tributaries of the River Severn as was situate within the county of Montgomery. By a certificate given in 1867 the district was further defined as including so much of the tributaries of the Rivers Vyrnwy and Teme as was within the county of Montgomery, and by a further certificate given in 1882 was further defined as including so much of the River Severn and of all its tributaries as was within the county of Montgomery.

After the 7th of April, 1879, on which day the requirements of the Freshwater Fishery Act, 1878, were complied with by the Board of Conservators of the Severn Fishery District, it became illegal for any person to fish with rod and line for trout or char within the Severn Fishery District without having first obtained a licence from the conservators.

By the Liverpool Corporation Waterworks Act, 1880, the Corporation of Liverpool were authorized to construct a reservoir (to be called the Vyrnwy Reservoir) to be formed by means of an embankment across the valley of the River Vyrnwy in the parish of Llanwddyn, and the reservoir was constructed accordingly. By section 36 of the Act the Corporation were empowered to take, collect, divert, impound, and use all the waters of the River Vyrnwy at or above the point at which the embankment of the Vyrnwy Reservoir crossed the river, and of all the tributaries, streams, and springs of the river above that point. Section 37 provided that as full compensation to the Severn Commissioners and to all other persons and bodies corporate for taking, diverting, impounding and appropriating all the waters of the River Vyrnwy and its tributaries as were authorized by this Act to be taken, the corporation should, before taking any part of the said waters for their own purposes, cause to flow and be discharged daily from the Vyrnwy Reservoir into the Vyrnwy River a certain equal and continuous supply of water, called the daily compensation water, and also in addition a further supply of water called the monthly compensation water. Section 49 provided that, except only as was by the Act provided, nothing therein contained should take away, lessen, prejudice, or alter any of the rights, powers, authorities, or privileges of the Board of Conservators of the Severn Fisheries, and, except as aforesaid, all powers, rights, privileges, and authorities might be exercised and enjoyed by the conservators in as full and ample a manner as if the Act had not been passed.

It was proved that on the day in question the respondent fished in the Vyrnwy Reservoir for trout with rod and line, and that the respondent had no licence from the Board of Conservators of the Severn fishery district.

The questions for the opinion of the court were (1) whether the Vyrnwy Reservoir was a tributary of the River Severn within the meaning of the certificates defining the limits of the Severn Fishery District? (2) whether the right to issue licences to fish for trout in the reservoir had been extinguished by the Liverpool Corporation Waterworks Act, 1880, and an agreement of the 24th of June, 1880? (This agreement was made by the Corporation of Liverpool and the Conservators of the Severn Fishery District, and provided for the withdrawal of the latter's opposition to the corporation's Bill. As the court were of opinion that it did not affect the question in this case it is unnecessary to refer to it more fully.)

Willis Bund, for the appellant.—It is admitted that previously to the construction of the embankment the site of the reservoir was within the Severn Fishery District. The making of the embankment across the Vyrnwy has not made it any the less a tributary of the Severn; the embankment does not prevent the Vyrnwy from continuing to flow into the Severn, it only diminishes the quantity of water so flowing. The Liverpool Waterworks Act provides that the corporation must permit a constant and regular supply of water from the reservoir into the Vyrnwy, and that distinguishes this case from *Harbottle* v. *Terry*, 31 W. R. 289, 10 Q. B. D. 131, where there was no such provision, and consequently the overflow there was intermittent, and might have been stopped altogether.

Joseph Walton, Q.C., and *W. F. Taylor*, for the respondent.—The effect of the embankment is that the part of the Vyrnwy above it has ceased to exist as a river or a tributary of the Severn, and in its place there is an enormous reservoir capable of containing twelve thousand millions gallons. The reasoning of the court in *Harbottle* v. *Terry* is entirely opposed to the argument that the reservoir can be a tributary of the Severn, and if it is not a tributary the fishery board have no rights over it.

Willis Bund replied.

LAWRANCE, J.—In this case two questions are asked of us: first, whether the portion of the River Vyrnwy which is above the embankment is a tributary of the River Severn? and, secondly, whether the right of the fishery board to issue licences to persons to fish in that portion of the River Vyrnwy has been extinguished? I am of opinion that the first question should be answered in the negative, and the second in the affirmative. There is no doubt that before the embankment was made the River Vyrnwy was a tributary of the Severn, and I think that so much of it as is below the embankment is still a tributary. But the question is whether the water, which is impounded by means of the embankment and which the Corporation of Liverpool are empowered by their Act to send to Liverpool instead of into the Severn, is a tributary of the Severn. It is argued that it is because there is a provision in the Act that a certain amount of compensation water is to be allowed to flow over the embankment. But the case of *Harbottle* v. *Terry* shows that the overflow water of a reservoir, although it flows down what was a tributary of a river, does not necessarily become a tributary itself. There is nothing in the Liverpool Waterworks Act inconsistent with our decision. In my opinion, the fishing in the reservoir above the embankment is as distinct from the fishing in the river below as if it was in a different river altogether.

COLLINS, J.—I am of the same opinion. It is admitted that if that portion of the River Vyrnwy which forms this reservoir is not a tributary of the River Severn it is not within the jurisdiction of the fishery board. The first question, therefore, to be considered is whether or not it is such a tributary. I admit that my mind somewhat fluctuated during the argument, and I doubt whether I should have come to the conclusion at which I have arrived were it not for the decision in *Harbottle* v. *Terry*. I think, however, that that case covers this one; and although there are some points of difference between the two cases, yet the principle of the decision is, I think, distinct from the points of difference. In *Harbottle* v. *Terry* the court thought that a reservoir used for commercial purposes could not be regarded as a tributary. A tributary, it was said, implied a stream, and a reservoir is not a stream. It is true that in that case there

was no provision, as there is here, for a flow of compensation water from the reservoir; but, as a matter of fact, when the reservoir was not being used, it did send a quota of overflow. All the arguments used in that case apply equally here, and I am clearly of opinion that this case comes within the principle there laid down. On that ground I concur in the opinion of my learned brother, that the portion of this river above the embankment is not a tributary of the River Severn, and is, therefore, not within the jurisdiction of the Severn Fishery Board.

As to the second question, I agree that it becomes unnecessary for us to answer it; otherwise, I should answer it in the affirmative.

Judgment for the respondent.

Solicitors for the appellant, *Stallard & Turner*, for *John Stallard & Son*, Worcester.

Solicitor for the respondent, *Venn*, for *Atkinson*, Town Clerk, Liverpool.

C. C. R.
(Lord Coleridge, C.J., and Hawkins, Cave, Day, and Collins, JJ.) Feb. 4.

REG. v. INSTAN. (*a*.)

Criminal law — Manslaughter — Death accelerated by neglect—Implied duty.

A prisoner, a woman between thirty and forty years of age, was indicted for manslaughter. It was proved that she had lived with the deceased, who was her aunt, and was seventy-three years of age, and at her expense, for a considerable time; that for some days before her death the deceased was incapable through illness of moving about or attending to her wants or procuring assistance; that the prisoner continued to live in the house of the deceased, and to receive and use articles of food which were brought to the house by tradespeople; that she failed to supply the wants of the deceased, either as to food or the obtaining of medical or nursing attendance, or to make known the condition of the deceased to her neighbours; and that the death of the deceased was substantially accelerated by neglect, want of food and of nursing and medical attendance. The prisoner was convicted.

Held, that, under the above circumstances, there was a duty implied by law on the part of the prisoner to attend to the wants of the deceased, and that, the prisoner's failure to perform that duty having assisted to cause the death of the deceased, the conviction was right.

Case stated by Day, J., as follows:—

Kate Instan was tried before me at the last assizes held in and for the county of Worcester upon a charge of feloniously killing one Ann Hunt.

The prisoner, who is between thirty and forty years of age and unmarried, had no occupation and no means of her own of living. She was a niece of the deceased.

At the time of the commission of the alleged offence, and for some time previous thereto, she had been living with and had been maintained by the deceased. The deceased was a woman of some seventy-three years of age, and until a few weeks before her death was healthy and able to take care of herself. She was possessed of a small life income, and had in the house in which she lived some little furniture and a few other things of trifling value.

The two women lived together in a house taken by the deceased; no one lived with them or in any way attended to them.

The deceased shortly before her death suffered from gangrene in the leg, which rendered her during the last ten days of her life quite unable to attend to herself, or to move about, or to do anything to procure assistance.

No one but the prisoner had, previously to the death, any knowledge of the condition in which her aunt thus was. The prisoner continued to live in the house at the cost of the deceased and took in the food supplied by the tradespeople; but does not appear to have given any to the deceased, and she certainly did not give or procure any medical or nursing attendance to or for her, or give notice to any neighbour of her condition or wants, although she had abundant opportunity and occasion to do so.

The body of the deceased was, on the 2nd of August, while the prisoner was still living in the house, found much decomposed, partially dressed in her day clothes, and lying partly on the ground and partly prone upon the bed. The death probably occurred from four to seven days before the 3rd of August, the date of the post mortem examination of the body. The cause of death was exhaustion caused by the gangrene, but substantially accelerated by neglect, want of food, of nursing, and of medical attendance during several days previous to the death.

All these wants could and would have been supplied if any notice of the condition of the deceased had been given by the prisoner to any of the neighbours, of whom there were several living in adjoining houses, or to the relations of the deceased, who lived within a few miles.

It was proved that the prisoner, while the deceased must have been just about dying, had conversations with neighbours about the deceased, but did not avail herself of the opportunities thus afforded of disclosing the condition in which she then was.

At the close of the case it was objected on behalf of the prisoner that there was no evidence of any legal duty such as would bind the prisoner to give or to procure any food or nursing or attendance to or for the deceased, or to give notice to anyone that such was required.

I thought it better not to stop the case, but to leave it to the jury to say whether, having regard to the circumstances under which the prisoner lived with the deceased and continued to occupy the house and to take the food provided at the expense of the deceased while the deceased was, as she knew, unable to communicate with any other person, and thus to procure necessaries for herself, the prisoner did or did not impliedly undertake with the deceased either to wait upon and attend to her herself, or to communicate to persons outside the house the knowledge of her helpless condition; and I told them that if they came to the conclusion that she did so undertake, and that the death of the deceased was substantially accelerated by her failing to carry out such undertaking, they might find the prisoner guilty of manslaughter, but that otherwise they should acquit her.

The jury found the prisoner guilty.

I reserved a case for the opinion of the court.

If the facts above stated do not afford evidence of the existence of any such undertaking or duty, then the conviction is to be quashed; if otherwise, it is to stand.

Vachell (at the request of the judge who presided at the trial), for the prisoner.—The conviction was wrong. There was no duty to care for the deceased binding upon the prisoner; such a duty will be presumed in a case where an infant is dependent upon an adult person, but not where both persons are

(*a*.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

of full age: *R.* v. *Friend*, R. & R. 20; *R.* v. *Shepherd*, L. & C. 147. There was no evidence to go to the jury of any undertaking, express or implied, on the part of the prisoner to attend to the wants of the deceased, and the existence of such an undertaking is necessary to sustain the conviction: *R.* v. *Marriott*, 8 C. & P. 425.

No counsel appeared for the prosecution.

Lord COLERIDGE, C.J.—We are all of opinion that this conviction must be affirmed. It would not be correct to say that every moral duty is also a legal duty, but it is correct to say that every legal duty is founded upon a moral duty. Now, in this case it is beyond question that it was the clear moral duty of this woman to impart to the deceased so much of the food which she took in from the tradespeople, and which was paid for out of the money of the deceased, as was necessary to sustain her life. The deceased could only get food through the instrumentality of the prisoner; it was the prisoner's duty to supply it, and that duty she did not discharge. There is no doubt that her failure to discharge that duty accelerated the death of the deceased. I think that that duty was a legal as well as a moral duty. There appears to be no case directly in point, but I think that this case is within the principle of the cases as to legal duty, and it would be a slur upon the English law if it were not so. Here, then, was a legal duty left unperformed, the non-performance of which assisted in causing the death of the deceased. I believe I am stating the opinion of my brethren as well as my own when I say that that is sufficient to establish that this conviction was right, and ought to be affirmed.

HAWKINS, CAVE, DAY, and COLLINS, JJ., concurred.

Conviction affirmed.

Court of Appeal.

From Chan. Div. (Lord Esher, M.R., and Lindley and Kay, L.JJ.) — March 21.

LOCK *v.* PEARCE. (*a.*)

Landlord and tenant—Lease—Forfeiture—Breach of covenant—Notice to remedy breach—Compensation—Application for relief—Originating summons—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 14, *sub-sections* 1, 2.

An application by a lessee, under section 14, *sub-section* 2, *of the Conveyancing Act*, 1881, *for relief against forfeiture by reason of a breach of covenant cannot be made by originating summons. It must be made either in the lessor's action to enforce the forfeiture, or in an action brought by the lessee.*

A notice by the lessor under section 14, *sub-section* 1, *specifying the breach complained of, and requiring the lessee to remedy it, is not invalid because it does not contain a claim for compensation in money for the breach.*

Decision of North, J. (40 *W. R.* 508, [1892] 2 *Ch.* 328), *affirmed.*

Appeal from the decision of North, J., reported 40 W. R. 508, [1892] 2 Ch. 328.

The plaintiffs were respectively the lessee and mortgagee by sub-demise of certain houses at Tottenham which were let to weekly tenants. The defendant was the assignee of the original lessor. The leases contained the usual covenants to repair.

On June 2, 1891, the defendant served notices on the plaintiffs, under section 14, sub-section 1, of the Conveyancing Act, 1881, stating that the houses were out of repair, and requiring the plaintiffs within three months to remedy the breach of covenant by doing the repairs set forth in the schedule, and requiring them to pay him the sum of £2 2s. for the expenses incurred by him for surveyor's fees and solitor's charges by reason of the breach of covenant; and giving further notice that if they made default in remedying the breach or in making the compensation thereby required the defendant would enter and take possession.

After the expiration of the three months the defendant commenced actions in the county court against the weekly tenants for recovery of possession of the houses, and on November 21, 1891, he obtained judgments for possession. The plaintiffs were not parties to these actions. On November 25 the plaintiffs took out an originating summons asking (1) for a declaration that no forfeiture had been incurred by reason of any breach of covenant to repair; (2) in the alternative, for relief against the defendant's right of re-entry and forfeiture; and (3) for an injunction to restrain the defendant from proceeding on his judgments in the county court to take possession. On December 9 the defendant obtained possession of the houses under his judgments.

North, J., dismissed the summons. The plaintiffs appealed.

Pitt-Lewis, Q.C., and *Oswald*, for the plaintiffs.

Upjohn, for the defendant.

The arguments and authorities were the same as in the court below.

Lord ESHER, M.R.—In my opinion this appeal must be dismissed, and every point which has been raised must be decided against the appellants. The first question is whether North, J., had any jurisdiction to entertain this originating summons at all. The summons was taken out under section 14, sub-section 2, of the Conveyancing Act, 1881, which provides that "where a lessor is proceeding by action or otherwise to enforce such right of re-entry or forfeiture the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief." The application for relief must be made before the lessor has re-entered. Now the action of ejectment in this case was brought in the county court. The plaintiffs could not have applied in that action for relief, as the county court has no jurisdiction to grant relief. The plaintiffs, therefore, could not have applied for relief in the lessor's action. It was left for them to apply for relief in an action brought by themselves. They did not do so, but applied by way of originating summons. Such a summons for the purposes of this section is not an action. It cannot be said to be a summons taken out "in an action brought by" the lessee. The learned judge, therefore, had no jurisdiction to entertain this summons at all. We have spoken to the learned judge upon the point, and his opinion was in favour of this view, though he did not decide the point. We are, therefore, agreeing with him rather than differing from him upon the point.

But supposing that there is jurisdiction to entertain this summons, there comes this difficulty: relief can only be asked when the lessor is proceeding to enforce the forfeiture. The plaintiffs by applying for relief admit the forfeiture. There is no jurisdiction now to inquire whether the judgment in the county

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

court was right or not. That judgment, as it has not been appealed against, has settled the question of forfeiture, and it must now be taken that there was a forfeiture.

But supposing, again, that we can inquire whether the judgment of the county court is right, the question then arises whether the notice of the 2nd of June, 1891, is an invalid notice, and therefore whether the right of re-entry was enforceable. It is contended that the notice is bad because it does not require the plaintiffs to make compensation in money for the breach according to section 14, sub-section 1, of the Conveyancing Act, 1881, it being said that the demand of £2 2s. for surveyor's fees and solicitor's charges was not a demand for "compensation," as, according to *Skinners' Co.* v. *Knight*, 40 W. R. 57, [1891] 2 Q. B. 542, those charges do not come within the meaning of that word in the section. Now in the present case the lessor served notices complaining of a breach of covenant to repair. If the breach of covenant is one which is capable of remedy the lessor must require the breach to be remedied, and cannot pass that by and demand money compensation for the breach. In such a case the lessor is bound in his notice to require the lessee to remedy the breach. Here the lessor did so, the breach being one which was capable of being remedied by the lessee. Where the breach is capable of remedy, as in the case of a covenant to repair, the "compensation" cannot be in respect of the repairs themselves, but must be for something else, and this is shown by the latter part of the sub-section. The true meaning of the sub-section is that besides remedying the breach there is to be compensation payable where there is anything to compensate, but if the lessor does not want any compensation he need not ask for it in his notice, and in that case he cannot obtain it either in the action to recover possession or in any other action. If the decision of Bacon, V.C., in *North London Land Co.* v. *Jacques*, 32 W. R. 283, is inconsistent with this reading of the section, I must say I do not agree with it. In the case of *Greenfield* v. *Hanson*, 2 Times L. R. 876, Bowen, L.J., felt himself bound by the construction placed upon the section by Bacon, V.C., but I think I can see from his language that if he were free to do so he would not have followed it. Therefore, in my opinion this notice was a good one, and the judgment in the county court was right. [His lordship then stated that, with regard to granting relief upon the merits, assuming the point was open, they were unable to differ from the conclusion arrived at by the learned judge.]

LINDLEY, L.J.—I am of the same opinion. The summons asks first for a declaration that no forfeiture has been incurred; secondly, in the alternative for relief against the forfeiture; and, thirdly, for an injunction to restrain the defendant from taking possession. No one ever heard of such an application as that being made by originating summons. It was utterly misconceived and inappropriate. But taking the summons as merely asking for relief against the forfeiture, the question is whether an originating summons is the proper procedure. The question depends upon section 14, sub-section 2, of the Conveyancing Act, 1881. By section 2 (xviii.), "the court" means the High Court of Justice, and by section 69 (i.) all matters within the jurisdiction of the court are assigned to the Chancery Division. Therefore the county court has no jurisdiction to give relief. To my mind the words, "action brought by" the lessee, in sub-section 2 of section 14 do not include an originating summons. The true meaning of the words is that there must be an action in the Chancery Division, and a summons must be taken out in that action. Therefore this originating summons is wholly misconceived, and the court has no jurisdiction upon such a summons to entertain the question.

Assuming, however, that the court has jurisdiction to entertain this application, the next question arises with regard to the notice. Is the notice to be held bad because the lessor does not demand compensation? There would be no sense in so holding. The lessor must tell the tenant what the breach is and what he wants done, and what compensation he wants. But if the lessor does not want any compensation—in the case, say, of a fire insurance not kept up where no damage has accrued—what sense is there in asking for compensation which he does not want? The section seems to me to have been correctly construed in *Skinners' Co.* v. *Knight*. Here the defendant told the plaintiffs what he wanted—namely, the repairs made good and £2 2s. compensation. True, he adds that the £2 2s. is for a surveyor's fee and solicitor's charges, but, in fact, he told them what compensation he wanted.

KAY, L.J., concurred.

Appeal dismissed.

Solicitor for the plaintiffs, *T. Noton.*

Solicitors for the defendant, *Pearce & Son.*

App. Bankruptcy.
(Lord Esher, M.R., and Lindley & Bowen, L.JJ.) Feb. 24.

Ex parte ASHMEAD.
In re NANCE. (*a.*)

Bankruptcy—Bankruptcy petition—Judgment creditor—Cost book mining company—Action by secretary for and on behalf of shareholders—Stannaries Act, 1869 (32 & 33 *Vict. c.* 19), *ss.* 2, 13.

Section 13 *of the Stannaries Act*, 1869, *which empowers cost book mining companies to sue, in the name of their purser or secretary, shareholders for the amount of unpaid calls, does not empower the company to institute bankruptcy proceedings, in the name of the secretary, in respect of a judgment recovered in such an action.*

Appeal from an order of the registrar in bankruptcy refusing to make a receiving order.

Ashmead, the appellant, was secretary of the Great Fortune and West Carzine Mines, a cost book mining company within the Stannaries. The appellant, suing as secretary for and on behalf of the shareholders of the company, brought an action against the judgment debtor in the Mayor's Court in respect of unpaid calls on shares, due from him to the company. Judgment was recovered for £135. This judgment not having been satisfied, the appellant presented a bankruptcy petition against the judgment debtor, which stated that the judgment debtor was justly and truly indebted to him as secretary for and on behalf of all the shareholders of the company, in the sum of £135. The registrar refused to make a receiving order on the petition, on the ground that the petitioning creditor, the appellant, was a bare trustee, and that the petition ought to be amended by joining the *cestui que trust.*

Section 13 of the Stannaries Act, 1869, provides that "the amount for the time being unpaid of any call made after the passing of this Act on any share in a company shall be deemed to be a debt due from the holder of such share to the company, and if at

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

the time appointed by the company for the payment of any such call any shareholder shall fail to pay the amount thereof, it shall be lawful for the company to sue such shareholder for the amount of such call, in any court of law having competent jurisdiction, in the name of the purser for the time being of the company, whether such purser is a shareholder in the company or not, as the nominal plaintiff for the company, and to recover the amount of such call, together with interest for the same and costs of suit."

Section 2 provides that if there is no purser the term "purser" shall mean the secretary for the time being.

E. Cooper Willis, Q.C., for the appellant, referred to *Guthrie* v. *Fisk*, 3 B. & C. 178, and *Hope* v. *Meek*, 10 Ex. 829, 4 W. R. Dig. 141.

F. C. Willis, for the debtor, was not called upon.

Lord ESHER, M.R.—In this case the alleged debtor was a shareholder in a mining company in the Stannaries, and the company made a call on his shares which he did not pay. At common law the company could not have sued him, because all the shareholders in such companies are partners, and one partner cannot sue another. In order to obviate that difficulty the Stannaries Act, 1869, was passed, section 13 of which Act gave the company power to sue a shareholder who had neglected to pay calls. [His lordship read section 13 and proceeded:] The section makes an unpaid call a debt due to the company, not to the secretary, and the right to sue for that debt is given to the company. The secretary has no right to sue, but the company is to sue in the name of the purser, or secretary if there is no purser, as nominal plaintiff. Then, the action having been brought by the company in the name of the purser, it is the company which recovers the amount due. The company is the judgment creditor, and is, therefore, the proper party to present a petition in bankruptcy.

In this case the secretary has presented the petition, and in it he describes himself as having recovered judgment for and on behalf of the shareholders in the company. That is not the case, the company has recovered judgment in his name. The secretary cannot draw the petition in such a way as to make himself a petitioning creditor, nor can he make the necessary affidavit, for there is no debt due to him, and he has not recovered judgment against the debtor.

A similar point was decided in *Guthrie* v. *Fisk* where it was held that where a company was empowered by its private Act to sue in the name of its secretary as nominal plaintiff, that did not give power to the company to institute bankruptcy proceedings in his name.

I think that the registrar was right in holding that the petition must be dismissed unless it was amended. The company elected not to amend, but to appeal against the registrar's decision, and their appeal must be dismissed.

LINDLEY, L.J.—I am of the same opinion. The question turns on section 13 of the Stannaries Act, 1869. The object of that Act was to cure the great defects that formerly existed in the manner of recovering calls by cost book mining companies, which are unincorporated companies. Section 13 does not say that these companies are to sue in their own names, but gives them power to sue in the name of their purser or secretary. The Act does not, however, empower these companies to make use of their purser's name in bankruptcy proceedings. This is not a new point, for the case of *Guthrie* v. *Fisk* shows that when a company is authorized by statute to sue by means of its public officer, the company cannot institute bankruptcy proceedings by its officer. In some cases Parliament has subsequently given companies power to do so, but that is not so in this case.

BOWEN, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the appellant, *Stacpoole, Batters, & Co.*

Solicitor for the respondent, *Rumney*.

From Q. B. Div. (Lord Esher, M.R., and Bowen and A. L. Smith, L.JJ.) — Feb. 9.

JOHNSON v. DIPROSE. (a.)

Bill of sale—Default in payment—Seizure of goods—Conditional tender of amount due—Removal of goods—Trespass—Redemption—Bills of Sale Act, 1882 (45 & 46 *Vict. c.* 43), *s.* 7.

The grantor of a bill of sale in the form prescribed by the Bills of Sale Act, 1882, *having made default in payment of a sum of money thereby secured, the grantee seized the goods comprised in the bill of sale. More than five days afterwards, the goods not having been yet removed from the grantor's premises, the grantor tendered payment of the amount due under the bill of sale, subject to a condition as to the giving of a receipt. The grantee declined to comply with the condition, and removed the goods.*

Held, that the grantor could not maintain an action of trespass against the grantee for the removal of the goods, but might redeem them on payment of principal, interest, the expenses incurred by the grantee in the seizure, and the costs of the claim for redemption.

Appeal by the defendant from the judgment of Wright, J., at the trial of an action with a jury.

The plaintiff, by a bill of sale drawn in the form prescribed by the Bills of Sale Act, 1882, assigned to the defendant certain furniture in her dwelling-house to secure the repayment by instalments of a sum of money advanced to her by the defendant. The plaintiff having made default in payment of two of the instalments, the defendant, on the 15th of March, 1892, entered the plaintiff's dwelling-house and seized the furniture comprised in the bill of sale, and left a man in possession. On the 26th of March, when the goods were on the point of being removed, the plaintiff tendered to the auctioneer, by whom the removal was being carried out, the sum of £51 5s., being the amount due for principal, interest to that date, and expenses, and also an additional sum of £2 15s., which was claimed as the auctioneer's levy fee; she, however, accompanied this tender with a demand for a separate receipt in respect of the £2 15s., refusing to pay either sum unless such receipt were given. The auctioneer refused to give a separate receipt, and the goods were removed. The plaintiff thereupon commenced this action, in which she claimed (1) damages for trespass in wrongfully removing the goods, and (2) redemption of the goods upon payment of principal and interest due in respect of the money advanced. The plaintiff brought into court the sum of £51 5s., and the defendant brought into court the sum of £5 in respect of the actual damage caused to the goods in removing them.

At the trial Wright, J., left the question on the claim for trespass to the jury, who gave the plaintiff £55 damages, viz., £50 for removing the goods, and

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

£5 beyond the sum of £5 paid into court in respect of actual damage to the goods. The learned judge gave judgment for the plaintiff for that amount, and further decreed that the plaintiff was entitled to redeem the goods on payment of £2 15s. beyond the sum of £51 5s. paid into court; and he allowed the plaintiff the costs of the action.

The defendant appealed.

Jelf, Q.C., and *Cababé*, for the defendant.—The plaintiff is not in a position to sue in trespass. The moment she made default in complying with the terms of the bill of sale her right to the possession of the goods determined; for, by virtue of section 7 of the Bills of Sale Act, 1882, the defendant became entitled to seize and take possession of them. No subsequent tender on the part of the plaintiff could restore her right to possession. The proviso to section 7 enacts that if the grantor takes certain steps within five days of the seizure of the goods, the grantee may be restrained from removing or selling the goods. But here the plaintiff did not comply with the terms of that proviso. The tender which she alleges was made after the expiration of the five days; and, further, it was a bad tender, inasmuch as it was conditional.

Herbert Reed, Q.C., and *Pocock*, for the plaintiff.—Where personal chattels are assigned by way of security for a debt, the presumption is that the property and the right to possession remain in the assignor. The right of the assignor to sue the assignee in trespass for wrongfully removing the chattels is recognized in *Brierly* v. *Kendall*, 17 Q. B. 937, and *Toms* v. *Wilson*, 11 W. R. 117, 4 B. & S. 442. The Bills of Sale Act contemplates the goods comprised in a bill of sale as being the grantor's goods, not the grantee's. The position of the grantor of a bill of sale is nearer that of a pledgor than a mortgagor. In the case of a pledge the general property remains in the pledgor, only a special property passes to the pledgee. In the same way in the case of a bill of sale the general property remains with the grantor. There is a strong presumption against the property passing to the grantee, as in the case of a mortgage of land. [BOWEN, L.J.—But is not *Maughan* v. *Sharpe*, 12 W. R. 1057, 17 C. B. N. S. 443, against that contention? There Williams, J., said:—"It is said that there cannot be a mortgage of a chattel, and therefore that this instrument must operate as a pledge. But why so? There is nothing illegal in making a grant in this form. The books recognize the distinction between a mortgage and a pledge of personal chattels, and there is an express authority in the case of *Flory* v. *Denny*, 7 Exch. 581, that there may be a mortgage of chattels, as distinguished from a pledge, without delivery, so that there would seem to be nothing contrary to law in what is ordinarily called a mortgage of personal chattels. The property is absolutely and indefeasibly vested in the grantee if the condition be not performed, and a court of law can look at no other owner than the mortgagee or grantee."] The policy of the Bills of Sale Act is to limit the rights of the grantee over the goods; the grantor may redeem the goods at any time before they are actually removed and sold. If, after the grantor has tendered payment of the amount due, the grantee removes the goods, the grantor may maintain trespass against him. At any rate, the plaintiff can maintain an action on the case. She had a right to redeem these goods, and, therefore, she had a right, if she tendered the amount due, to prevent their removal. And if after her tender the defendant removed them, she must have some right of action at common law for their removal. Courts of law take notice of an equity of redemption. [They cited *Jenkins* v. *Jones*, 8 W. R. 270, 2 Giff. 99.]

Cababé, in reply, cited *Yungmann* v. *Briesmann*, *ante*, p. 148.

Lord ESHER, M.R.—In this case the plaintiff has brought an action against the defendant in respect of an alleged interference with her goods, and she has brought the action in two forms: the first form is that of a common law action for trespass, the other is that of an action in equity for redemption. The learned judge at the trial gave judgment for the plaintiff on the common law claim for the amount of damages which was assessed by the jury, and which was partly in respect of injury to the goods and partly in respect of the consequences to the plaintiff of the wrongful seizure. On the claim for redemption the learned judge also gave judgment for the plaintiff.

The defendant has appealed, on the ground that an action of trespass will not lie, because the plaintiff had given him a valid bill of sale of the goods in the form enacted by the Bills of Sale Act, and the plaintiff had made default in complying with the terms of the bill of sale and the Act, which default gave the defendant a right to seize the goods, and at common law to keep them and do what he liked with them. This gives rise to the question, What is the right view to be taken as to the construction of a bill of sale drawn in the form prescribed by the Act? Such a bill of sale might have been made before the Act, for bills of sale were then made in many forms. But the Act, for the protection of borrowers, says that if a bill of sale is given by way of security for an advance, it may no longer be drawn in any of the old forms, but must be in this form. What, then, is the effect of a bill of sale in this form? A bill of sale is a document under seal given in respect of chattels, where it is desired that the property in them should pass, but where possession is not to be given. The object of the deed is to enable the property in the goods to pass, although the possession does not pass. That is the meaning of a bill of sale. It is not a pledge, for the property is to pass.

Now a bill of sale might be drawn so as to make the property pass subject to conditions as to the right of possession, formerly subject to any conditions, but now subject only to the prescribed conditions. A bill of sale in the form given in the Act states that, in consideration of a sum of money paid to the grantor by the grantee, the grantor doth "assign" unto the grantee the chattels described in the schedule by way of security for the repayment of the said sum. To assign a chattel is to pass the property in it. Therefore we see that by the very terms of the document the property passes. And if that were the whole of the document, the right to possession would also pass; the property would carry the right to possession with it. But the stipulations contained in section 7 of the Act are incorporated in the bill of sale. That section says that "personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes:—(1) If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment." That derogates from the absolute right of the grantee, not from his right to the property, for that, as I have said, passes, but from his right to take possession. Although he has the property, he is not to take possession except for certain causes. If the grantor makes default in payment of any of the instalments secured by the bill of sale, then the grantee has the right to take possession of the goods. The section then goes on to provide that the grantor may within

five days from the seizure of the goods apply to the High Court, and the court, if satisfied that by payment or otherwise the cause of seizure no longer exists, may restrain the grantee from removing or selling the goods. This is a summary remedy given to the grantor in the place of the old chancery remedy —viz., a suit for redemption. And the courts have held that, if the grantor does not apply under this proviso within the five days, he loses his summary remedy, though he does not lose his equitable remedy: he may still bring his suit for redemption.

The result is that, if the grantor pays the money at the right time in accordance with the terms of the bill of sale, the grantee cannot seize the goods; if he does, he is liable to an action of trespass. And if at the right time the grantor goes with the money ready, and properly tenders all that he is bound to pay, such tender is, for the purpose of fixing the rights of the parties, equivalent to payment; and if the grantee rejects such tender and seizes the goods, he is liable to an action of trespass. But if the grantor has neither paid the money at the right time, nor tendered payment and been refused, section 7 says that the grantee may seize and take possession of the goods. If he does so, the grantor cannot maintain an action of trespass against him, for he has the property in the goods and also the right to the possession: the goods are in contemplation of law his goods. An action of trespass lies for a wrongful interference with the plaintiff's possession or with his right to immediate possession. Here the plaintiff has neither possession nor the right to immediate possession; for she neither paid the money at the right time, nor did she make a proper tender, and therefore the defendant became entitled to possession. The plaintiff says she tendered the money afterwards. But that is not sufficient; it was too late; and besides that it was not an unconditional tender. The plaintiff, therefore, cannot maintain an action for trespass, and the judgment on the common law claim is, in my opinion, wrong, and, so far as that is concerned, the appeal must succeed.

Then we come to the equitable claim, as to which the Queen's Bench Division is now, of course, bound to administer equitable remedies. The rule in equity has always been that a mortgagor can maintain a redemption suit on terms of paying principal and interest, and the mortgagee's costs and expenses, and the costs of the redemption suit. Unless there has been extortion on the part of the mortgagee, the plaintiff can only obtain redemption on those terms. The learned judge did not impose on the plaintiff the term that she should pay the costs of the redemption suit. In that respect we think the judgment should be varied. As to the injury to the goods, we think that the damages which the jury gave in respect of the injury caused by the defendant's negligence might have been recovered in a suit for redemption. The plaintiff is therefore entitled in the redemption to be allowed the amount of those damages—viz., £10. As the appeal has substantially succeeded, the plaintiff must pay the costs of the appeal, and also the costs of the action.

BOWEN and A. L. SMITH, L.JJ., concurred.

Judgment varied.

Solicitor for the plaintiff, *John Westcott.*

Solicitor for the defendant, *O. C. Kent.*

High Court of Justice.

Chan. Div. } North, J. } Feb. 18.

In re EASTERN AND AUSTRALIAN STEAMSHIP CO. (*a.*)

Company—Reduction of capital—Payment of shares by appropriation of reserve fund—Companies Act, 1867, *ss.* 9, 11, 13, 14, 25—*Companies Act*, 1877, *ss.* 3, 4.

A company set aside a reserve fund, and expended the greater part thereof in improving their property. On a further issue of shares the existing shareholders were credited with a number of shares as fully paid up equal in value to the amount of the reserve fund, which was carried to the capital account in the books of the company. On petition by the company for reduction of capital,

Held, that, as the proposed reduction of the capital of the company did or might involve the diminution of liability in respect of unpaid capital, the petition must stand over until creditors had been advertised for.

Petition.

This company was registered on the 10th of August, 1880, with a nominal capital of £200,000, divided into 20,000 shares of £10 each. The articles of the company gave it power to reduce capital. Article 78 provided that the directors should, out of the net earnings of the vessels of the company, after payment of current expenses, &c., set apart in each year such sums as the company in general meeting might direct, and, unless and until otherwise determined, such sums as they might deem expedient, to be accumulated as a reserve fund, to be invested as therein mentioned, and that subject thereto dividends might be declared with the sanction of an ordinary general meeting. Article 79 gave the directors a discretionary power to apply in the purchase of additional vessels, or otherwise in extending the company's trade, all or any part of the reserve fund for the time being. Article 80 provided that no dividends should be payable except out of the profits arising from the business of the company, and that no dividends should carry interest against the company, and article 81 gave power to the company to deduct from dividends anything payable by a person who otherwise would be entitled to a dividend.

In 1883 5,000 shares only had been issued, which were all fully paid up, and at that time the directors had set apart a reserve fund amounting to £50,000. This had, however, been nearly all applied in improving the company's fleet of steamers.

On the 1st of May, 1883, the directors sent round a circular in which it was proposed to issue the remaining 15,000 shares, firstly, by dividing the reserve fund as it stood at £50,000 amongst the existing shareholders, allotting to each one share of £10 fully paid up for every share held, which would absorb 5,000 shares; and, secondly, by the issue of the remaining 10,000 shares at £10 each. This scheme was ratified by the company in two general meetings, and in pursuance thereof the reserve fund was carried over to the capital account in the books of the company, and in respect thereof 5,000 shares were allotted to the existing shareholders *pro rata* credited as fully paid up. No shareholder declined to take these shares, 4,895 shares were also issued and allotted for cash at £10 each.

In 1892, owing to depreciation in the value of shipping property, the company had lost some £75,000, and in October and November a special resolution was passed by the company for the

(*a.*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

reduction of its capital from £200,000 divided into 20,000 shares of £10 each to £100,000 divided into 20,000 shares of £5 each, by cancelling capital which had been lost or was unrepresented by available assets to the extent of £5 per share upon each of 14,895 issued shares, and by reducing the nominal amount of all the shares to £5 each.

This was a petition by the company for the confirmation by the court of the above resolution, and it stated that the proposed reduction did not involve the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital.

Cozens-Hardy, Q.C., and *T. K. Young*, for the company.—The 5,000 shares have been fully paid for in cash by the appropriation of the reserve fund, which must be deemed to be a payment to the shareholders by way of dividend, and a repayment by them for their new shares.

They cited *Bouch* v. *Sproule*, 36 W. R. 193, 12 App. Cas. 385; *In re Bridgwater Navigation Co.*, [1891] 2 Ch. 317, 39 W. R. Dig. 56.

NORTH, J.—I have no doubt that what has been done here was done with perfect fairness and perfect good faith, and that there is nothing whatever which can be said against the directors, except that it may be said they did not observe what the law requires, and that they have not accomplished the result of making these newly-issued shares, shares that are fully paid up. In the present case the articles provide:—[His lordship read the articles above set out, and continued:—] Under that article 79, as it stands, the directors are bound in each year to set apart such sums as the company tell them to set aside, or in the absence of such directions such sums as they in their discretion think fit to be accumulated as a reserve fund. Now it may be that if such a state of things had happened here as happened in the *Bridgwater case*, and everything else had been cleared off, and there was a surplus fund to be distributed among preference and ordinary shareholders, that this reserve fund, when every purpose had been accomplished and the company had come to an end, would have to be divided between the ordinary and preference shareholders according to their rights. But we are dealing now with a company which has not come to an end, and which the directions of the articles bind, under which a reserve fund is to be accumulated, and is to be applied in a certain way, and it is only subject to the setting apart of this reserve fund that dividends may be declared; and I do not see how, if in one year, or two or three or four years, the company had required, or the directors had determined, that a certain reserve fund should be set aside, after that the directors could proceed to undo that without altering the articles, and divide as dividend what was being accumulated under the express provision of the articles as a reserve fund.

But, in the next place, supposing they could have done so, I do not see here that they have ever done it, because what happened was this: Having issued 5,000 shares, they wanted to issue 15,000 more; 10,000 were issued in a way which is unexceptional for this purpose, but 5,000 shares were issued by appropriating to each holder of the first 5,000 issued one new share fully paid up, and the way it is done is not by any alteration of the articles, and by no construction can their resolution operate as an alteration of the articles, because it is admitted that it was not so passed as to be capable of altering them. It must, therefore, simply stand as carrying out the articles in their original form. Then the intention is shown clearly on the circular issued to the shareholders. [His lordship read the circular, and continued:—] That would have exhausted the reserve fund, which at that time was £50,000, and it is done, not by applying it for any purpose mentioned in the articles, but simply by giving each shareholder credit for a corresponding amount. Then the petition states that, anticipating their proposals with regard to the reserve fund would be adopted by the shareholders, the directors had in fact applied the whole, or the greater part thereof, in the improvement of the company's fleet prior to the 30th of June, 1883, and I have not the least doubt that that matter was mentioned by the directors to the meeting at which it was resolved to carry out the resolution. The result is this, that, so far from dividing the reserve fund among the shareholders, if they had power to do so, it is the very last thing that they intended to do, and, what is more, they could not have done it if they wished, because they said it had already been laid out, for purposes no doubt advantageous to the company, but in such a way as rendered it absolutely impossible to divide it by way of dividend, and there is not any declaration whatever of any application of any part of this fund by way of dividend to a shareholder, and if he had come to ask for it as dividend the answer would have been "No." There has been no dividend declared, nor any fund out of which to declare it, and I think the words quoted from Lord Herschell's judgment in *Bouch* v. *Sproule* apply precisely to the present case, though the facts are different. His lordship there said: "I am of opinion that the company did not pay, or intend to pay, any sum as dividend, but intended to, and did, appropriate"—"the undivided profits," he said there, I will call it the reserve fund, because that is the real meaning of it—"did appropriate the reserve fund dealt with as an increase of the capital stock in the concern."

The result is that I cannot proceed upon this petition as it stands. The shares are, or at any rate may be, shares upon which nothing has been paid, and I cannot, therefore, proceed with the petition except upon the footing that creditors are advertised for in the usual way.

I will put it in this way. The court, being of opinion that the proposed reduction of the capital of the company does or may involve the diminution of liability on unpaid capital, directs the petition to stand over until the creditors have been advertised for. I have only heard one side, and therefore do not wish to put on record my opinion as to what the construction of what has been done is, and I propose to add the words does or may for that purpose.

Solicitors, *Druces & Attlee*.

Chan. Div. North, J. } Feb. 18.

CHESTON v. WELLS. (a.)

Practice — Mortgage — Foreclosure — Receiver — Personal order for payment against mortgagor — Form of judgment.

In a foreclosure action, a receiver having been appointed; upon judgment, in default of appearance, for a personal order for payment against the mortgagor, and for foreclosure, the plaintiff must produce an affidavit to the registrar that since filing his statement of claim nothing has been received on account of principal or interest. As there were no special circumstances in this case, a proviso to the effect that "any person redeeming, or the plaintiff in event of foreclosure, might apply in

(a.) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

chambers for transfer of any money in court to the credit of the action or in the hands of the receiver," was not allowed to be inserted.

Short cause.

This was an action for foreclosure of a mortgage of land and houses at Felixstowe, in which the plaintiff claimed an account against the defendant in respect of the mortgage and a further charge, and payment of two principal sums of £600 and £50, with interest from November 4, 1891, to judgment, less a small sum already paid for interest, and foreclosure or sale.

The writ was issued in December, 1892, the interest being in arrear for twelve months. The defendant did not enter an appearance, and on January 27, 1893, a receiver was appointed. On February 1, 1893, the plaintiff filed his statement of claim.

This was a motion in default of appearance for personal judgment against the defendant for principal and interest, an account, and foreclosure in default of payment within six months after certificate.

G. Henderson, for the plaintiff.—I ask that the following proviso may be inserted in the judgment:—"Let any person redeeming the premises under the provisions of this order, or the plaintiff in the event of foreclosure, be at liberty to apply to the judge in chambers for payment and transfer of any moneys in court to the credit of this action or in the hands of the receiver." A similar proviso was inserted in the judgment in *Coleman* v. *Llewellyn*, 35 W. R. 82, 34 Ch. D. 143.

NORTH, J.—I decline to insert the proviso. In *Coleman* v. *Llewellyn* it was pointed out by the Court of Appeal that the proviso which was there inserted in the order must have been put in for some special reason by the judge, which makes a broad distinction between that case and the case of *Jenner-Fust* v. *Needham*, 34 W. R. 709, 32 Ch. D. 582, which lays down the general rule that in ordinary cases where the receiver receives rents between the date of the certificate and the day fixed for redemption, those rents must be taken into account, and a further time allowed for redemption. I am not disposed to adopt a course which might enable the plaintiff, if the receiver's accounts are not passed until after foreclosure, to put into his pocket, money which was in the receiver's hands at the date of the foreclosure and which ought to be brought into account with the mortgagor. As there are no special circumstances here, there must be judgment as claimed, but without the proviso, and the plaintiff must produce an affidavit to the registrar that since filing the statement of claim nothing has been received on account of principal or interest.

Solicitors, *Jones, Hall, & Manning.*

Chan. Div. North, J. — Jan. 27.

BAKER *v.* WILLIAMS. (*a.*)

Vendor and purchaser—Specific performance—Declaration of lien—Rescission.

A vendor having obtained judgment for specific performance of an agreement for sale and a declaration of lien, with liberty to apply,

On motion for rescission in lieu of enforcing the lien,

Held, that the agreement might be rescinded.

Henty *v.* Schroeder, 27 *W. R.* 833, 12 *Ch. D.* 666, *distinguished.*

(*a.*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

Motion.

This was an action brought by a vendor to obtain specific performance of an agreement dated the 30th of November, 1890, for the purchase of certain freehold property. £40 had been paid as deposit. At the trial of the action the defendant did not appear, and the plaintiff obtained judgment for specific performance. The judgment directed the usual account to be taken, and that the defendant should pay the balance found due from him, and also declared that the plaintiff was entitled to a lien upon the property, with liberty to apply to enforce such lien. The chief clerk's certificate found a balance of £4,162 due from the defendant. The defendant made default in payment of the said amount.

J. A. Hay, for the plaintiff, now moved that the agreement of the 30th of November might be rescinded, that all further proceedings in the action might be stayed, and for the costs of the action and the motion. [He referred to Seton on Decrees, 4th ed., pp. 1329, 1330, and *Henty* v. *Schroeder*, 27 W. R. 833, 12 Ch. D. 666.] [NORTH, J.—As the purchaser has chosen his remedy by lien, can I now give him rescission?] Stirling, J., made an order similar to that asked for against the same defendant in an unreported case of *Hudson* v. *Williams*, 1891, H., 1,622.

The defendant did not appear to the motion.

NORTH, J., distinguished the present case from that of *Henty* v. *Schroeder* and the cases referred to in Seton, on the ground that in none of those cases did it appear, as in this case, that the decree for specific performance contained a delaration of lien and liberty to apply, and said that if the order made by Stirling, J., was produced to the registrar he would follow it. His lordship accordingly made the order asked for, subject to such production.

Solicitors, *Patersons, Sons, & Candler.*

Chan. Div. Kekewich, J. — Feb. 25; March 4.

In re WYTHES.
WEST *v.* WYTHES. (*a.*)

Settlement—Settled land—Equitable tenant for life—Right to possession of estate—Custody of title deeds—Settled Land Acts, 1882 *and* 1884.

The powers granted to, and the duties imposed on, a tenant for life by the Settled Land Acts raise a presumption, in favour of his title to possession, not before existing and render it incumbent on the court to provide that, if the estate and trustees can be adequately protected by reasonable safeguards, an equitable tenant for life should be let into possession.

An equitable tenant for life is entitled to the custody of the title deeds.

Adjourned summons.

This was a summons by the equitable tenant for life under the will of the testator to be let into possession of two freehold properties, forming part of the testator's real estate, which was devised to the trustees of the will with large powers of management.

Rigby, S.G., and *Leverson*, for the applicant.—The equitable tenant for life is entitled to possession. Under the Settled Land Acts he has powers and authorities to exercise for the proper performance of which possession is necessary: *Tidd* v. *Lister*, 5 Madd. 429; *Baylies* v. *Baylies*, 1 Coll. 537; *Taylor* v.

(*a.*) Reported by FRANCIS T. DUKA, Esq., Barrister-at-Law.

Taylor, 23 W. R. 947, L. R. 20 Eq. 297, *Hoskins* v. *Campbell*, W. N., 1869, p. 59; *Temple* v. *Thring*, 56 L. T. N. S. 283, 35 W. R. Dig. 8. I am entitled to the custody of the title deeds: *In re Burnaby's Settled Estates*, 42 Ch. D. 621, 38 W. R. Dig. 183; *In re Bentley*, *Wade* v. *Wilson*, 33 W. R. 610, 54 L. J. Ch. 782.

Warmington, *Q.C.*, and *Munns*, for the reversioners.

Renshaw, *Q.C.*, and *R. J. Parker*, for the trustees.

KEKEWICH, J.—It would not have been satisfactory to make such an order as is asked, in chambers. The matter deserved the full attention which it has received in open court. Inasmuch as there was no hostile argument, there is no occasion for me to go through the authorities, or to recapitulate the rules deducible from them, or to explain in detail how far recent legislation has qualified them or rendered them inapplicable. On the other hand, it must be borne in mind that the applicant's case was placed before the court by the Solicitor-General as fully and with as much precision as if he was encountering opponents; and counsel for the trustees were prepared to insist on any point requiring consideration, not thus brought out. And not only during the arguments, but since, I have though it my duty to reflect on the case made by the applicant, and to consider all the authorities cited, with special reference to the provisions of the Settled Land Acts, on which the applicant's case was rested.

My conclusion is that the Solicitor-General's argument is sound, and that the old authorities, of which *Tidd* v. *Lister* may be taken to be the type, and which were summarized by the late Master of the Rolls in *Taylor* v. *Taylor*, may be treated as largely, if not altogether, abrogated by the Acts just mentioned. I must not be understood as saying that even now an equitable tenant for life—where the trustees in whom the legal estate is vested have duties of management and the like to perform—is entitled as a matter of course to be let into possession; but I intend to hold that the powers granted to and the duties imposed on a tenant for life, as defined by the Settled Land Acts—which definition clearly includes an equitable tenant for life, such as the applicant—have raised a presumption in favour of the title to possession which did not before exist, and have made it incumbent on the court to provide that, if the estate and the trustees can be adequately protected by reasonable safeguards, an equitable tenant for life shall be let into possession and be enabled personally to exercise these powers and discharge these duties, unless there be found some reason to the contrary far more urgent than is disclosed by any of the terms of this will. The point is, in a great measure, new. It was before Pearson, J., in *In re Bentley*, *Wade* v. *Wilson*, and I have no doubt, from a perusal of his judgment, that he would have decided this case as I am now deciding it. The title to possession once established, the custody of the title deeds appears to follow, unless, of course, there is, in any particular case, reason for distinction. As regards the deeds, the case of *In re Burnaby*, before Stirling, J., is distinctly in point. There was no opposition there, but the arguments for the applicant were based on the provisions of the Settled Land Acts, and the learned judge must be taken to have assented to them, as I do.

Solicitors, *Upton*, *Atkey*, & *Upton*; *Munns* & *Longden*; *Field* & *Co.*, for *Smith*, *Pinsent*, & *Co.*, Birmingham.

Chan. Div.
Vaughan Williams, J. } March 17, 18.

In re MINING SHARES INVESTMENT CO. (*a.*)

Company—Alteration of memorandum of association—Jurisdiction—Sanction of court—Winding-up court—Companies (Memorandum of Association) Act, 1890 (53 & 54 *Vict. c.* 62), *s.* 1—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *ss.* 1, 2, 32, *sub-section* (2)—*Order of Lord Chancellor of the 26th of March*, 1892.

The judge to whom the jurisdiction of the High Court in the winding up of companies has been assigned by the order of the Lord Chancellor of the 26th of March, 1892, *has jurisdiction to make orders under the Companies (Memorandum of Association) Act*, 1890.

This was a summons for directions which had been taken out and adjourned into court.

A petition had been presented under the Companies (Memorandum of Association) Act, 1890, for the purpose of obtaining the sanction of the court to certain alterations in the memorandum of the above-named company, which was a company with a capital paid up, or credited as paid up, of £10,000, and therefore for winding up purposes subject to the jurisdiction of the High Court.

The question was now raised whether Vaughan Williams, J., had jurisdiction to entertain the matter, or whether the jurisdiction was vested in the other judges of the Chancery Division unaffected by the transfer of the winding-up business to Vaughan Williams, J.

F. T. Procter, for the company.—This is the first case of a petition under the Companies (Memorandum of Association) Act, 1890, which has come before your lordship. No doubt there is jurisdiction vested in your lordship to make orders under the Companies (Memorandum of Association) Act, 1890. I think that the jurisdiction is, at any rate, concurrent with that vested in the other judges of the Chancery Division. Section 1, sub-section (1), of the Companies (Memorandum of Association) Act, 1890 (which Act was passed on the same day—namely, August 18, 1890—as the Companies (Winding-up) Act, 1890), says that the alteration of the memorandum is not to take effect until confirmed on petition by the "court which has jurisdiction to make an order for winding up the company." By section 32, sub-section (2), of the Companies (Winding-up) Act, 1890, it is provided that "In Part IV. of the Companies Act, 1862, and in this Act the expression 'the court,' when used in relation to a company, shall, unless the contrary intention appears, mean the court having jurisdiction under this Act to wind up the company." Section 81 of the Companies Act, 1862, now repealed (Companies (Winding-up) Act, 1890, s. 33), defines "the court" to mean, in the case of a company registered in England, "the High Court of Chancery," the jurisdiction of which has by virtue of the Judicature Acts been transferred to the High Court of Justice. The jurisdiction, therefore, starts *de novo* entirely. Section 1 of the Companies (Winding-up) Act, 1890 (sub-section 1), says: "The courts having jurisdiction to wind up companies in England and Wales shall be the High Court, the Chancery Courts of the Counties Palatine of Lancaster and Durham, the county courts, and the Stannaries Court." Section 2 of the same Act provides that, "subject to general rules and orders of transfer made under the authority of the

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

Supreme Court of Judicature Act, 1873, and the Acts amending it, the jurisdiction of the High Court under this Act shall, as the Lord Chancellor may from time to time by general order direct, be exercised either generally or in specified classes of cases, either by such judge or judges of the Chancery Division of the High Court as the Lord Chancellor may assign to exercise that jurisdiction, or by the judge who for the time being exercises the bankruptcy jurisdiction of the High Court." By an order of the Lord Chancellor and Lord Chief Justice dated the 26th of March, 1892, it was ordered that "Mr. Justice Vaughan Williams, sitting and acting for the purpose of the exercise of such jurisdiction" [*i.e.*, the jurisdiction of the High Court under the Companies (Winding-up) Act, 1890] "as an additional judge of the Chancery Division, and the said judge shall, on and after the day aforesaid [6th of May, 1892], "and until further order, be the judge of the High Court assigned for the purpose of the exercise of that jurisdiction pursuant to the Companies (Winding-up) Act, 1890." It follows that your lordship has jurisdiction to confirm a petition of this description, because you have jurisdiction to wind up. The winding-up court, if this company were ordered to be wound up, would be the High Court, of which your lordship is appointed an additional judge, and the winding up would come before your lordship in the natural course: *In re Islington and General Electric Supply Co.*, 36 SOLICITORS' JOURNAL, 487, where Chitty, J., said that the jurisdiction under the Companies (Memorandum of Association) Act, 1890, was not affected by the order of the 26th of March, but he only meant that the jurisdiction remained in judges of the Chancery Division. Chitty, J., did not intend to say that your lordship has not got jurisdiction.

Jones v. *The Swansea Benefit Building Society*, 29 W. R. 382, was also referred to.

VAUGHAN WILLIAMS, J.—In this case a petition has been presented under the Companies (Memorandum of Association) Act, 1890, and a summons for directions has been taken out which raises the question whether I have jurisdiction to deal with petitions under that Act. I have arrived at the conclusion that I have jurisdiction, and I do not purpose to decide anything more than that. I do not propose to say whether, in my judgment, the jurisdiction which I possess is exclusive, or whether it is jurisdiction which I possess concurrently with other judges of the Chancery Division; and I do not propose to discuss the question in such a way that I shall have to express an opinion that the jurisdiction is concurrent. All that was decided by Chitty, J., in *In re Islington and General Electric Supply Co.*, was, that he himself had jurisdiction under the Act as a judge of the Chancery Division. He did not decide—and the question was not before him—that I have not jurisdiction. If he had come to such a decision, and the question had been before him for determination, I might have been bound to follow his decision; but the question was not before him. In my judgment I have jurisdiction, and I propose to state very shortly the ground of my decision. Section 81 of the Companies Act, 1862, enacted that "the expression 'the court' as used in this part of the Act" (that is, Part IV., the part which deals with "Winding up of companies and associations under this Act") "shall mean the following authorities (that is to say)" (except in local cases) "in the case of a company registered in England . . . the High Court of Chancery." That jurisdiction was, by the Judicature Act, transferred to the High Court of Justice. Section 81 of the Act of 1862 was repealed by section 33 of the Companies (Winding-up) Act, 1890, and I may observe that that Act was passed on the very day on which the Companies (Memorandum of Association) Act, 1890, was passed.

Section 1, sub-section (1), of the Winding-up Act provides that "the courts having jurisdiction to wind up companies in England and Wales shall be the High Court" (and certain other courts), and sub-section 2 provides that in the case of a company like this having a capital of over £10,000 the petition shall be to the High Court. By section 2, subject to general rules and order of transfer, "the jurisdiction of the High Court under this Act shall, as the Lord Chancellor may from time to time direct, be exercised, either generally or in specified classes of cases, either by such judge or judges of the Chancery Division of the High Court as the Lord Chancellor may assign to exercise that jurisdiction, or by the judge who for the time being exercises the bankruptcy jurisdiction of the High Court." Therefore the winding-up jurisdiction is to be exercised by the judges mentioned in the section. By the order of the Lord Chancellor and the Lord Chief Justice of the 26th of March, 1892, it was directed that on and after the 26th of May, 1892, "the jurisdiction of the High Court under the Companies (Winding-up) Act, 1890, shall, until further order, be exercised by" me, "sitting and acting for the purpose of the exercise of such jurisdiction as an additional judge of the Chancery Division," and I am the judge of the High Court thereby assigned for the exercise of such jurisdiction. In the circumstances, it seems to me to be perfectly clear that I am a judge having assigned to me the jurisdiction of the High Court in the winding up of companies. Now section 1 of the Companies (Memorandum of Association) Act, 1890, provides that an alteration in a memorandum shall not take effect "until confirmed on petition by the court which has jurisdiction to make an order for winding up the company." I am of opinion that I am "the court having jurisdiction" to make such an order in the sense that the High Court has such jurisdiction, and that I am the judge to whom that part of the jurisdiction has been assigned. It has been suggested that the word "has" does not mean "has at the time of the presentation of the petition," but "has in relation to the point of time when the Act of Parliament was passed." I do not agree with that suggestion. In any case it would be a forced and unnatural construction, but it is especially so where the word is used in an Act passed on the very day on which an Act was passed repealing section 81 of the Companies Act, 1862, and pointing out what court shall exercise jurisdiction in winding up. In these circumstances I am of opinion that I have jurisdiction, and I shall refer the petition to chambers to be dealt with in the ordinary way.

Solicitor, *H. P. Cobb.*

Q. B. Div.
(Lord Coleridge, C.J., and A. L. Smith, L.J.) March 16.

RASSAM v. BUDGE. (*a.*)

Slander—Pleading—Embarrassing defence.

The defendant in an action of slander denied by his defence having spoken the words alleged in the statement of claim, and set out in his defence other words which he

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

admitted having spoken, and which he alleged were true in substance and in fact.

Held, that this pleading was embarrassing, and that the paragraphs containing the words admitted by the defendant ought to be struck out.

Appeal of the plaintiff from an order of Kennedy, J., in chambers, refusing to strike out certain paragraphs in the defendant's defence.

The action was brought by the plaintiff, a retired officer of the Indian Civil Service, for damages for libel and slander alleged to have been written and spoken by the defendant with reference to certain antiquarian researches in Asiatic Turkey, which the plaintiff had conducted on behalf of the Trustees of the British Museum. The defendant was a second-class assistant in the Egyptian and Oriental Department in the British Museum. The appeal related only to the portion of the case which dealt with the alleged slander.

Paragraph 6 of the statement of claim was as follows:—"In or about the month of June, 1891, the defendant falsely and maliciously spoke and published of the plaintiff and of him as such agent of the British Museum as aforesaid the words following, that is to say:—'(A) This is the kind of thing Rassam sent home. Other people got all the whole tablets; we got the fragments, mere rubbish. The overseers who carried on the excavations were his' (meaning plaintiff's) 'relations, and they picked out all the good tablets, and sold them to the Germans, Americans, and others. There was great dishonesty on the part of these men. Oh, yes, the overseers were his relations. David Thoma was his relation, and so were the others. He allowed these men to appropriate the perfect tablets from our excavations at Abou Hubba and elsewhere which belonged to the British Museum, and ought to have been sent here, and to sell them to the agents of the Berlin and other museums.'" Sections B and C of paragraph 6 contained other statements of a similar character alleged to have been spoken by the defendant. The innuendo alleged was that the plaintiff had habitually neglected his duties and grossly misconducted himself as agent for the British Museum, and had assisted others to defraud the trustees of the British Museum.

The defendant by his defence admitted that he had spoken the two first sentences of section A of paragraph 6 of the statement of claim, but denied having spoken the remainder of section A or any of sections B and C. He also pleaded that the words, if spoken, did not bear the defamatory meaning alleged and were privileged. Paragraph 10 of the defence was as follows:—"The defendant upon the said date" (viz., on the date when the words in section A of paragraph 6 of the statement of claim were alleged to have been spoken) "did say the following words: 'That the men employed by the plaintiff and the British Museum in the said excavation appropriated tablets and other antiquities and sold them to other persons and to agents of other museums. That tablets which must have been dug from the said sites had been sold to Germans and Americans, and that the British Museum had made a large purchase of such tablets in open market, and that the tablets so purchased were in a more perfect condition and more valuable than those forwarded directly to the British Museum.' The said words were and are true in substance and in fact, and were published on a privileged occasion as hereinafter appearing in paragraph 12 of this defence." Paragraph 14 of the defence was similar to paragraph 10, and contained the defendant's version of what was said by him on the occasion when the words in sections B and C of paragraph 6 of the statement of claim were alleged to have been spoken, and a plea that the defendant's version was true and privileged. The plaintiff applied to the judge in chambers to strike out paragraphs 10 and 14 of the defence, on the ground that they were irrelevant and raised immaterial issues, and disclosed no answer to the plaintiff's cause of action, but were embarrassing.

Kennedy, J., dismissed the application, and the plaintiff appealed.

Blake Odgers, for the plaintiff.—Paragraphs 10 and 14 of the defence ought to be struck out, for the defendant is endeavouring by them to raise immaterial issues. He does not justify the words in the statement of claim, but alleges that he used certain other words and that they were true. That is embarrassing to the plaintiff, and is not a good defence in an action of slander: *Brembridge* v. *Latimer*, 12 W. R. 878; *Alexander* v. *North-Eastern Railway Co.*, 13 W. R. 651.

Temple Franks, for the defendant.—*Brembridge* v. *Latimer* is not in point. That case only decided that where a plaintiff complained of certain passages in a newspaper article which imputed to him dishonesty as an election agent, it was no defence for the defendant to say that the article also contained charges of bribery which he was prepared to justify. In this case the plaintiff is suing on a definite conversation. The defendant admits that the conversation took place, but says that it is inaccurately set out in the statement of claim. He cannot pick out single passages in the plaintiff's version and say they are untrue, therefore he is bound to set up his own version.

He also cited *Millington* v. *Loring*, 29 W. R. 207, 6 Q. B. D. 190; *Whitney* v. *Moignard*, 24 Q. B. D. 630, 38 W. R. Dig. 109.

Lord COLERIDGE, C.J.—I am of opinion that this appeal must be allowed, and that paragraphs 10 and 14 of the defence must be struck out. The plaintiff complains that the defendant said various things about him, which *primâ facie* were libellous. It would be open to the defendant to plead, by way of defence, that he did not say the words complained of, or that he did do so, and that they were true or privileged. The defendant has, however, adopted a course which is most embarrassing to the plaintiff. He says, in effect, "I did not say exactly what you (the plaintiff) say I did, but I set out my version of the conversation and plead that it is true." If the defendant's version is substantially different from the plaintiff's, he is not guilty of the slander complained of, whereas if it is substantially the same he cannot successfully rely on the defence of not having spoken the words set out in the statement of claim. The trial of actions such as this would be much embarrassed if this plea were allowed to stand.

A. L. SMITH, L.J.—I am of the same opinion. Under the old practice a plea of not guilty and justification would have carried everything that the defendant wants to say. The defence raised by these two paragraphs is of a novel character, and one that ought not to be allowed.

Appeal allowed.

Solicitors for the plaintiff, *Emmet, Sons, Stubbs, & Melhuish.*

Solicitors for the defendant, *Lewis & Lewis.*

(1895) 1 Q.B. 626.

Q. B. Div.
(Lord Coleridge, C.J., and Cave, J.) Feb. 8, 9.

REG. v. JUSTICES OF GLOUCESTERSHIRE.
REG. v. LICENSING JUSTICES OF BRISTOL. (a.)

Licensing Acts—Refusal to renew licence—Appeal to quarter sessions—Notice of appeal—Service on "the other party"—Superintendent of police opposing renewal—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *s.* 31.

Where a superintendent of police has served notice of opposition to the renewal of a licence, and has appeared before the licensing justices in support of his opposition, he is "the other party" to the proceedings within the meaning of section 31 *of the Summary Jurisdiction Act,* 1879, *and a person aggrieved by the refusal of the justices to renew the licence must, as a condition precedent to the hearing of his appeal to quarter sessions, serve upon the superintendent notice of his intention to appeal.*

Reg. *v.* Justices of Glamorganshire, 40 *W. R.* 436, [1892] 1 *Q. B.* 621, *and* Price *v.* James, ante, *p.* 57, [1892] 2 *Q. B.* 428, *followed.*

The first of these two cases (which were heard together) was the argument of a rule *nisi* for the issue of a writ of *mandamus* to justices in quarter sessions to hear and determine an appeal from licensing justices. The applicants (Usher's Wiltshire Brewery, Limited) were the landlords of a licensed beerhouse in Bristol, of which Passmore was the tenant in the year 1892. Before the general annual licensing meeting, which was held on the 21st of September in that year, Passmore was duly served (in accordance with the provisions of section 42 of the Licensing Act, 1872, 35 & 36 Vict. c. 94) on behalf of the superintendent of police with notice of opposition to the renewal of his licence. At that meeting Passmore applied for a renewal, and the applicants (by their solicitor) supported his application; the superintendent of police opposed the application, which was refused by the justices. The applicants, as "persons aggrieved" within the meaning of the Licensing Act, 1828 (9 Geo. 4, c. 61, s. 27), served notice of their intention to appeal from this decision to quarter sessions upon the clerk to the justices, but not upon the superintendent of police. Upon the appeal coming on for hearing at the quarter sessions it was objected that the superintendent ought to have been served as being the "other party" to the proceedings within the meaning of section 31 of the Summary Jurisdiction Act, 1879. The court of quarter sessions upheld the objection and refused to hear the appeal. The applicants then obtained this rule *nisi*.

In the second case a rule against the licensing justices had been obtained by the same applicants upon the ground that they had refused to renew Passmore's licence for reasons other than those stated in the notice of opposition. This rule was sought to be made absolute in the event of the rule against the justices in quarter sessions being discharged.

The Summary Jurisdiction Act, 1879, s. 31, provides that a person authorized to appeal from the order of a court of summary jurisdiction to a court of quarter sessions may do so subject to (*inter alia*) the following condition:—"(2) The appellant shall within the prescribed time . . . give notice of appeal by serving on the other party and on the clerk of the said court of summary jurisdiction notice in writing of his intention to appeal, and of the general grounds of such appeal."

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

Poland, Q.C., and *A. T. Lawrence*, for the justices in both cases, showed cause against the rules.—It has been decided by *Reg.* v. *Justices of Glamorganshire*, 40 W. R. 436, [1892] 1 Q. B. 621, that the procedure under the Summary Jurisdiction Acts applies to appeals from licensing justices to quarter sessions. Under section 31 of the Summary Jurisdiction Act, 1879, upon any such appeal notice of the intention to appeal must be served upon "the other party." In this case the superintendent of police appeared before the licensing justices and opposed the renewal; he is, therefore, the other party, and ought to have been served. In *Price* v. *James*, where the appeal was by way of special case under section 33 of the Summary Jurisdiction Act, 1879, the superintendent of police was under similar circumstances held to be the proper respondent to the appeal. As to the second rule, the applicants had their remedy by appeal to quarter sessions, and therefore no *mandamus* can go to the licensing justices to rehear the case: *Reg.* v. *Smith*, 21 W. R. 382, L. R. 8 Q. B. 146.

Gwynne James, for the applicants, in support of the rules.—This case is distinguishable from the cases of *Reg.* v. *Justices of Glamorganshire* and *Price* v. *James*. "Party" in section 31 of the Summary Jurisdiction Act, 1879, means "party to the proceedings before the court of summary jurisdiction"; the superintendent of police was not a party to those proceedings, neither were the applicants, for the application to the justices was by the tenant, not by the applicants, who are his landlords. The applicants not being parties to the proceedings before the justices, there can be no "other party" as far as they are concerned, and, therefore, there is no one whom they are bound to serve. It would be a great hardship if the appellants, in any case of a refusal to grant or renew a licence, were obliged to serve an unlimited number of persons who had opposed the grant or renewal. The procedure under the Summary Jurisdiction Acts is not intended to apply so as to work hardship to persons who have a statutory right of appeal under section 27 of 9 Geo. 4, c. 61: *per* Fry, L.J., in *Reg.* v. *Justices of Glamorganshire*. *Price* v. *James* only decides that where the appeal is by way of special case the person who opposed is the proper respondent, and not the justices who have stated the case. That case has, therefore, no application to the present. As to the second rule, which is only asked for in case the first is discharged, the licensing justices exceeded their jurisdiction by deciding on grounds other than those stated in the notice of objection. *Mandamus* therefore lies.

Lawrence replied.

Lord COLERIDGE, C.J.—In the case against the justices of Gloucestershire the objection taken to the hearing of the appeal by the court of quarter sessions was that no notice of the intention to appeal was served upon the other party. That notice is necessary under section 31 of the Summary Jurisdiction Act, 1879, a provision which was extended by subsequent Acts to appeals in licensing cases. It is clear that under that Act notice of the intention to appeal must be given to "the other party." Who is "the other party"? That has in effect been decided by the case of *Price* v. *James*. In that case the Lords Justices held that where the superintendent of police has been the person who has served his notice of objection and has appeared before the justices and opposed the renewal of the licence, he is in fact "the other party." As Bowen, L.J., points out, the justices ought not to be made respondents in a case which is to be stated by them, and he goes on, in effect, to say that the respondent must be the other party to the

proceedings, and that the superintendent of police who appeared and objected was the other party. Here, too, the superintendent was the other party; he was the person who conducted the opposition to the licence; it was with him that the persons who alleged that they were aggrieved by the decision of the justices had to deal. It appears to me clear from the words of the statute and from the decisions that notice of the intention to appeal ought to have been given to the superintendent of police; that notice was not given, and therefore the appeal could not be heard.

Then it is said that, the appeal having failed from the absence of this notice, a *mandamus* ought to issue to the licensing justices to rehear the case. The answer to that contention is that the proper remedy of the applicants is by appeal to quarter sessions, and if they have lost that remedy through want of the proper notice, they are not entitled to obtain any *mandamus* against the licensing justices.

I am of opinion, therefore, that both rules must be discharged.

CAVE, J.—I am of the same opinion. *Reg.* v. *The Justices of Glamorganshire* has decided that the procedure under the Summary Jurisdiction Acts applies to appeals from licensing justices, and that is really an end of this case. For it is clear to my mind, even apart from the case of *Price* v. *James*, that the superintendent of police was "the other party" here, for he was the person who gave notice of opposition and appeared before the licensing justices and opposed the renewal of the licence. I quite agree that, if authority be needed, *Price* v. *James* is an authority for this view.

As to the rule against the licensing justices, I agree that it must be discharged for the reasons which my lord has given.

Rules discharged.

Solicitor for the respondents, *H. M. Phillips*, for *J. Holmes Gore*, Bristol.

Solicitors for the applicants, *Meredith & Co.*, for *G. Pearson*, Bristol.

Q. B. Div.
(Lord Coleridge, C.J., and Cave, J.) Jan. 18; Feb. 8.

REG. v. KENNEDY. (a.)

Lands Clauses Acts—Compulsory taking of land—Compensation—Notice to treat—No steps taken under notice—Possession taken—Tenant's interest in land taken—At what date interest is to be calculated—Lands Clauses Act, 1845 (8 *Vict. c.* 18), *s.* 121.

A notice to treat was given by a railway company for a strip of land which formed part of lands held by the tenant under a lease. Nothing was done under this notice to treat, but about a year afterwards the company required and took possession of the strip under section 85 *of the Lands Clauses Act*, 1845. *At the time the notice to treat was given the tenant had an interest for more than a year, but at the time the strip was taken he had an interest for less than a year in the strip taken. The tenant claimed compensation for the strip taken, and for severance damage.*

Held, that the time at which the tenant's interest was to be considered was the time when the strip was taken under section 85, *and not the time when notice to treat was given, under which nothing was done, and as at the former time the tenant had an interest in the strip of land less than for a year, a magistrate had jurisdiction to assess the compensation under section* 121 *of the Lands Clauses Act*, 1845.

Rule for a *mandamus* to a metropolitan police magistrate commanding him to proceed to determine the amount of compensation to be paid by the Bexley Heath Railway Co. to Colonel North for the value of his unexpired term or interest in certain lands in the parish of Eltham and for the damage done to him in his tenancy by severing the lands held by him or otherwise injuriously affecting the same by reason of the execution of the works of the company.

The solicitor to the railway company filed an affidavit, which contained the following admitted facts:—

By certain Acts of Parliament the Bexley Heath Railway Co. were empowered to make compulsory purchase of certain lands in the parish of Eltham and county of Kent.

Part of the land required for the construction of the line authorized by the said Acts was Crown land, let by the Crown to Colonel North by a lease dated the 5th of February, 1889, and by this lease Colonel North had a term of thirty years from the 10th of October, 1886, but under this lease the lessor reserved "the power, for the purpose of sale or exchange, or for building or making roads or drains, or for accommodation purposes, or for any other purpose than that for which these presents are demised, or in case the said right and liberty of sporting over the said premises shall at any time during the tenancy thereof be required by the lessor for any other purpose than that of letting the sporting at any time or times, upon giving to the lessee three calendar months' previous notice in writing of the intention so to do, to determine the tenancies of the whole or such part or parts."

On the 14th of May, 1891, and the 15th of August, 1891, the railway company duly served notices to treat for certain portions of the land occupied by Colonel North under the lease.

On the 30th of June, 1892, the lessor, the Crown, served on Colonel North notice under the lease requiring possession at the expiration of three months of that portion of the Crown land required for the construction of the railway, being the same portion of land as that included in the notices to treat.

On the 20th of July, 1892, the company required and took possession of the said land referred to in the notices to treat in the manner provided by the 85th section of the Lands Clauses Consolidation Act, 1845.

On the 21st of October, 1892, the company took out a summons before the metropolitan police magistrate sitting at Woolwich to hear and determine the amount of disputed compensation to be paid by the company to Colonel North, as provided by section 121 of the Lands Clauses Consolidation Act, 1845.

On the 28th of October, 1892, the parties appeared before the magistrate, when it was contended on behalf of Colonel North that he had an interest under the lease greater than as a tenant "for a year or from year to year," and that therefore the police magistrate had no jurisdiction to hear the case under the 121st section of the Act.

The railway company contended that Colonel North has no greater interest than as a tenant "for a year or from year to year" within the meaning of section 121 of the Act, and that therefore the amount of compensation for the value of his unexpired term or interest should be determined in the manner provided by that section.

Colonel North claimed, not only compensation in respect of the lands taken, but compensation for injuriously affecting other lands held by him under the lease.

(a.) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

On the 4th of November, 1892, the learned magistrate decided that he had no jurisdiction to hear the case, and in an affidavit filed by him he stated:—"At the date of the notice to treat—which, as I understand, determines the time at which the value of the owner's interest is to be considered—no notice on the part of the Crown had been served on Colonel North requiring possession at the end of the three calendar months, and it seemed to me that, until such notice was given, Colonel North's interest under the lease was greater than that of a tenant from year to year, and consequently not within the terms of section 121 of the Act."

A rule for a *mandamus* was then obtained at the instance of the promoters of the railway company.

Section 121 of the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), provides:—"If any such lands shall be in the possession of any person having no greater interest therein than as tenant for a year or from year to year, and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands, and for any just allowance that ought to be made to him by an incoming tenant, and for any loss or injury he may sustain, or if part only of such lands be required, compensation for the damage done to him in his tenancy by severing the lands held by him, or otherwise injuriously affecting the same; and the amount of such compensation shall be determined by two justices in case the parties differ about the same."

Lawson Walton, Q.C., and *Forman*, on behalf of Colonel North, showed cause against the rule.—There are two points raised here: it is said in the first place that, as this lease could be determined at any time on giving three months' notice, therefore it originally was a lease for less than a year, so that, even before the notice to treat was given the tenant had an interest for less than a year. The real question, however, is that the time at which the tenant's interest is to be looked at for the purpose of assessing compensation, is the date of the notice to treat, and not the date when possession was taken under section 85: *Reg.* v. *Stone*, 14 W. R. 791, L. R. 1 Q. B. 529; *Reg.* v. *Great Northern Railway Co.*, 25 W. R. 41, 2 Q. B. D. 151; *Tyson* v. *Mayor of London*, 20 W. R. 112, L. R. 7 C. P. 18. That being so, the tenant had—at the date of the notice to treat—an interest in the strip taken, larger than an interest "for a year or from year to year," and therefore the magistrate had no jurisdiction under section 121 of the Act to assess the compensation, but Colonel North was entitled to have the same settled by a jury or an arbitrator under section 68. Moreover, there was also a claim for severance damage as well as for the strip taken, and as the compensation must be assessed once for all, this could not be settled under section 121.

E. Boyle (*G. Elliott* with him), for the promoters, in support of the rule.—As to the first point, as the lease was determinable in certain events—in fact, in any event—by a three months' notice, it was therefore never at any time larger than an interest for a year, so that, if that were so, the magistrate would have jurisdiction under section 121. As to the second point, and that is the real point of the case, the notice to treat was given, but nothing whatever was done under it by either party, and then a year afterwards notice was given requiring possession under section 85, and possession was taken under that section. At the time possession was required and taken under section 85 the tenant had an interest for less than a year—namely, for two months, and our contention is that the time at which the tenant's interest is to be estimated is the date at which possession was taken; and, that being so, the magistrate had jurisdiction under section 121 to assess the compensation.

Feb. 8.—The judgment of the COURT (Lord COLERIDGE, C.J., and CAVE, J.) was delivered by

CAVE, J.—This case was argued before my lord and myself on the 18th of January, and we took time to consider our decision, which I have now to deliver.

The matter was an application to compel a police magistrate to hear and determine the amount of compensation to which Colonel North was entitled under the following circumstances.

The point in dispute was whether the question was one which could be heard and determined by a police magistrate, or whether Colonel North was entitled to have a jury summoned for the purpose of assessing his compensation, and the question whether he is entitled to one or the other depends upon his interest in the property in question.

Now originally Colonel North had a lease for thirty years, which was dated in February, 1889, and that, of course, gave him a greater interest than for a year, or from year to year. There was, however, a power in the lease to the lessor, the Crown, to determine the lease on giving three months' notice in certain events, and with certain limitations. On the 14th of May, 1891, the Bexley Heath Railway Co. gave Colonel North a notice to treat for certain portions of the property comprised in this lease. Nothing further was done under that notice—I mean nothing was done in the way of summoning a jury to assess compensation. The railway company took no steps to summon a jury, and Colonel North took no steps to compel them to do so, and matters remained simply in that condition. Notice to treat given; nothing done upon it.

On the 30th of June, 1892, the Crown exercised the power contained in the lease to give notice, and they gave a notice with respect to that portion of the land which the railway company had given notice to treat for, and the result of that naturally was that Colonel North's interest in that portion of the land, which originally had been an interest for thirty years less the time he had actually enjoyed it, became an interest for three months only. On July 20, 1892, the railway company gave notice that they wanted possession under section 85 of the Act, and I believe on that same day, the 20th of July, they took possession of the land in the manner provided for by that section.

Now, that being so, they were bound at once to take proceedings for the purpose of having compensation assessed, and on the 21st of October they took out a summons before a metropolitan police magistrate to have the amount of compensation heard and determined. Colonel North appeared upon the return day of the summons and contended that the magistrate had no jurisdiction, and that he was entitled to have a jury summoned for the purpose of assessing payment. No doubt if the proceedings had been taken under the notice to treat, and before the Crown notice on the 20th of June, 1892, had been given, the contention of Colonel North would have been perfectly right. But proceedings were not taken under the notice to treat; they were taken in pursuance of the company's having got possession in July, 1892, and that does undoubtedly raise a point of some little nicety which we thought it advisable to take time to consider.

Some cases were cited upon the matter, but none of them have any very strong bearing on the point;

and, in point of fact, one is driven back to the construction to be placed upon the statute.

If the proceedings had been wholly taken under section 85 it is clear that at the time when possession was taken the interest of Colonel North was an interest for less than a year, and that consequently the magistrate would have had jurisdiction. Now does it affect the case that a previous notice to treat had been given? Upon consideration we have arrived at the conclusion that it does not. Nothing was done under that notice to treat. The company might have taken proceedings to settle compensation; Colonel North might have compelled them to take proceedings; but neither party acted, both apparently being content that matters should remain *in statu quo*, and it was not until after the Crown had given the notice to quit that the railway company took proceedings under section 85. Now I endeavoured to elicit from the learned counsel for Colonel North what his claim was, but could not do so, and the result was that I could not ascertain what the claim was, and I have arrived at the conclusion that Colonel North has no claim except for the loss of the right to occupy the particular piece in question from July, 1892, when possession was taken down to the expiration of his interest, which would be less than three months, and also for the severance occasioned by taking a part of his property during the same period. Now, if that is so, then it is clear that his actual interest is less than a year's interest, and that it comes within the principle of the statute, that the compensation in that case should be assessed by a police magistrate and not by a jury. Under these circumstances I am inclined to think that Colonel North cannot fall back upon the notice to treat under which nothing was done, but that the compensation must be assessed in the manner provided, where at the time when proceedings were commenced there is less than twelve months interest in the claimant. That being so, though the matter is not so clear as one would wish it to be, I come to the conclusion that the magistrate had jurisdiction, and that he ought to have proceeded to ascertain the compensation.

My lord authorizes me to say that he agrees in this judgment.

Rule absolute.

Solicitors for the company, *Dollman & Pritchard.*

Solicitor for Colonel North, *George Whale.*

Q. B. Div.
(Lord Coleridge, C.J., and Charles, J.) — Jan. 25.

MAYOR, ALDERMEN, AND BURGESSES OF SOUTHPORT v. MORRISS. (*a*.)

Shipping—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 318—*Navigation—Electric launch not having certificate carrying passengers on an artificial lake.*

The appellants were convicted by the justices of Southport on a charge that they, being the owners of an electric launch, did ply with more than twelve passengers on board without having a duplicate of a certificate of the Board of Trade put up in a conspicuous part of the vessel, so as to be visible to all persons on board the same, contrary to section 318 *of the Merchant Shipping Act*, 1854. *The vessel was an electric launch, owned by the appellants, in which passengers were taken for hire on pleasure trips on an artificial lake in a park also the property of the appellants.*

Held, that the electric launch was not within section 2 *of the Act, which enacts that the term "ship" shall include a "vessel used in navigation," and that the Act, therefore, did not apply, and the conviction was wrong.*

This was a case stated by the justices of the borough of Southport, in Lancashire. The information, which was preferred by the respondent, Morriss, against the appellants, the Mayor, Aldermen, and Burgesses of the said borough, was in the following terms:—"For that the said mayor, aldermen, and burgesses on the tenth day of August, one thousand eight hundred and ninety-two, at the borough aforesaid, being then the owners of a certain electric launch used for carrying passengers called *The Bonnie Southport*, unlawfully did allow the said electric launch to ply, and the said electric launch did then ply, with more than twelve passengers on board without having the duplicate of a certificate issued by the Board of Trade for such vessel under the Merchant Shipping Act, 1854, (being a certificate then in force and applicable to the voyage) put up in some conspicuous part of the said vessel so as to be visible to all persons on board the same, contrary to section 318 of the Merchant Shipping Act, 1854."

The case stated by the justices was as follows:

"1. At the hearing of the said information the appellants and respondent appeared and were represented by their solicitors, and the following facts were either proved before us or admitted by both parties.

"2. That the appellants were the owners of an artificial lake or piece of water on the foreshore in the said borough, a land-locked lake not open to the sea except at high spring tides, in or abutting on a park provided by them and laid out on the said foreshore, and the said lake had been excavated from the sand on the said foreshore to a depth of three feet or thereabouts, and was surrounded by a concrete wall or path. The lake is about half a mile in length and about 160 yards in width.

"3. That the said lake was used for boating purposes, and the appellants had placed on it for hire a certain vessel or launch called *The Bonnie Southport*, of about three tons burthen, capable of carrying twelve passengers and upwards, and propelled by electricity from accumulators charged by a direct current dynamo from a charging station.

"4. That the said launch had not been registered as a British ship under the provisions of the Merchant Shipping Act, 1854.

"5. That no duplicate of the certificate mentioned in section 318 of the Merchant Shipping Act, 1854, had been on the said 10th day of August, 1892, put up in any part whatsoever of the said launch as required by section 317 of the said Act, and no such certificate was in force for the said launch on the said 10th day of August, 1892, or had, indeed, ever been issued to such launch.

"6. That the said launch on the said 10th day of August, 1892, proceeded from the landing stage of the said lake on a trip round the said lake and back again to such landing stage, having on board twelve passengers and upwards—in fact there were on board between thirty and forty passengers.

"7. That each of the said passengers had paid the appellants, or their duly authorized officer or servant, the stipulated fare for such trip.

"8. On these facts we were of opinion that *The Bonnie Southport* was a passenger steamer plying with passengers within the meaning of the 318th section of the Merchant Shipping Act, 1854, and the Acts amending the same, and that the offence charged in the information was proved.

"9. And we, the said justices, adjudged and determined that the appellants, for their said offence,

(*a*.) Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

On the 4th of November, 1892, the learned magistrate decided that he had no jurisdiction to hear the case, and in an affidavit filed by him he stated:—"At the date of the notice to treat—which, as I understand, determines the time at which the value of the owner's interest is to be considered—no notice on the part of the Crown had been served on Colonel North requiring possession at the end of the three calendar months, and it seemed to me that, until such notice was given, Colonel North's interest under the lease was greater than that of a tenant from year to year, and consequently not within the terms of section 121 of the Act."

A rule for a *mandamus* was then obtained at the instance of the promoters of the railway company.

Section 121 of the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), provides:—"If any such lands shall be in the possession of any person having no greater interest therein than as tenant for a year or from year to year, and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands, and for any just allowance that ought to be made to him by an incoming tenant, and for any loss or injury he may sustain, or if part only of such lands be required, compensation for the damage done to him in his tenancy by severing the lands held by him, or otherwise injuriously affecting the same; and the amount of such compensation shall be determined by two justices in case the parties differ about the same."

Lawson Walton, Q.C., and *Forman*, on behalf of Colonel North, showed cause against the rule.—There are two points raised here: it is said in the first place that, as this lease could be determined at any time on giving three months' notice, therefore it originally was a lease for less than a year, so that, even before the notice to treat was given the tenant had an interest for less than a year. The real question, however, is that the time at which the tenant's interest is to be looked at for the purpose of assessing compensation, is the date of the notice to treat, and not the date when possession was taken under section 85: *Reg.* v. *Stone*, 14 W. R. 791, L. R. 1 Q. B. 529; *Reg.* v. *Great Northern Railway Co.*, 25 W. R. 41, 2 Q. B. D. 151; *Tyson* v. *Mayor of London*, 20 W. R. 112, L. R. 7 C. P. 18. That being so, the tenant had—at the date of the notice to treat—an interest in the strip taken, larger than an interest "for a year or from year to year," and therefore the magistrate had no jurisdiction under section 121 of the Act to assess the compensation, but Colonel North was entitled to have the same settled by a jury or an arbitrator under section 68. Moreover, there was also a claim for severance damage as well as for the strip taken, and as the compensation must be assessed once for all, this could not be settled under section 121.

E. Boyle (*G. Elliott* with him), for the promoters, in support of the rule.—As to the first point, as the lease was determinable in certain events—in fact, in any event—by a three months' notice, it was therefore never at any time larger than an interest for a year, so that, if that were so, the magistrate would have jurisdiction under section 121. As to the second point, and that is the real point of the case, the notice to treat was given, but nothing whatever was done under it by either party, and then a year afterwards notice was given requiring possession under section 85, and possession was taken under that section. At the time possession was required and taken under section 85 the tenant had an interest for less than a year—namely, for two months, and our contention is that the time at which the tenant's interest is to be estimated is the date at which possession was taken; and, that being so, the magistrate had jurisdiction under section 121 to assess the compensation.

Feb. 8.—The judgment of the COURT (Lord COLERIDGE, C.J., and CAVE, J.) was delivered by

CAVE, J.—This case was argued before my lord and myself on the 18th of January, and we took time to consider our decision, which I have now to deliver.

The matter was an application to compel a police magistrate to hear and determine the amount of compensation to which Colonel North was entitled under the following circumstances.

The point in dispute was whether the question was one which could be heard and determined by a police magistrate, or whether Colonel North was entitled to have a jury summoned for the purpose of assessing his compensation, and the question whether he is entitled to one or the other depends upon his interest in the property in question.

Now originally Colonel North had a lease for thirty years, which was dated in February, 1889, and that, of course, gave him a greater interest than for a year, or from year to year. There was, however, a power in the lease to the lessor, the Crown, to determine the lease on giving three months' notice in certain events, and with certain limitations. On the 14th of May, 1891, the Bexley Heath Railway Co. gave Colonel North a notice to treat for certain portions of the property comprised in this lease. Nothing further was done under that notice—I mean nothing was done in the way of summoning a jury to assess compensation. The railway company took no steps to summon a jury, and Colonel North took no steps to compel them to do so, and matters remained simply in that condition. Notice to treat given; nothing done upon it.

On the 30th of June, 1892, the Crown exercised the power contained in the lease to give notice, and they gave a notice with respect to that portion of the land which the railway company had given notice to treat for, and the result of that naturally was that Colonel North's interest in that portion of the land, which originally had been an interest for thirty years less the time he had actually enjoyed it, became an interest for three months only. On July 20, 1892, the railway company gave notice that they wanted possession under section 85 of the Act, and I believe on that same day, the 20th of July, they took possession of the land in the manner provided for by that section.

Now, that being so, they were bound at once to take proceedings for the purpose of having compensation assessed, and on the 21st of October they took out a summons before a metropolitan police magistrate to have the amount of compensation heard and determined. Colonel North appeared upon the return day of the summons and contended that the magistrate had no jurisdiction, and that he was entitled to have a jury summoned for the purpose of assessing payment. No doubt if the proceedings had been taken under the notice to treat, and before the Crown notice on the 20th of June, 1892, had been given, the contention of Colonel North would have been perfectly right. But proceedings were not taken under the notice to treat; they were taken in pursuance of the company's having got possession in July, 1892, and that does undoubtedly raise a point of some little nicety which we thought it advisable to take time to consider.

Some cases were cited upon the matter, but none of them have any very strong bearing on the point;

view by the way in which section 309 is expressed. Having regard to these sections and to section 303 I am of opinion that the Act does not apply to a case like the present. I concur in the rest of the observations which the Lord Chief Justice has made.

The conviction set aside.

Solicitors for the appellants, *Andrew, Mellor, & Smith*, for *J. Davies Williams*, Southport.

Solicitor in support of the conviction, *The Solicitor for the Board of Trade.*

Q. B. Div.
(Lord Coleridge, C.J., and Cave, J.) Jan. 14.

McKENZIE v. DAY. (a.)

Licensing Act, 1874 (37 & 38 *Vict. c.* 49), *s.* 17—"*Illegally dealing in*"—*Penalty.*

The provision in section 17 *of the Licensing Act*, 1874, *that persons found upon suspected premises entered by a constable in pursuance of a warrant to search for liquors sold or kept for sale contrary to law, shall be presumed to be guilty of "illegally dealing in intoxicating liquor" until the contrary be shown, is not confined to a seller, but applies also to a buyer, of such liquors.*

Special case stated by the stipendiary magistrate at Cardiff.

By the Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 17, a justice of the peace may, "if satisfied by information on oath that there is reasonable ground to believe that any intoxicating liquor is sold by retail or exposed or kept for sale by retail at any place within his jurisdiction," issue a search warrant, by virtue of which a constable may enter and search suspected premises for intoxicating liquor, and seize and remove any liquor found therein which there is reasonable ground to suppose is in such place for the purpose of unlawful sale, &c., and it is further provided as follows: "When a constable has entered any premises in pursuance of any such warrant as is mentioned in this section, and has seized and removed such liquor as aforesaid, any person found at the time on the premises shall, until the contrary be proved, be deemed to have been on such premises for the purpose of illegally dealing in intoxicating liquor, and be liable to a penalty not exceeding forty shillings."

Ellen Day was charged with illegally dealing in intoxicating liquor under the following circumstances: "A constable entering a private house in Mary Anne-street, Cardiff, on Sunday, the 16th of October, 1892, in pursuance of a warrant under the above section, found a woman named Ellen Riley in the act of handing beer to a man, and receiving money from him. The constable thereupon proceeded to collect the drinking vessels on the premises, when the defendant, who held one in her hand, said to him, "You shall not have this, I've paid for it."

The stipendiary magistrate was of opinion that the section referred only to persons selling intoxicating liquor, and that the defendant could not therefore be convicted of "illegally dealing," but on the application of the chief constable he stated a case for the opinion of the court.

B. F. Williams, Q.C., and *C. J. Jackson*, for the chief constable.—The learned magistrate was wrong in the view he took: the words "illegally dealing" in the section clearly apply to buying as well as selling. [They were stopped by the court.]

Brynmor Jones, for the defendant.—Illegal dealing applies only to a seller of intoxicating liquors: in all the dictionaries a "dealer" is defined as a "distributor," and that is the sense in which the word is used in the Licensing Act. The expression "illegal dealing" is used as an abbreviation for the larger expression, "sold by retail or exposed or kept for sale by retail," used in the earlier part of the section, and it could not have been the intention of the Legislature to create a new and separate offence by a mere paragraph in a section dealing with the right of search. The object of it really was to get over the difficulty in such cases of proving the actual seller, by providing that everyone present should be presumed to be the seller unless the contrary was proved.

Lord COLERIDGE, C.J.—In my opinion the magistrate should have convicted in this case. The plain meaning of the section is to include the buyer as well as the seller of intoxicating liquor; you must have two parties to a "dealing." The object of the Act of Parliament is to prevent in private houses what it has tried to put down in public-houses. It is a strong section, and the presumption is that when liquor is being dealt in in a private house, everyone is guilty of that illegal conduct, that is, of joining in an act which cannot be done by one alone, and it is illegal when done by two, unless they can rebut it. I am unable to see how it is possible to evade the Act, and that it clearly applies to this case. We therefore remit the case to the learned magistrate, with an order to him to convict the defendant.

CAVE, J.—I agree.

Order accordingly.

Solicitors, *Andrew, Mellor, & Smith*, for *Wheatley*, Town Clerk, Cardiff; *Riddell, Veysey, & Smith.*

House of Lords.

From C. A. (England). Dec. 16.

HICK v. RAYMOND & REID. (a.)

Shipping—Bill of lading—Delay in unloading—Demurrage—Reasonable time—Strike.

Where the terms of a bill of lading contain no stipulation as to the time within which the consignee is to discharge the ship's cargo, the obligation on him is to discharge within a reasonable time under the circumstances existing at the time of unloading.

Should the existing circumstances be extraordinary, owing to a strike preventing the obtaining of necessary labour, the consignee (provided the delay was not due to any act or default on his part) under such a bill of lading is not liable to the shipowner for damages for detention of the ship.

Decision of the Court of Appeal (*reported* sub nom. Hick *v.* Rodocanachi, 40 *W. R.* 161, [1891] 2 *Q. B.* 626) *affirmed.*

This was an appeal from a decision of the Court of Appeal (Lindley, Fry, and Lopes, L.JJ.), reported as *Hick* v. *Rodocanachi*, 40 W. R. 161, [1891] 2 Q. B. 626. The facts are shortly as follows:—The appellant was the owner of the ship *Derwentdale*; the respondents were consignees of the greater part of the cargo. The action was to recover damages from the respondents

(a.) Reported by JOHN P. MELLOR, Esq., Barrister-at-Law.

(a.) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

for detention of the ship. The charter-party provided that the ship was to proceed to London, that freight was to be paid on delivery of cargo, and contained various terms as to loading and demurrage, and a provision that the freighters' liability on the charter-party was to cease when the cargo was shipped (provided the same was worth the freight, dead freight and demurrage, on arrival at the port of discharge), the owner or his agent having an absolute lien on the cargo for freight, dead freight, &c., at the port of discharge. The bills of lading contained no reference to the charter-party, and no express limit of time for discharging the cargo, but they did state that the goods were to be applied for within twenty-four hours of the ship's arrival and reporting at the Custom House; otherwise the master or agent was to be at liberty to put into lighters and land at the expense of the owners of goods, and that the master or agent was to have a lien on the goods for freight and payments, &c., as therein provided. *The Derwentdale* arrived at Millwall on the 14th of August, 1889, and the consignees, Raymond & Reid, duly demanded delivery of the cargo, and on the 16th of August and the two following days they sent barges to receive the cargo, which was being duly unloaded. On the 20th of August the dock labourers struck, on the 23rd the lightermen, and on the 26th the strike became general, and it lasted until the 16th of September, after which the unloading was proceeded with with all despatch, and completed on the 18th of September. Notwithstanding the strike, the ship's crew were able and willing to do such part of the unloading as had to be performed by the shipowners, who were in no default. Raymond & Reid, the consignees, did all they could under the circumstances.

Mathew, J., held that, under the cesser clause of the charter-party, the freighters' (other defendants to the action) liability ceased upon the arrival of the vessel at the port of discharge, but that the consignees (the present respondents) were liable for the loss occasioned by the detention of the vessel, as they had not discharged the vessel within a reasonable time. Raymond & Reid appealed, and the Court of Appeal held that the consignees under the above bill of lading were not liable to the shipowner under the above circumstances, as the reasonableness of the time is to be measured by the circumstances existing at the time of unloading. The shipowner appealed.

Finlay, Q.C., and *Robson, Q.C.* (*Hollams* with them), for the appellant.—The contract bound the respondents to discharge the cargo within a reasonable time, *i.e.*, as is customary at the port of discharge. The owner of the goods must be taken to know the state of things at that port, and should provide the labour and appliances necessary. The consignees could have protected themselves against the consequences of a strike, but they did not, and they are liable for the non-delivery by their sub-contractors: *Wright* v. *New Zealand Shipping Co.*, 4 Ex. D. 165, 27 W. R. Dig. 199; *Admas* v. *Royal Mail Steam Packet Co.*, 7 W. R. 9, 5 C. B. (N. S.) 492; *Ford* v. *Cotesworth*, 17 W. R. 282, 18 *Ibid.* 1169, L. R. 4 Q. B. 127, L. R. 5 Q. B. 544.

Taylor v. *Great Northern Railway*, L. R. 1 C. P. 385, 14 W. R. C. L. Dig. 21; *Postlethwaite* v. *Freeland*, 28 W. R. 833, 5 App. Cas. 599; *Burmester* v. *Hodgson*, 2 Camp. 488; *Barker* v. *Hodgson*, 3 M. & S. 267; *Hill* v. *Idle*, 4 Camp. 327; *Castlegate Steamship Co.* v. *Dempsey*, 40 W. R. 335, 533, [1892] 1 Q. B. 54, 854, were cited or referred to. [*Good* v. *Isaacs*, [1892] 2 Q. B. 555, was referred to by Lord HERSCHELL in the course of the argument for the appellant.]

Sir R. E. Webster, Q.C., and *Bucknill, Q.C.* (*Leck* with them), for the respondents.—The delay was beyond the respondent's control, and therefore they are not responsible: Lord Blackburn in *Fraser* v. *Telegraph Construction Co.*, 20 W. R. 724, L. R. 7 Q. B. 566; *Hall* v. *Wright*, 27 L. J. Q. B. 345, 6 W. R. C. L. Dig. 84; *Taylor* v. *Great Northern Railway*; *Ford* v. *Cotesworth*; *Postlethwaite* v. *Freeland*. The case has been decided in America in our favour: *Cross* v. *Beard*, 26 N. Y. Rep. (12 Smith's App. Cas.), 85.

Robson, Q.C., in reply.

The House took time for consideration.

Dec. 16.—Lord HERSCHELL, L.C.—This action was brought by the plaintiff, who is a shipowner, against the defendants, who were consignees and holders of the bills of lading of a cargo carried on board the plaintiff's steamship *Derwentdale* to recover damages for the detention of the vessel during her discharge at the port of London. By the bills of lading the cargo was to be delivered in good order and condition at the port of London. On the 14th of August, 1889, the vessel arrived in the Millwall Dock, and was reported to the Custom House. The discharge of the wheat, of which the cargo consisted, commenced on the 16th of August. On the 20th of August a strike of dock labourers began in the port of London, and some of the labourers engaged in the discharge of *The Derwentdale* then ceased to work. The next day the strike became general, and no work was done in the discharge of the vessel until the 16th of September, when it was recommenced and finished on the 18th. Evidence was given that apart from the strike the discharge of the vessel would have been completed in six days. The dock company were employed by the respondents to discharge the vessel. Only the trimming of the cargo was to be the work of the shipowner, otherwise the entire obligation to discharge the vessel rested on the consignees.

At the commencement of the trial, in the course of the discussion which took place as to whether the case should be heard with or without a jury, certain admissions were made by the learned counsel, and I think it well to state at the outset what I take to be the facts either proved or admitted. I think it must be taken that throughout the whole of the time during which the discharge ceased, and the dock company were unable to supply labour to effect it, it was not possible for the respondents either to find any other person to provide the labour or themselves to obtain the necessary labour in any other way. If the terms of the bills of lading had required the discharge to be effected in any particular number of days, it is quite clear that the burden of the delay caused by the difficulty of obtaining labour would have fallen upon them, and it would have been no answer to a charge that they had failed to fulfil their obligation, to say that the circumstances had rendered it impossible for them to do so. The bills of lading in the present case contained no such stipulation, and, therefore, in accordance with ordinary and well-known principles the obligation of the respondents was that they should take discharge of the cargo within a reasonable time. The question is, Has the appellant proved that this reasonable time has been exceeded? This depends upon what circumstances may be taken into consideration in determining whether more than a reasonable time was occupied. The appellant's contention is, that inasmuch as the obligation to take discharge of the cargo, and to provide the necessary labour for that purpose, rested upon the respondents, the test is, what time would have been required for the discharge of the vessel under ordinary circumstances, and that, inasmuch as they have to provide the labour, they must be responsible if the discharge is delayed beyond that period. The respondents, on

the other hand, contend that the question is not what time would have been necessary or what time would have been reasonable under ordinary circumstances, but what time was reasonable under existing circumstances, assuming that, in so far as the existing circumstances were extraordinary, they were not due to any act or default on the part of the respondents.

There appears to me to be no direct authority upon the point, although there are judgments bearing on the subject to which I will presently call attention. I would observe, in the first place, that there is, of course, no such thing as a reasonable time in the abstract. It must always depend upon circumstances. Upon "the ordinary circumstances," say the learned counsel for the appellant. But what may without impropriety be termed the ordinary circumstances differ in particular ports at different times of the year. As regards the practicability of discharging a vessel they may differ in summer and winter. Again, weather increasing the difficulty of, though not preventing the discharge of a vessel, may continue for so long a period that it may justly be termed extraordinary. Could it be contended that in so far as it lasted beyond the ordinary period the delay caused by it was to be excluded in determining whether the cargo had been discharged within a reasonable time? It appears to me that the appellant's contention would involve constant difficulty and dispute, and that the only sound principle is that the "reasonable time" should depend on the circumstances which actually exist. If the cargo has been taken with all reasonable despatch under those circumstances I think the obligation of the consignee has been fulfilled. When I say the circumstances which actually exist, I, of course, imply that those circumstances, in so far as they involve delay, have not been caused or contributed to by the consignee. I think the balance of authority, both as regards the cases which relate to contracts by a consignee to take discharge, and those in which the question what is a reasonable time has had to be answered when analogous obligations were under consideration is distinctly in favour of the view taken by the court below. In *Postlethwaite* v. *Freeland* the law was stated by Lord Selborne thus:—"If, on the other hand, there is no fixed time, the law implies an agreement to discharge the cargo within a reasonable time; that is (as was said in *Ford* v. *Coteswortb*), a reasonable time under the circumstances." In the same case Lord Blackburn clearly indicated that this view of the law was, in his opinion, correct and in accordance with the current of previous authority; and he not only quoted with approval the law laid down in *Taylor* v. *Great Northern Railway Co.*, that "a reasonable time" meant what was reasonable under the circumstances as distinguished from "the ordinary time," which it had been contended was the same thing as a reasonable time, but stated that in his opinion the law so laid down was applicable to the case then under consideration. It is true that in the case of *Postlethwaite* v. *Freeland* the point which has now to be determined did not directly arise, inasmuch as in that case the charter-party contained the stipulation that the cargo was to be discharged with all despatch according to the custom of the port, and I cannot agree with what appears to have been the view of Lord Blackburn, that this was necessarily the same as the implied obligation to discharge within a reasonable time. In that case it was proved that the mode of discharge customary in the port was by means of a warp and lighters, and that these were under the absolute control of a company to which the Government authorities had transferred all their powers, and that the company allowed vessels the use of the warp and lighters in turn. The result was that, owing to the presence of a considerable number of ships, the turn of the appellants' vessel did not come for a considerable time. It appears to me that, under the circumstances, the judgment was inevitable that the cargo had been discharged with all despatch according to the custom of the port, and also that *Postlethwaite* v. *Freeland* cannot be taken as a decision concluding the question arising on this appeal. The *dicta* are undoubtedly of great weight, and I concur with the result at which Lord Blackburn arrived, that so far as there was prior authority it pointed in the direction of the view adopted in the present case by the Court of Appeal. Lord Blackburn excepted the case of *Wright* v. *New Zealand Shipping Co.*, regarding the decision there as conflicting with that of the Court of Appeal in *Postlethwaite* v. *Freeland*. Now it is to be observed that Thesiger, L.J., who had been a party to the judgment in *Wright* v. *New Zealand Shipping Co.*, was also a party to the decision in *Postlethwaite* v. *Freeland* in the Court of Appeal. He manifestly did not intent to lay down the law differently in the two cases, nor do I think there is any necessary conflict between them, although, no doubt, expressions are to be found in the judgments in *Wright* v. *New Zealand Shipping Co.* which favour the contention of the appellant in the present case. Cotton, L.J., in his judgment in that case in terms says that he will not attempt to lay down an exhaustive rule, but will speak chiefly with reference to the case then before the court. The facts there were that the cargo was to be delivered into lighters alongside or at the wharf, as charterers' agents might direct, no time being fixed within which the discharge was to take place. At the port of discharge there were only two firms of lightermen for discharging cargoes, one of which worked solely for the defendants, the charterers, and the captain was compelled to employ this firm alone to discharge the vessel. At the time when the vessel arrived the port was usually crowded by a "rush" of vessels, and about twenty vessels were lying there, of which one half either belonged to or were chartered by the defendants. The number of lighters was small, and it was proved that after the arrival of the vessel preference in discharging cargoes was shown to vessels with "round" charters. The learned judge who tried the case, in summing up, told the jury that they were to take into consideration the circumstance that the port was full of vessels, but he did not directly tell them not to consider the deficiency of lighters caused by the large number of ships so far as that state of things had been produced by the defendants themselves; nor did he tell them that the defendants were bound to provide the means of unloading within a reasonable time; nor that they were bound to allot the lighters proportionately among the vessels or to use the lighters for them in the order in which they arrived. The jury found in favour of the defendants, and the appeal was against the judgment of the Queen's Bench Division making absolute a rule for a new trial. It will thus be seen that the circumstances which prevented the vessel being loaded within the ordinary time were not beyond the control of the defendants. It was not shown that they could not by reasonable precautions or exertions have provided the necessary lighters elsewhere or earlier and so have avoided the delay which took place. Under these circumstances I think the decision was perfectly right and a new trial properly granted.

In my opinion the cases referred to by the appellant's counsel, in which it has been held that there was a breach of the obligation on the part of a charterer to supply a cargo, do not involve the assertion of any doctrine in conflict with that which

has been laid down in the present case by the Court of Appeal. For these reasons, I am of opinion that the judgment of the court below was correct, and ought to be affirmed, and the appeal dismissed with costs.

Lord WATSON.—Although the question raised in this appeal is submitted for the first time to the determination of an English court the principles which must govern its decision are as old as the law of contract. When the language of a contract does not expressly or by necessary implication fix any term for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time. The rule is of universal application, and is not confined to contracts for the carriage of goods by sea. In the case of other contracts the condition of reasonable time has been frequently interpreted, and has invariably been held to mean that the party upon whom it is incumbent duly fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably. In the face of the admission given by him at the trial, it is in vain for the appellant to suggest that the delay which occurred in unloading *The Derwentdale's* cargo was owing to causes under the respondents' control, or to their failure to do anything which could possibly or reasonably have been done in order to avoid that delay. In that state of the law and of the facts it is, in my opinion, impossible that the appellant can prevail unless he is able to show that the rule as administered in the case of other contracts, is subject, when the contract is constituted by bill of lading, to this singular exception—that the owner of the goods must be held to have acted unreasonably, and to be liable for the delay, whenever the operation of unloading is stopped by an unforeseen obstacle which he did nothing to create and is powerless to remove. A proposition of that character requires some authority to support it, but none has been produced. In none of the cases cited at the bar does it appear to me that the point now raised was present to the minds of the learned judges. But it is sufficient for the purpose of this appeal that while nothing was said in any of them which in the least lends countenance to the proposition maintained by the appellant, much was said pointing in an opposite direction. These cases, in so far as they were relied on by the appellant as authorities in his favour, have been carefully examined in the opinion just delivered by my noble and learned friend, to whose reasons for affirming the judgment of the Court of Appeal I have really nothing to add.

Lord ASHBOURNE.—The question raised in this appeal is important, and is up to this, not covered by any express authority. Having regard to the admissions of the parties, the sole question is, Who is to bear the loss caused by the strike? Who is to bear the risk of the strike assuming each party to be innocent, that each party did what he could, and that the happening of the strike was entirely beyond and outside the control of either? The contract not naming any time for unloading, the obligation of the defendants was to unload within the time implied by law, that is, a reasonable time. What is the meaning of this expression "reasonable time"? It is obvious that "reasonable" cannot mean a definite and fixed time. It would not be "reasonable" if it was not sufficiently elastic to allow the consideration of circumstances, which all reason would require to be taken into account. The appellant accordingly admits that the consignee has a right to have all ordinary circumstances taken into account, but insist that all extraordinary circumstances are to be excluded from consideration. Is this distinction sound, and does it rest upon any real principle? If the consignee does all he can, is not his conduct reasonable? If by circumstances absolutely outside his control he can do nothing, is his inaction unreasonable? If it is reasonable to consider some circumstances outside his control in favour of the consignee, why are not all circumstances in the events which actually happen, and which he cannot control, also to be taken in account? In considering how to ascertain "reasonable time," must not the question come in, whether the consignee in the circumstances which eventuated acted unreasonably? If throughout the consignee acted reasonably, if he did all he could, if he omitted nothing that he should have done, why should all the circumstances be arbitrarily divided into ordinary and extraordinary for the purpose of putting a narrow and artificial meaning upon the words "reasonable time"? Unless *lex cogit ad impossibilia*, I think when the parties have used a form of contract, which names no day, and leaves the discharge of the cargo to be made within the reasonable time implied by law, that reasonable time should be ascertained by a consideration of all circumstances which eventually happen and which are outside the control of the consignee.

It is somewhat strange that this important question has not heretofore been clearly and finally settled by direct authority; and it is manifest, from the arguments addressed to your lordships, that the decisions in somewhat similar cases are conflicting, and the opinions of eminent judges would appear not to harmonize. The particular point involved in this appeal has never, I believe, been expressly discussed or decided, although the decisions which have been referred to deal with topics and considerations most apposite to the case before your lordships. The case of *Ford* v. *Cotesworth* is worthy of attention. The contract was silent as to time, and therefore the freighter was bound to unload within a reasonable time. Owing to threats of bombardment the cargo could not be landed in the usual time, and it was held that the charterer was not liable for the delivery. Cockburn, C.J., in his summing up said: "There would be a point of law whether this case was to be decided with reference to the ordinary state of things at the port or whether any extraordinary circumstances that prevented the unloading might be taken into account." The questions left to the jury were, whether, looking to the ordinary state of things at the port, there was any unreasonable delay; whether, looking to the extraordinary circumstances, there was any unreasonable delay; whether there was any delay caused by political circumstances over which the consignees had no control; was any delay caused by the default of the consignees; and to contingently assess the damages for the time during which the ship was kept at her berth doing nothing by the action of the Government of the place and the threats of bombardment. The jury, in answer to the first two questions, found that there had been no unreasonable delay, and they assessed the damage, if any was to be allowed. The plaintiff applied to the Queen's Bench to enter the verdict for him, and that court held that the contract implied by law was that each party would use reasonable diligence in performing their part of the delivery, which by the custom of the port fell upon him; and that there was no implied contract that the discharge should be performed in the time usually taken at the port. Blackburn, J., in pronouncing the judgment of the court said: "We are aware of no authority for saying that the law implies a contract to discharge in the usual time, except what is said in *Burmester* v. *Hodgson*, in which case it was not necessary for the decision. We think

that the contract which the law implies is only that the merchant and shipowners should each use reasonable despatch in performing his part. That such was the opinion of Lord Tenterden appears to be implied from his ruling in *Rogers* v. *Hunter*, 1 Moo. & M. 63, as to what was the obligation of the holder of a bill of lading. If this be so, the delay having happened without fault on either side, and neither having undertaken by contract, express or implied, that there should be no delay, the loss must remain where it falls." The Exchequer Chamber also, on appeal, upheld the verdict for the defendant. Martin, B., in giving judgment, said: "I am not aware of any case which goes to impose by mere implication of law, without any stipulation whatever, so unreasonable a liability as that which the plaintiffs seek to impose on the defendants, that they are to be answerable for the delay caused by *vis major*."

Ten years later, in the year 1878, came the case of *Wright* v. *The New Zealand Shipping Co.*, which has been so much relied on by the appellant. There the charter-party was silent as to time, and, therefore, it was implied that the ship should be unloaded within a reasonable time. Lord Bramwell said: "A reasonable time for doing an act is a time within which it may be done by a person working reasonably"; and Thesiger, L.J., said: "A reasonable time means a reasonable time under ordinary circumstances." The case of *Postlethwaite* v. *Freeland* followed, and is most important in consequence of many of the *dicta*, although the precise point involved in this case did not actually arise. The Earl of Selborne, in giving judgment in the House of Lords, said: "If there is no time fixed, the law implies an agreement to discharge the cargo within a reasonable time—that is, as was said by Blackburn, J., in *Ford* v. *Cotesworth*, within a reasonable time under all the circumstances." Lord Blackburn's own judgment in this case is the strongest decision in favour of the contention relied on by the respondents, and presents the topics against the appellant's contention with great force.

These cases and others cited during the argument show that there is a conflict of judicial opinion on the questions involved, but in my opinion the preponderance of authority and reasoning is against the appellant. Besides, the authorities by way of analogy (as forcibly pointed out by Fry, L.J.) are also against the appellant, and in favour of the view that reasonable time must be determined by reference to the actual events which occur. In the case of *Taylor* v. *Great Northern Railway Co.* it was held that a common carrier was only bound to carry within a reasonable time, looking at all the circumstances of the case. Erle, C.J., says plainly, "I take reasonable time to mean a time within which a carrier can deliver, using all reasonable exertions." The case of *Hall* v. *Wright* also shows an effort to apply a liberal construction of "reasonable time" in an action of breach of promise of marriage. And the American case of *Cross* v. *Beard*, decided thirty years ago, shows that a breach in a canal and a storm on a lake were taken into account in measuring what was reasonable time.

But it is not upon analogies or upon conflicting authorities alone that the decision of your lordships can rest, although they are most valuable and important to elucidate the position. Principle and reason, in my opinion, alike oppose the contention of the appellant. It is somewhat hard to make either party suffer, but there is no help for it. It must be remembered that there are forms of bills of lading which expressly name strikes and such contingencies, and cast the responsibility upon the consignees. If the shipowner wishes the merchant to be answerable for such events he must stipulate for it expressly. It is no doubt hard on the shipowner in this case, but I do not apprehend any disturbance in mercantile contracts, as parties can readily, if they please, change the terms of future contracts, and prevent the possibility of misunderstanding or surprise. On the grounds that I have referred to I think the judgment of the Court of Appeal should be affirmed.

Lords MORRIS and FIELD concurred.

Order appealed from affirmed, and appeal dismissed, with costs.

Solicitors for the appellant, *Downing, Holman, & Co.*

Solicitors for the respondents, *Lowless & Co.*

High Court of Justice.

Chan. Div. } March 16, 17, 21, 22.
Chitty, J. }

PECK AND THE LONDON SCHOOL BOARD. (*a*.)

Vendor and purchaser—Open contract—Form of conveyance—General words—Right of way—Reputed occupied or enjoyed—No special provision in contract—Right to limit general words—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 6 (1) (2) (4).

Under an open contract for the sale of land with the appurtenances, the purchaser is only entitled to have such general words expressed or implied in his conveyance as he would have been entitled to before the Conveyancing Act, 1881, *came into operation; and if the general words implied by section* 6 *of that Act are more extensive, the vendor is entitled to limit them accordingly.*

Section 6 *of the Conveyancing Act,* 1881, *does not apply to contracts.*

Vendor and purchaser summons.

The school board, in exercise of their compulsory powers, gave the vendors notice to treat for "the land and premises in the schedule with the appurtenants." The vendor had used a way from the premises purchased to a gate in a main road over a piece of waste land belonging to him. It was neither a way of necessity, nor a made or metalled road, but there was sufficient user for it to have passed under such general words as "ways appertaining or reputed to appertain to, or at the time of conveyance occupied or enjoyed with or reputed or known as appurtenant to," the lands sold. The vendor, who did not wish to grant any such way, claimed a right to limit the above general words which would be implied by the Conveyancing Act, 1881, s. 6 (1) (2); but the school board contended that they were entitled to the implied general words in full. This summons was accordingly taken out to settle the form of conveyance.

Byrne, Q.C., and *Whiteway*, for the school board.—We do not ask the court to determine the question of right now, but only to say what form of conveyance we are entitled to under the contract. In the absence of express stipulation we are entitled to a simple conveyance without any exceptions. We are in fact entitled to the same form of conveyance that we should have got before the Conveyancing Act, or at the very least to a conveyance following the exact words of the contract.

Farwell, Q.C., and *B. B. Rogers*, for the vendors.—A simple conveyance would pass this way under the

(*a*.) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

general words implied by the Conveyancing Act. The school board have not included it in their notice to treat, though they have power to purchase easements. We have a right to limit the general words under section 6 (4) so as to avoid any question of implied grant. Before the Conveyancing Act a contract to purchase land "with the appurtenances" or "with all ways thereunto appertaining" did not carry a right of way over another tenement of the grantor: *Bolton* v. *Bolton*, 11 Ch. D. 968, 27 W. R. Dig. 230. The Conveyancing Act was not intended to alter the construction of contracts, but only to shorten conveyances. Its application is entirely limited to conveyances.

Byrne, Q.C., in reply.—*Bolton* v. *Bolton* is practically overruled by Sir Edward Fry's *dictum* in *Bayley* v. *Great Western Railway Co.*, 26 Ch. D. 434, 457, 32 W. R. Dig. 227.

See also *Barkshire* v. *Grubb*, 29 W. R. 929, 18 Ch. D. 616.

CHITTY, J., stated the facts, and continued:—The school board contend that they are entitled to have included in their conveyance all the general words implied by the Conveyancing Act, 1881, s. 6—*i.e.*, that the vendor is not entitled to insert anything to exclude any of such words from the conveyance. The argument of the school board properly understood is really an argument that this section has altered contracts and the rights that flow from them. It is my clear opinion that it has done nothing of the kind. Its object is to show what general words will be taken as included in a conveyance of land or houses where the conveyance is silent on the point. It is the conveyance alone with which the Legislature is dealing, not the contract. Neither party is entitled to have words included in the conveyance unless those words are justified by the contract. As the section itself states (sub-section 4), it applies "only if and so far as a contrary intention is not expressed in the conveyance," and it has effect "subject to the terms of the conveyance and to the provisions therein contained." The main object of the section was to shorten conveyances. Words included in sub-sections 1 and 2 were, with variations, in general use among conveyancers before the Act was passed, and the Legislature, thinking such words appropriate to the majority of cases, enacted that a conveyance should be deemed to include them in the absence of a contrary intention expressed in the conveyance. It has done nothing more than this.

On examining the words of sub-sections 1 and 2 I find as to "ways" language used which conveys "ways appertaining or reputed to appertain to" the land or premises conveyed, or "at the time of conveyance occupied or enjoyed with, or reputed or known as appurtenant to," the same. On the authorities there is no question that such words would pass a way not existing as of right, but *de facto* enjoyed at the time of conveyance. It is quite unnecessary to cite any authority for that proposition. The school board have declined to go into evidence. They are quite right in saying that the court has not to decide what right ought to pass, but what are the appropriate words to be inserted in the conveyance. It is plain, however, that they are aiming at obtaining a grant of this right of way. The vendor rightly says that the board have not exercised their power to buy any such easement, and that he is entitled to be protected against the insertion in the conveyance of anything which might operate as an express grant, or otherwise carry this right of way. There is no question but that the vendor would be in a worse position if the words of section 6 were allowed to remain. Now the notice to treat contained the word "appurtenances" and no other general words. In the statutory form in the schedule to the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), the general words run "together with all ways, rights, and appurtenances thereto belonging." Such form is permissive only, and the school board are not bound to take their conveyance in that form, but the form gives an indication on the part of the Legislature of what ought to pass where there are no special words in the contract or notice to treat. I will mention two authorities. In *Bolton* v. *Bolton* the contract for sale did not contain any words with regard to the right of way, and Sir Edward Fry said: "In my view, therefore, the contract was for the conveyance of the premises with all that was appurtenant or appendant to them, and nothing more." And he held that the purchasers were not entitled to a special grant of the right of way, and settled the general words accordingly. That case was decided before the Conveyancing Act, 1881, but that Act has made no difference to the decision, which is, therefore, an authority for the case before me. It is a stronger authority than is required, because in that case there were two made roads, whereas here there is no made road or anything in the nature of a made road. *Barkshire* v. *Grubb* was another case of construction of the agreement, and the court had regard to the circumstance that at the date of the contract a gravel path was actually used as a mode of access. That decision was on the special words of the contract and the circumstances of the case, and it is no authority as regards my present decision.

In the result I must take care that the general words inserted or implied will give the school board their rights under the contract, and protect the vendor against granting more than was agreed upon or paid for. In my opinion it is necessary to exclude the operation of section 6 of the Conveyancing Act, 1881, altogether, and then the right form will practically follow that in the schedule to the Lands Clauses Consolidation Act, 1845. The purchasers may amplify it if they desire, but within proper limits. Substantially I hold that, the Conveyancing Act being excluded, words carrying "appurtenances" will carry all that the school board are entitled to. They must not have the words "reputed" or "enjoyed."

It has been argued that in *Bayley* v. *Great Western Railway Co.* Sir Edward Fry overruled his decision in *Bolton* v. *Bolton*. I do not think that is the effect of anything the judge uttered. He said that where there was a made and visible road probably the mere grant of the land itself, without general words, would carry the right of way. If that is correct, as to which I express no opinion, nor did Sir Edward Fry state it as law, the words inserted will still give the school board the benefit of the *dictum* if they can prevail on any court to adopt it in reference to the state of this property and the surrounding circumstances at the time of the grant. I propose not to encourage the school board to raise the question, and it is no part of my duty to discourage them.

Solicitors for the school board, *C. E. Mortimer*.

Solicitors for the vendor, *Crowders & Vizard*.

Chan. Div. }
Romer, J. } Dec. 13, 14, 17.

HUNTER v. DOWLING. (a.)

Partnership—Death of partner—Share of partner dying to be determined by last signed yearly account—Death after expiration of partnership year, but before taking of account for that year completed.

Under a deed of partnership it was provided that the partnership accounts should be taken and signed by the partners at the end of each partnership year, or as near thereto as conveniently might be, and that the share of a partner dying should be determined by reference to the last signed yearly account prior to his death. A partner died shortly after the expiration of a partnership year, but before the taking of the account for that year had been completed. The yearly accounts had been, according to the practice of the firm, taken somewhat later in the year than the date of his death.

Held, that the surviving partners were not entitled to have his share determined by reference to the last signed yearly account, but that the account for the partnership year immediately preceding his death must be taken, and his share determined thereby.

Semble, *it would not have made any difference if, in fact, the taking of the accounts for the partnership year immediately preceding his death could not have been completed in his lifetime.*

Trial of action.

A partnership deed dated the 31st of March, 1884, between Edmund Dowling, Edwin Skelton Pinchin, Edward Arthur Johnson, and Charles Edward Dowling, under which those four persons carried on business as oil and colour merchants, contained the following provisions:—

"15. On the 31st day of March in each year during the continuance of the partnership, or as near thereto as conveniently may be, a general account shall be taken of the assets and liabilities of the partnership, and of all dealings and transactions of the partnership during the then preceding year, and of all matters and things usually comprehended in accounts of a like nature taken by persons engaged in a like business, and in taking such account a just valuation shall be made of all items requiring valuation, together with an estimate of all doubtful and bad debts; and in the general yearly account so to be taken there shall from time to time be made a balance-sheet, and the said balance-sheet shall be signed by all the partners in testimony of their approbation thereof, and the accounts to be so made and signed shall not afterwards be called in question, opened, or in any manner contravened after such yearly settlement as aforesaid."

"23.—If any partner shall retire under the provisions hereinbefore contained, or shall die during the continuance of the partnership, the remaining or surviving partners shall (but subject in respect of a partner so dying to the power hereinbefore contained of bequeathing his share and interest in the partnership) accept and take in the shares and proportions to which they shall at the time of such retirement or decease be interested in the profits of the partnership business, all the share and interest of the partner so retiring or dying in the capital of the business, and the share of the profits of the partner so retiring or dying, and the amount of the share and interest of the partner so retiring or dying shall be taken at the amount appearing as standing to his credit in the last annual balance-sheet which shall have been signed previously to the date of such retirement or death, addition being made thereto on account of the proportion of profits which shall have accrued due to such partner since the last annual account according to the average amount of profits during the three years preceding the last annual account if so many years shall have elapsed, and if so many years shall not have elapsed according to the average amount of profits during so many years as shall have elapsed."

The partnership deed contained also a clause for reference to arbitration of any dispute touching the policy, articles, or any clause or thing therein contained.

The annual account for each year ending on the 31st of March was taken, not on that day, but about the end of April. This was done until April, 1890. In the account then taken a value was placed on certain leasehold premises of the partnership at Hammersmith, but not on other leasehold premises of the partnership at St. George's-in-the-East.

On the 16th of June, 1890, notice to treat for part of the premises at St. George's-in-the-East was served on the partnership by the London and Blackwall Railway Co. In August, 1890, notice was served on the railway company by the partnership, requiring the company to take all those premises, which notice was acceded to by the company, and in December, 1890, a claim was made by the partnership on the company for £28,000. Negotiations ensued, which were not concluded at the death of E. A. Johnson on the 10th of April, 1891. E. A. Johnson's will, appointing the plaintiff, Hunter, his executor, was proved on the 6th of July, 1891. The negotiations, continued after E. A. Johnson's death, finally resulted in the purchase by the railway company of the whole of the premises at St. George's-in-the-East for £19,000.

The account for the year ending the 31st of March, 1891, was not taken in E. A. Johnson's lifetime, but the judge held that it might have been so taken.

This was an action by E. A. Johnson's executor, the plaintiff Hunter, against the surviving partners, for an account of the partnership dealings up to the 31st of March, 1891, and to have E. A. Johnson's share in the partnership assets ascertained, including in such assets the sum of £19,000, the purchase-money for the St. George's-in-the-East premises.

Neville, Q.C., and *Dauney*, for the plaintiff.—The plaintiff's right to have an account taken to the 31st of March, 1891, is not affected by the fact that E. A. Johnson died before the account was actually taken or signed: *Pettyt* v. *Janeson*, 6 Madd. 146. To ascertain the rights of the parties on the last signed account would exclude the plaintiff from sharing in the purchase-money of the premises taken by the railway company, which would be unfair to him, and was certainly not the intention of the partners.

Chadwyck Healey, Q.C., and *Stone*, for the defendants.—When E. A. Johnson died the last signed account was that for the year ending the 31st of March, 1890, and the plaintiff is bound thereby under the partnership deed. Regard must be had to the uniform practice of the partnership as to taking its accounts, and the plaintiff cannot go behind the last account made out in accordance with such practice: *Ex parte Barber*, 18 W. R. 940, L. R. 5 Ch. App. 667. The partners are bound by the uniform practice as to taking the accounts, even though inconsistent with the partnership deed: *Coventry* v. *Barclay*, 12 W. R. 500, 3 De G. J. & S. 320.

ROMER, J.—The principal clauses in the partnership deed on which the questions depend are those numbered 15 and 23.

As to clause 15, I think it provides that on the completion of a partnership year the accounts shall

(a.) Reported by C. HERBERT BROWN, Esq., Barrister-at-Law.

be taken for that year and signed. The partnership year as indicated by the clause and by the practice of the firm was to end on the 31st of March. The words with which the clause commences: "On the 31st of March in each year during the continuance of the partnership, or as near thereto as conveniently may be," I think merely indicate what would have been obviously the meaning without them, that the taking of the account might not be, in practice, completed on the 31st of March, but shortly afterwards. But evidently, under the clause, the account was to be taken as up to the end of each completed year. This appears from the whole tenour of the clause, and particularly from the words "during the then preceding year." On the completion of a partnership year I think the parties were bound and entitled to have the account for that year taken, and not the less because afterwards one or more of the parties might die. The clause also provides that the account when taken is to be signed. Of course, that means if it can be signed. The fact that when taken it might not be capable of being signed by reason of the death or physical inability to sign of one partner would not prevent the necessity of the account being taken as between the persons interested.

This being, in my opinion, the meaning of clause 15, I now turn to clause 23. The words in that clause, with reference to the annual balance-sheet, "which shall have been signed previously to the date of such retirement or death," are, I think, descriptive, and are used with reference to clause 15, providing that the accounts of each completed year should be taken and signed; and, as I have pointed out, by that clause the parties were bound to take and sign the account for that year if it was completed. I think that clause 23 refers to the annual sheet as signed, because clause 15 provides for that being done, and that clause 23 contemplates what was to be done as having been done. I think this is borne out by the subsequent words in clause 23, referring to the "last annual account" as being synonymous with the "annual balance-sheet which shall have been signed previously to the date of such retirement or death." The authorities, in fact, show that in clauses like clause 23 the absolute signing is not essential, nor is, indeed, the absolute taking of the account essential, if the account, according to the articles, ought to have been taken and signed. Indeed, the defendant's counsel did not dispute this proposition generally, but based their case on what appears to me a somewhat startling proposition—namely, that in cases of this kind if the partner dies so soon after the account day that the account up to that time could not with reasonable speed be taken in the meantime, then not that account but the immediately preceding account governs the relations of the parties. No authority was cited in support of this. I think it would operate unfairly and lead to manifest inconveniences, not the least of which would be the necessity of inquiry in each case whether the account could or could not be reasonably made up in so many days. Nor do I think that this is the true meaning of clauses of this kind. I think they really mean—in the absence of something special to the contrary, which does not exist in the present case—that when a partner dies after an account day, then the account taken or to be taken on that day is the one that governs the rights of the parties. I do not think it necessary that the partner should have survived the day when the account was in fact completed, or that his representatives must show that it might have been completed before he died.

It is to be borne in mind that there is no difficulty in taking the account as to the past year, though one partner may have died since its expiration and before the account is actually completed. I may add that in the present case, if the fact be really material, which in my view it is not, I am of opinion, notwithstanding Mr. Dowling's evidence, that the account could in fact have been taken and signed between the 31st of March and the date of Mr. Johnson's death, though I agree that in the ordinary course the parties probably would have taken some time longer. Coming, therefore, to the conclusion at which I arrive, that the account to be taken as on the 31st of March, 1891, is that which governs the rights of the parties, it is clear that under the circumstances I must make a declaration that an account ought to be taken as provided for by clause 15 of the articles up to the 31st of March, 1891.

With regard to the special point in dispute, it is clear that on the 31st of March, 1891, the leaseholds in question were, at any rate to some extent, valuable, and they ought, therefore, to be valued as an asset, and not the less because in the accounts of the 31st of March, 1890, when the leaseholds were not valuable, or, at any rate, were not considered valuable, they were not valued. There is no practice of the partnership that leaseholds should not be valued; on the contrary, some leaseholds of the firm were valued in the other accounts. This particular lease was only granted on the 24th of June, 1889, and the fact that it was not valued on one occasion cannot establish a principle that under no change of circumstances was it to be valued if it became valuable. I shall make a further declaration that in taking the accounts the leaseholds in question ought to be valued as of their value on the 31st of March, 1891. As to what value will be put on this leasehold in question I say nothing. I do not wish to prejudice the arbitrators in any way.

Solicitors, *Hunter & Davies; Stones, Morris, & Stone.*

Q. B. Div. (Lawrance and Collins, JJ.) — Feb. 7.

CLEARY, *Appellant.*
BOOTH, *Respondent.* (*a.*)

Elementary education—Board school master—Authority to inflict punishment—Offence committed by pupil off the school premises.

The authority of the master of a board school to punish pupils attending the school is not limited to acts of misconduct committed by them on the school premises.

Special case stated by justices for the borough and county of Southampton.

At a court of summary jurisdiction held at Southampton on the 19th of September, 1892, an information was preferred by the respondent against the appellant charging him with unlawfully assaulting and beating the respondent. The appellant was the head master of a board school at Southampton, and the respondent was a pupil at that school. On the 15th of September, 1892, the appellant inflicted corporal punishment on the respondent for an act of misconduct alleged to have been committed by the respondent in relation to another pupil of the same school whilst they were on their way from their homes to the school. The appellant was convicted and fined, subject to this case.

The questions for the court were:—(1) Whether the appellant was justified in punishing the respondent for an offence not committed on the school

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

premises; (2) whether, if the appellant was so justified, the punishment inflicted was excessive.

Poland, Q.C. (*P. H. White* with him), for the appellant, contended that the authority of a schoolmaster to inflict punishment on a pupil was the same as that of a parent; that the punishment must be reasonable, and that the schoolmaster's authority to punish was not limited to acts committed by pupils on the school premises.

The Education Code of 1892 was referred to, and the following cases were cited:—*Reg.* v. *Hopley*, 2 F. & F. 202; *Fitzgerald* v. *Northcote*, 4 F. & F. 656; *Hunter* v. *Johnson*, 32 W. R. 857, 13 Q. B. D. 225.

The respondent did not appear.

LAWRANCE, J.—The question in this case is whether the head master of a board school has power to administer corporal punishment to a pupil for something done by the pupil outside the school premises. The question is not an easy one, because there is no authority directly in point, and the case is, therefore, one of first impression. The cases cited in argument show that a schoolmaster is in the position of a parent; but the question we have to decide is which of the two, parent or master, is to take notice of acts of misconduct committed by a boy on his way from his home to school. I should have thought that a power to act in such cases was amongst the powers delegated by the parent to the schoolmaster. If the Education Code of 1892 is looked at, we find that a grant is given to board schools for organization and discipline, and care is to be taken by the master in the management of the school "to bring up the children in habits of punctuality, of good manners and language, of cleanliness and neatness, and also to impress upon the children the importance of cheerful obedience to duty, of consideration and respect for others, and of honour and truthfulness in word and act." Can it be said, having regard to the duties imposed upon a board school master by this code, that the master's authority is limited to acts done in school, and that he has exceeded the authority delegated to him by the parent if he punishes a boy who is guilty of gross misbehaviour immediately after leaving the school premises? It is difficult to express in words the extent of the schoolmaster's authority in respect of the punishment of his pupils, but in my opinion his authority extends not only to acts done in school, but also to cases where a complaint of acts done out of school is made to the schoolmaster. In the present case it may also be borne in mind that the act for which the boy was punished was done to another pupil of the same school. I therefore come to the conclusion that the conviction was wrong, and the case must be sent back to the justices for them to find as a fact whether the punishment was excessive.

COLLINS, J.—I am of the same opinion. It is clear law that a father may administer reasonable chastisement to his child, and it is equally clear, and in accordance with ancient practice, that the father may delegate this right to a schoolmaster. The question is, how far does the delegated authority of the schoolmaster extend? Is it limited to the four walls of the school, or does it extend in any sense beyond that limit? In my opinion it is impossible to deny that a schoolmaster's authority over a pupil must to some extent include an authority over the pupil when he is off the school premises, though it is a question of fact in each case whether the schoolmaster's authority has been exceeded. It would be impossible for a master of a day-school to carry on his duties if the parent's authority over the pupils extended up to the school door, and that the schoolmaster's authority only then commenced. Further, it is clearly contemplated by the code to which my learned brother has referred that the duties of the master of a board school are not confined to teaching; he is also entrusted with the moral training of his pupils, for which purpose it must be necessary for him to have some control over them out of school. In my opinion parents contemplate such an exercise of authority by the schoolmaster as has occurred in the present case, and I am satisfied that this schoolmaster acted within his delegated authority in punishing the pupil.

The question whether the punishment inflicted was, in fact, excessive is one for the justices.

Case remitted.

Solicitors for the appellant, *Baker & Nairne*.

Q. B. Div.
(Lord Coleridge, C.J., and Hawkins, Cave, Day, and Collins, JJ.) Feb. 4.

PENN, *Appellant.*
ALEXANDER, *Respondent.* (*a.*)

Licensing Acts—Sale during prohibited hours—"Bonâ fide *traveller*"*—Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 9.

The appellant, a licensed victualler, was charged with permitting his licensed premises to be open for the sale of refreshment during prohibited hours—namely, on a Sunday morning before 12.30 *p.m. The justices found that many of the persons served by the appellant were residents in, and had come from, a neighbouring town a little more than three miles distant, in order to obtain beer at the appellant's premises; that they were not* bonâ fide *travellers within section* 9 *of the Licensing Act*, 1874, *and that the appellant did not truly believe them to be* bonâ fide *travellers; and the appellant was convicted and fined.*

Held, by Lord Coleridge, C.J., *and* Hawkins, Day, *and* Collins, JJ. (Cave, J., *dissenting*), *that, on the evidence in the case, the conviction was right.*

Special case stated by justices at quarter sessions for the county of Northampton.

The appellant, who was a licensed victualler, and the occupier of the "White Lion" beerhouse, Little Houghton, was convicted by a court of summary jurisdiction under the Licensing Act, 1874, for opening his premises for the sale of intoxicating liquors during prohibited hours on Sunday, the 10th of April, 1892.

The appellant appealed to the court of quarter sessions, when the conviction was affirmed, subject to this case.

The facts of the case were as follows:—On Sunday, April 10, two policemen watched the appellant's premises from 10.44 a.m. to 11.20 a.m., and during that time they saw eighty-five persons enter the appellant's yard, and seventy-four leave, all of whom, except eight persons, went towards Northampton. The policemen entered the appellant's yard and found about fifty-seven men there, some of whom were drinking beer. In the yard tables were spread on tressels and provided with forms, and on the tables were jugs containing beer. The tables and forms were not set out in the yard on weekdays. The appellant explained that Sunday travellers were only allowed to use the yard, and not the house, and that they entered the yard by a side gate, because when the front door had been used travellers standing

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

about the door caused a block in the highway. It was proved or admitted that, with the exception of four or five persons, all the 131 persons who were on the appellant's premises during the time mentioned were artisans, and had come from Northampton, which was 3¼ to 3½ miles off, and returned, or were returning, after taking beer and other refreshment. There was no evidence that any of the persons had stayed in the yard an unreasonable time or had too much to drink, and they all left in a quiet and orderly manner. The appellant and his son were called as witnesses, and proved that many of the persons were known to them as artisans from Northampton; that before anyone was served he was asked where he had come from, and where he had slept the previous night; and that no one was allowed to have more than one pint of beer or to be served more than once. The appellant admitted that two extra waiters were employed by him on Sundays to attend to customers.

The court of quarter sessions came to the conclusion that many of the persons had left their homes at Northampton in order to get some beer at Little Houghton, as they could not be served at Northampton, and the court were of opinion that such persons were not *bonâ fide* travellers, and the court were not satisfied that under the circumstances the appellant truly believed that all the persons were *bonâ fide* travellers.

[The case was first argued before Lord Coleridge, C.J., and Cave, J., and as they were unable to agree in their decision, the case was ordered to be reargued before a court of five judges.]

Poland, Q.C., and *Sills*, for the appellant.—The conviction was wrong. The persons found on the appellant's premises were *bonâ fide* travellers. They had come from a place more than three miles off, and there is nothing in the evidence to show that their object was solely to obtain beer. It is equally consistent with their conduct that their object was a walk in the country. The appellant did everything in his power to ascertain whether they were *bonâ fide* travellers, and took precautions to prevent anyone from obtaining too much drink or stopping too long on the premises. The number of persons found on the premises is not large having regard to the population of Northampton.

They cited *Atkinson* v. *Sellers*, 28 L. J. M. C. 12, 7 W. R. C. L. Dig. 53; *Taylor* v. *Humphries*, 9 W. R. 705; s. c., 13 W. R. 136; *Peplow* v. *Richardson*, 17 W. R. 410, L. R. 4 C. P. 168; *Oldham* v. *Sheasby*, 60 L. J. M. C. 81, 40 W. R. Dig. 124; *Cowap* v. *Atherton*, *ante*, p. 158, [1893] 1 Q. B. 49.

Lloyd, Q.C., and *Attenborough*, for the respondent, were not called on.

COLLINS, J.—In this case the magistrates have found that these persons were not *bonâ fide* travellers, and that the appellant did not in fact believe them to be so. I am of opinion that these findings were right. Whether a man is a *bonâ fide* traveller or not is a question of fact, and it is obvious from the words of section 9 of the Licensing Act, 1874, that the mere fact of a man's having travelled three miles is not of itself sufficient to constitute him a *bonâ fide* traveller. What, then, is the test by which the question may be determined? The test is, what is the object of the journey? If it is for business or pleasure, then it is *bonâ fide* travelling. But if the form of pleasure, which constitutes the object of the journey, is to obtain beer, then it is not *bonâ fide*. The magistrates have found that that was the case here, and I think their finding was right. As to the question whether the appellant really believed that these men were *bonâ fide* travellers, the evidence shows that he could not have believed that, but must have drawn the inference that they came solely for the purpose of obtaining beer.

DAY, J.—I am of the same opinion.

CAVE, J.—I regret that I am compelled to differ from the rest of the court. I have not thought it necessary to hear the arguments for the respondent, because I have on a former occasion heard the arguments on both sides.

The question is whether there is any evidence on which the appellant ought to have been convicted. In section 9 of the Licensing Act, 1874, the term "*bonâ fide* traveller" is not defined. There have been decisions on the earlier Acts as to what is a traveller, and it has been laid down that a traveller is one who travels either for business or pleasure. There is no doubt that these persons were travellers in that sense, but the question is whether they were *bonâ fide* travellers. I agree that the answer to that question depends on the object with which these persons went out. Was their main purpose to obtain drink, or was it to indulge in a country walk? The Act says that a person shall not be deemed to be a *bonâ fide* traveller unless he has travelled three miles from the place where he lodged the previous night. These persons had travelled three miles, and therefore there is nothing in the Act preventing them from being *bonâ fide* travellers, but on the other hand there is nothing in the Act which says that they shall be. This is a criminal case, and before a conviction is obtained the case in support of it ought to be satisfactorily made out. There is evidence here that these persons did not stay at the public-house an unreasonable length of time, and that they did not have too much to drink. But the fact which seems to have caused the magistrates to consider that they were not *bonâ fide* travellers was that such a large number of persons should have stopped at this village, which was just outside the three mile limit, and did not proceed any further. That fact, however, does not satisfy my mind that their main object was to get beer. I can well understand that large numbers of persons living all the week in a country town should like a country walk on Sunday morning. The time of day was the natural time for people in their position of life to indulge in a country walk, and their conduct was consistent with that being their object. Then, as to the question of the reasonable grounds of the appellant's belief in the *bona fides* of these persons, it must be remembered that he is bound to serve *bonâ fide* travellers, and he ought not to be convicted solely because he was rather too easily convinced as to their *bona fides*. It seems to me that this man could not have been expected to do more than he did, he asked each man where he had come from and where he had slept the night before. Supposing he had asked what was their object in leaving Northampton, is it not probable that the answer would have been—for a country walk?

I am of opinion that not only is there no evidence that these persons were not *bonâ fide* travellers, but also that under the circumstances the appellant had no grounds for believing that they were not *bonâ fide* travellers, and ought not to have been convicted.

HAWKINS, J.—I concur in the judgment which the Lord Chief Justice is about to deliver, and have nothing to add.

Lord COLERIDGE, C.J.—The question for the court in this case is simply one of interpretation of the statute, and of applying it to the facts of the case. The only observation which I desire to make on section 9 of the Act is that it is a negative section, it

does not say who is a *bonâ fide* traveller, but only says who is not. [His lordship stated the facts and continued:] The magistrates had all the circumstances before them, and they found that these persons were not *bonâ fide* travellers, but had gone to the appellant's inn solely for the purpose of obtaining beer. In my opinion it is impossible to say that there is no evidence to support that finding. There appears to have been a regular system for persons to leave Northampton during closing hours and to go into the country in order to obtain that beer which they could not get in the town. I say that that is not *bonâ fide* travelling. It is impossible for anyone to be ignorant that this system prevails in the neighbourhood of most large towns, and I have not the slightest doubt that it is contrary to the law. Further, the case is governed by authority. In *Taylor* v. *Humphries*, in the year 1864, Erle, C.J., 13 W. R., at p. 137, said, "We think that a person would be a traveller within the exception if he came abroad from any of the motives above suggested as legitimate, and by reason thereof needed refreshment, but if he came abroad merely because he desired to go to a public-house and obtain drink, he would not." That was founded on a judgment of Cockburn, C.J., to the same effect. It is true these cases were decided under the old law, but the only alteration in this point made by the later legislation is the addition of the words "*bonâ fide*," which makes the case against the appellant stronger. Two recent cases have been cited, but they have no bearing on this case, and we find, therefore, that there is authority against the appellant but none in his favour. I am clearly of opinion that the magistrates were right in their findings of fact, and that this conviction ought to be affirmed.

Conviction affirmed.

Solicitors for the appellant, *Godden, Holmes, & Co.* for *Becke & Green*, Northampton.

Solicitor for the respondent, *E. E. Hobson* for *Rawlins & Son*, Market Harborough.

Q. B. Div.
(Day and Collins, JJ.) } Jan. 31.

CROFT *v.* KING. (*a.*)

Practice—Writ—Service of concurrent writ out of the jurisdiction—Action of tort—R. S. C., 1883, *ord.* 11, *r.* 1 (g).

By R. S. C., 1883, *ord.* 11, *r.* 1, *service out of the jurisdiction of a writ of summons may be allowed* (g) *whenever any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.*

Held, that clause (g) *applies to an action of tort.*

The plaintiff, an undischarged bankrupt, brought an action for malicious prosecution against K. & Co. (*Limited*) *and K. The prosecution of which the plaintiff complained had been carried on at the instance of K. & Co.* (*Limited*); *K., who was the manager of a London depôt of K. & Co.* (*Limited*), *having laid the information against the plaintiff.*

The registered office of K. & Co. (*Limited*), *a company incorporated under the Companies Act*, 1862, *was in Belfast. K. had been duly served within the jurisdiction with the writ in the plaintiff's action.*

Held, that leave ought to be granted to serve a concurrent writ on K. & Co. (*Limited*) *at their registered office in Ireland.*

(*a.*) Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

Application by F. King & Co. (Limited) to Kennedy, J., at chambers (who referred the summons to a divisional court) to set aside an order made *ex parte* by Day, J., at chambers, giving the plaintiff leave to issue a concurrent writ of summons against the intended defendants, F. King & Co. (Limited), and, further, giving leave to serve the concurrent writ at 26, Waring-street, Belfast, or elsewhere in Ireland.

The action was brought to recover damages for malicious prosecution. The plaintiff was an undischarged bankrupt. The prosecution of the plaintiff had been carried on at the instance of F. King & Co. (Limited). F. King & Co. (Limited) had a depôt in London, of which F. J. King was manager and he had laid the information against the plaintiff. F. J. King had been duly served within the jurisdiction. The address 26, Waring-street, Belfast, was the registered office of F. King & Co. (Limited). Day, J., sitting at chambers, gave leave *ex parte* to issue a concurrent writ of summons against F. King & Co. (Limited), and to serve it at 26, Waring-street, Belfast, or elsewhere in Ireland.

F. King & Co. (Limited) now applied to set aside the order of Day, J.

J. E. Bankes, for F. J. King & Co. (Limited), in support of the summons.—First, order 11 does not apply to an action of tort, and there was therefore no jurisdiction to make this order: *Watkins* v. *Scottish Imperial Insurance Co.*, 37 W. R. 670, 23 Q. B. D. 285; *Lenders* v. *Anderson*, 32 W. R. 230, 12 Q. B. D. 50; *Field* v. *Bennett*, 1 Times L. R. 374, 56 L. J. Q. B. 89, 35 W. R. Dig. 162. [DAY, J., referred to *Indig. Co.* v. *Ogilvy*, 39 W. R. 646, [1891] 2 Ch. 31.] Secondly, this is not a case in which the jurisdiction ought to be exercised. An Irish company is in a better position than a mere foreign company: *Washburn and Moen Manufacturing Co.* v. *Cunard Co.*, 5 Times L. R. 592.

Willis, Q.C. (*Clydesdale* with him), for the plaintiff.—[DAY, J.—You need only address yourself to the question of jurisdiction in an action of tort.] The order was properly made. Order 11 mentions specific cases, and then follows a general provision: *Massey* v. *Heynes*, 36 W. R. 834, 21 Q. B. D. 330; *Bree* v. *Marescaux*, 29 W. R. 858, 7 Q. B. D. 434.

Bankes, in reply.—The words in clause (*g*) are not intended to have the very wide construction the other side wishes to put on them.

DAY, J.—There are no grounds for this application, and it must be dismissed. It is said that in an action of tort there is no authority to direct service of a writ out of the jurisdiction. The cases in which service out of the jurisdiction may be allowed are set out in clauses (*a*), (*b*), (*c*), (*d*), (*e*), and (*f*), and then clause (*g*) is introduced.

It is said that into the words "necessary or proper party" we must introduce a proviso, viz., that it must be clearly understood that this does not apply to actions of tort if the person is resident in Ireland. Why, I cannot understand. The words are perfectly general. They deal with cases where the person out of the jurisdiction is a necessary or proper party. The judgment of Huddleston, B., in *Lenders* v. *Anderson* has been read, but I think it has nothing to do with this case. The attention of the learned judge was not called to clause (*g*). Clause (*g*) was not necessary for his decision. The action was one of contract. I think he never intended to hold that clause (*g*) does not apply to an action of tort.

It is also objected that the company is not a necessary or proper party. If not a necessary, at any rate it is a proper party. It has an agency in London.

do not see that the company can be put into any difficulty by being made a defendant, except the inconvenience of having to pay damages. The London manager is already a party to the action. Access may be necessary to documents which may not be available in London. Discovery may also be necessary. It seems to me that the principals who have instigated the prosecution (we must assume that the action is well founded), *i.e.*, the company, should be made parties. They are the persons under whose orders the prosecution has taken place, and they are proper parties.

COLLINS, J.—I am of the same opinion. The question is whether in this case a foreigner can be brought under the jurisdiction of the court. It has been laid down that this jurisdiction is to be regarded with very great jealousy. We must look jealously to see that the prescribed conditions have been complied with. In *Leaders* v. *Anderson* Huddleston, B., said: "It is to be observed that the power which previously existed of allowing service out of the jurisdiction in actions of tort is taken away except so far as such a power is involved in sub-clauses (*a*), (*c*), or (*f*)," but his attention was not directed to clause (*g*). He went a little further than was necessary, and therefore the *dictum* is not an authority upon clause (*g*). In the case of *Field* v. *Bennett* Cave, J., seems to have acted upon Mr. Pollard's argument that under the new Rules the practice was to refuse leave to serve out of the jurisdiction, in actions of tort; but the report of the case is very short; and it also appears from the observations of Lord Coleridge, C.J., when the case came before a divisional court (see 56 L. J. Q. B., at p. 91) that from the manner in which the case was presented to Cave, J., his decision cannot be accepted as an authority.

Under ord. 11, r. 1, of R. S. C., 1883, a series of cases in which service out of the jurisdiction may be allowed is laid down, and then follows the general provision in clause (*g*):—"Whenever any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction." In this case the plaintiff has a person within the jurisdiction who is a party to the action, and I think that in such case the argument for introducing foreigners in cases of contract, applies equally to cases of tort. I therefore think that clause (*g*) applies to cases of tort.

I also agree that this is a case in which leave to serve the writ out of the jurisdiction ought to be given.

Solicitors for F. King & Co. (Limited), *J. H. Johnson, Son, & Ellis.*

Solicitors for the plaintiff, *Hatchett, Jones, & Co.*

Court of Appeal.

From Q. B. Div. (Lindley and Kay, L.JJ.) March 20.

WITTED *v.* GALBRAITH, PEMBROKE, & CO. (*a.*)

Practice—Writ—Service out of the jurisdiction—Action against defendant within the jurisdiction and defendant out of the jurisdiction—Concurrent writ—Action properly brought against defendant within the jurisdiction—Ord. 11, *r.* 1 (g).

A stevedore, while engaged in discharging the cargo of a ship, fell through a hatchway, in consequence as was alleged, of the negligence of those in charge of the ship, and sustained injuries from which he died. His widow brought an action, under Lord Campbell's Act, against the brokers of the ship, who carried on business in London, and the owners of the ship, who carried on business and resided in Scotland. The writ having been served on the brokers, the plaintiff obtained an order at chambers, under ord. 11, *r.* 1 (g), *giving her leave to issue a concurrent writ for service out of the jurisdiction, and to serve the same on the owners in Scotland.*

The Court of Appeal, considering that the plaintiff had made the brokers defendants to the action merely for the purpose of being able to sue the Scotch owners in the English court, held that the action was not "properly brought" against the brokers within the meaning of ord. 11, *r.* 1 (g), *and therefore that service on the owners in Scotland ought not to be allowed.*

Appeal by the defendants, Dunlop & Sons, from the decision of a divisional court (Lord Coleridge, C.J., and Hawkins, J.) refusing to set aside service of a writ out of the jurisdiction.

This was an action under Lord Campbell's Act. The plaintiff, Harriet Witted, the widow of John Witted, commenced the action by issuing a writ against Galbraith, Pembroke, & Co. and Dunlop & Sons, claiming damages for the death of her husband, for which she maintained that the defendant firms, or one or other of them, were liable.

The deceased, who was a stevedore, met with his death in consequence of injuries which he received by falling through a hatchway of the steamship *Queen Adelaide* while he was engaged in discharging a cargo from that ship in the London and India Docks.

The plaintiff alleged that some bags were allowed by those in charge of the ship to remain covering the hatchway, which thus constituted a hidden danger.

The defendants Galbraith, Pembroke, & Co. were shipbrokers, carrying on business in London. They acted as the inward brokers of *The Queen Adelaide*, and, on her arrival in the port of London, they made an agreement with the Joint Committee of the London and India Docks, under which the Joint Committee were to find the ship a berth and discharge her cargo. Galbraith, Pembroke, & Co. were not otherwise interested in the ship or her management. The defendants Dunlop & Sons were the owners of *The Queen Adelaide*, and they carried on business and resided in Scotland.

It appeared that the deceased was at the time of his death in the service of the Joint Committee of the London and India Docks.

The writ having been served on Galbraith, Pembroke, & Co., the plaintiff applied *ex parte* at chambers, under ord. 11, r. 1 (*g*), and ord. 6, r. 2, and obtained from Bruce, J., an order directing that she should be at liberty to issue a concurrent writ for service out of the jurisdiction, and to serve the same on Dunlop & Sons at Glasgow or elsewhere in Scotland. Dunlop & Sons, having been served with such concurrent writ, gave the plaintiff notice of motion, under ord. 12, r. 30, to set aside the service and to discharge the order authorizing such service. Kennedy, J., before whom the application came, referred the matter to the court. The Divisional Court thought that this was a case in which the plaintiff might reasonably bring her action against the two sets of defendants in the alternative; and, on the authority of *Massey* v. *Heynes*, 36 W. R. 834, 21 Q. B. D. 330, refused to set aside the service of the writ.

Dunlop & Sons appealed.

Joseph Walton, Q.C., and *Hollams*, for Dunlop & Sons.—Ord. 11, r. 1 (*g*), allows service of a writ out of the jurisdiction where "any person out of the

(a.) Reported by F. G. RUDKER, Esq., Barrister-at-Law.

jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction." In order to bring this case within that rule, the plaintiff must show that this action is properly brought against Galbraith, Pembroke, & Co. But there is no reasonable ground for supposing that Galbraith, Pembroke, & Co., can be under any liability to the plaintiff. They had no control over the ship. The only persons who can be under any liability to the plaintiff for this cause of action are Dunlop & Sons. And, as they are out of the jurisdiction, the plaintiff cannot sue them directly in the English court, ord. 11, r. 1, not providing for any such case. The plaintiff ought not to be allowed indirectly to bring them into the English court by the mere expedient of adding as co-defendants persons within the jurisdiction against whom she has no *primâ facie* cause of action. *Massey* v. *Heynes* is not an authority for allowing service out of the jurisdiction in this case. This is not a *bonâ fide* alternative claim.

Bernard Coleridge, Q.C., and *W. Howland Roberts*, for the plaintiff.—The case is within ord. 11, r. 1 (*g*). The action is properly brought against Galbraith, Pembroke, & Co.; and Dunlop & Sons are, if not necessary parties, at least proper parties to the same action. Galbraith, Pembroke, & Co., as brokers of the ship, were agents to procure the discharge of her cargo, and were bound to protect from concealed dangers persons who were invited by them on to the ship for the purpose of unloading; and their liability is not affected by the fact that the ship was under the control of persons other than their own servants: *John* v. *Bacon*, 18 W. R. 894, L. R. 5 C. P. 437. See also *Heaven* v. *Pender*, 11 Q. B. D. 503, and *Indermaur* v. *Dames*, 15 W. R. 434, L. R. 2 C. P. 311. If both sets of defendants had been within the jurisdiction it could not be said that it was frivolous or vexatious to join Galbraith, Pembroke, & Co. And Dunlop & Sons being proper parties to the action, *Massey* v. *Heynes* is a case directly in point to show that the order for service out of the jurisdiction was rightly made.

LINDLEY, L.J.—The question is whether this is a proper case for allowing a concurrent writ to be served on shipowners, who are Scotchmen residing out of the jurisdiction. The action is brought against these Scotch owners and also against Galbraith, Pembroke, & Co., the brokers of the ship, who are within the jurisdiction, and have been already served with the writ. The theory on the part of the plaintiff is that one or other of these two sets of defendants can be rendered liable in this action. It is clear that there is no method of suing the Scotch owners in England unless the case can be brought within ord. 11, r. 1 (*g*). That rule says that service out of the jurisdiction of a writ of summons may be allowed whenever "any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction." The plaintiff says that this action is properly brought against Galbraith, Pembroke, & Co., and that the Scotch owners are proper, if not necessary, parties to that action. But if we should come to the conclusion that the action was brought against Galbraith, Pembroke, & Co. merely for the purpose of trying to bring in the Scotch owners under this rule, then I think we should be bound to say that the action was not properly brought against them, and that, therefore, the case did not come within the rule. The best test to apply seems to me to be to ask the question, whether, if both the owners and the brokers had been in this country, they would have been joined as defendants in the action? Would the plaintiff in that case have been advised to join the brokers as defendants? It seems to me quite certain that she would not have been so advised. And if not, it is clear that they are now sued merely for the purpose of proceeding against the Scotch owners under this rule. I think, therefore, that this is not a *bonâ fide* action against the brokers, and that consequently the rule does not apply. The appeal must be allowed.

KAY, L.J., concurred.

Appeal allowed.

Solicitor for the plaintiff, *F. Deakin.*

Solicitors for the defendants, *Hollams, Sons, Coward, & Hawksley.*

From Q. B. Div. (Lord Esher, M.R., and Lindley and Bowen, L.JJ.) — March 6, 14.

WHITE v. COHEN. (*a*.)

County court—Practice—Costs—Action commenced in High Court and transferred to county court—Less than £20 recovered—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 65, 116.

Section 116 *of the County Courts Act*, 1888, *applies to actions brought in the High Court and transferred to the county court under section* 65. *Therefore, where an action of contract for less than £50 is brought in the High Court and transferred to the county court, and less than £20 is recovered, the county court has no power to allow the plaintiff any costs of the action, notwithstanding the provisions as to costs contained in section* 65.

Decision of the Divisional Court (Lord Coleridge, C.J., *and* Cave, J.), ante, *p.* 250, *affirmed.*

Armitage *v.* Fison, 67 *L. T. N. S.* 415, *overruled.*

Appeal from the judgment of a divisional court, (Lord Coleridge, C.J., and Cave, J.), *ante*, p. 250.

The action, which was founded on contract, and was for less than £50, was brought in the High Court, and transferred under section 65 of the County Courts Act, 1888, to the City of London Court. The plaintiff obtained judgment for less than £20. The judge of the City of London Court affirmed the refusal of the registrar to tax the plaintiff's costs, holding that section 116 of the County Courts Act, 1888, precluded the plaintiff from recovering any costs. The Divisional Court affirmed the decision of the judge of the City of London Court.

The plaintiff appealed.

E. Hume Williams and *Herdman*, for the appellant.—The plaintiff is entitled to be allowed his costs incurred in the county court. In *Armitage* v. *Fison*, 67 L. T. N. S. 415, Day and Charles, JJ., allowed a plaintiff to tax his costs incurred in the county court under exactly similar circumstances. That case was not brought to the attention of the court below. Section 65 of the County Courts Act, 1888, is the section which deals with the transfer of actions from the High Court to the county court, and it expressly enacts that when such a transfer is made the costs of all proceedings subsequent to the transfer, *i.e.*, the costs incurred in the county court, shall be allowed on the county court scale. The effect of the section is that when an action has been transferred, then, so far as regards the costs of the proceedings in the county court, the action is to be treated as if it had never been in the High Court. The decision in *Harris* v. *Judge*, *ante*, p. 9, [1892] 2 Q. B. 565, is

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

authority in support of this construction, and is in the plaintiff's favour. Section 116 does not apply to actions which are transferred to the county court, but to actions which are brought and tried in the High Court. An examination of the language of the section shows that it must be limited to proceedings which take place in the High Court. If section 116 includes the case of a transferred action at all, the rules laid down therein can only apply to costs incurred in the High Court up to the time when the action is transferred. Costs incurred subsequently to the transfer are governed by section 65. This view is consistent with the case of *Harris* v. *Judge*.

They also cited *Barker* v. *Hempstead*, 37 W. R. 685, 23 Q. B. D. 8, and *Wilson* v. *Statham*, 39 W. R. 686, [1891] 2 Q. B. 261.

Haldinstein, for the respondent.

Cur. adv. vult.

March 14.—The judgment of the COURT (Lord ESHER, M.R., and LINDLEY and BOWEN, L.JJ.) was read by

LINDLEY, L.J.—This appeal raises the point left undetermined by *Harris* v. *Judge*. But that case turned on the same sections of the County Courts Act, 1888, as have to be considered on the present occasion, and throws considerable light on their true construction. The sections are 65 and 116 of 51 & 52 Vict. c. 43. Section 65 applies in terms to actions commenced in the High Court and sent for trial in the county court. Section 116 applies in terms to all actions brought in the High Court which might have been brought in the county court. The two sections, therefore, are not mutually exclusive; they may both stand together so far as their subject-matter is concerned; and so far as they are not inconsistent they ought to be read together. This was the view taken in *Harris* v. *Judge*. Upon the particular point which had there to be decided, the two sections could not be construed together, and section 65 was held to prevail over section 116. But it does not follow that the result ought to be the same in the present case. The last part of section 65 of the County Courts Act, 1888, says in terms what rule of costs is to be allowed in the cases to which it relates; it applies as well to plaintiffs as to defendants; but it does not say or mean that the costs which, if allowed, are to be taxed according to the rule mentioned, are in all cases to be allowed either to the plaintiff or to the defendant. Whether they are to be allowed or not, and to whom, depends on other sections. The section which enables the county court judge to give costs is section 113. But as regards actions brought in the High Court, but which might have been brought in the county court, there are specific directions or rules contained in section 116; and these specific directions or rules must be applied by the judge of the county court to whom an action brought in the High Court, but which might have been brought in the county court, is sent for trial. This is what I said in *Harris* v. *Judge*, and I think on reconsideration I am still of opinion is correct. The language, however, which I used in *Harris* v. *Judge* was too wide, and was understood by Bowen, J., to mean that the county court judge should give the certificate referred to in section 116. I agree with him that the county court judge cannot do that, and my language to that extent ought to be corrected. The clause in section 116 relating to the certificate or order allowing costs can only come into operation when the action is tried in the High Court. This result was relied upon by the appellant's counsel as a ground for holding that section 116 had no application to actions brought in the High Court, and ordered to be tried in a county court under section 65. If the last part of section 65 was an enactment that the costs should be allowed in all cases, partly on the county court scale and partly on the High Court scale, his argument would be very strong. But if, as we think, the last part of section 65 is only a direction as to the taxation of the costs, if any, which one party is to pay to the other, the argument loses its force.

Again, it was urged that the costs referred to in section 116 were not all the costs of the action, but only those incurred in the High Court; and that in a case brought in the High Court and ordered to be tried in the county court under section 65, the plaintiff might lose the costs incurred by him in the High Court, and yet recover the costs incurred by him in the county court. For this construction reliance was placed on *Armitage* v. *Fison*. But with deference to the learned judges who decided that case, we think the language of section 116, if it applies at all, is too clear and unambiguous to be confined to part only of the plaintiff's costs. In the cases to which the section applies, if the plaintiff recovers less than £20 in an action founded on contract the section says "he shall not be entitled to any costs of the action," unless he gets such a certificate as is afterwards mentioned, and which in an action ordered to be tried in a county court under section 65 the plaintiff cannot get. For these reasons we are of opinion—first, that the rules laid down in clauses 1 and 2 of section 116, depriving a plaintiff of costs, wholly or partially, are applicable to all actions brought in the High Court which might have been brought in the county court, whether tried in the High Court or ordered to be tried in the county court under section 65; and, secondly, that those rules apply to all the costs of such actions, and not only to so much of them as in a case ordered to be tried in the county court have been incurred previously to such order. The judgment appealed from must be affirmed, and the appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitor for the appellant, *Henry Pumfrey*.

Solicitors for the respondent, *Prince, Ayres, & Austen*.

From Chan. Div. (Lord Esher, M.R., and Lindley, L.J.) March 23.

In re TARN. (*a*.)

Practice—Interpleader—Appeal—Decision in summary manner—Common Law Procedure Act, 1860 (23 & 24 *Vict. c.* 126), *s.* 17—*Ord.* 57, *rr.* 9, 11.

Where, upon an interpleader summons, the question is one of law, and the judge decides it under ord. 57, *r.* 9, *without directing an issue or a special case, his decision is a decision in a summary manner, and is final and conclusive, and there is no power to give leave to appeal.*

Appeal from an order of Kekewich, J., at chambers upon an interpleader summons.

Certain furniture, having been seized in execution, was claimed by the trustees of the debtor's marriage settlement. An interpleader summons was taken out before Kekewich, J., in chambers, and the learned judge, as the question was one of law, the facts not being in dispute, decided the question himself, under ord. 57, r. 9, in favour of the execution creditor,

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

without directing an issue or ordering a special case to be stated, and certified that he did not require further argument.

The claimants appealed.

Buckley, Q.C., and *Sargant*, for the claimants, took the preliminary objection that no appeal lay, upon the ground that this was a decision of the judge in a summary manner, and that by ord. 57, r. 11, the decision was final, and leave to appeal could not be granted.

They referred to *Waterhouse* v. *Gilbert*, 15 Q. B. D. 569, 33 W. R. Dig. 158; *Lyon* v. *Morris*, 35 W. R. 707, 19 Q. B. D. 139; *Dodds* v. *Shepherd*, 24 W. R. 322, 1 Ex. D. 75; *Bryant* v. *Reading*, 34 W. R. 496, 17 Q. B. D. 128; *Dawson* v. *Fox*, 33 W. R. 514, 14 Q. B. D. 377; Common Law Procedure Act, 1860, s. 17; ord. 57, rr. 8, 9, 11.

Crackanthorpe, Q.C., and *F. Dodd*, for the execution creditors, contended that the authorities only went to this, that the decision of a judge in a summary manner under rule 8 was final, and that no leave to appeal could be given; but that a decision under rule 9 was not a decision in a summary manner, and under rule 11 leave to appeal could be given. The judge certified that he did not require further argument, and that amounted to leave to appeal. Section 17 of the Common Law Procedure Act, 1860, said nothing about leave to appeal, and to this extent was altered by rule 11.

Lord ESHER, M.R.—Before the Judicature Acts and Rules, by reason of the Common Law Procedure Act, 1860, and the earlier Interpleader Act (1 & 2 Will. 4, c. 58), every decision of a judge in an interpleader matter, where he did not direct an issue or order a special case to be stated, was a decision by him in a summary manner, and no appeal lay. That was the state of the law when the Rules of 1883 were framed. The next inquiry is whether those rules have made any alteration. The matter is full of difficulty; but, as I understand the decisions of the Court of Appeal, they lay it down that the rules did not intend to, and did not, make any alteration in this respect. Accordingly, where there was no appeal before those rules, no appeal is now given.

In the present case Kekewich, J., decided the question without directing an issue or ordering a special case to be stated. His decision, therefore, was a decision in a summary manner, and no appeal lies.

LINDLEY, L.J.—I am of the same opinion. If the rules had stood alone I should have thought that there would have been an appeal from a decision of a judge under rule 9. But rule 11 commences with the words "except where otherwise provided by statute," and when the statutes are looked into I cannot see that there is much of rule 11 left. Under section 17 (which is still in force) of the Common Law Procedure Act, 1860, no appeal lay from the decision of a judge at chambers under section 14, which corresponds with ord. 57, r. 8, nor under section 15, which corresponds with rule 9. So that when one looks into the statutes, which by rule 11 are made applicable, as to interpleader proceedings, it is seen that no appeal in either case lies. Rule 11 is very awkwardly drawn, and the difficulty can only be solved by looking out of the rule at the statutes still in force which regulate interpleader proceedings.

Appeal dismissed.

Solicitors for the appellants, *Birchalls.*

Solicitors for the respondents, *Loughborough & Gedge.*

From Chan. Div. (Lindley, Bowen, and A. L. Smith, L.JJ.) — Nov. 9, 10; Feb. 3.

DAVID v. SABIN. (a.)

Vendor and purchaser—Covenant—Implied covenant—Title—"Beneficial owner"—Fraud of third party—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict.* c. 41), *s.* 7 (1) A.

In 1885, *the defendant, being tenant for life of certain land, granted to B. a lease for ninety-nine years. B. executed three mortgages, by way of sub-demise, of the land so leased to him. In June*, 1887, *B., as beneficial owner, surrendered the term to the defendant for valuable consideration, without disclosing the mortgages. A few days later the defendant, "as beneficial owner," conveyed the land to B. in fee. B. subsequently, as beneficial owner, conveyed to the plaintiff in fee for valuable consideration, without disclosing the existence of the mortgages. In an action by the plaintiff against the defendant for breach of the covenant for title implied by virtue of section* 7 (1) A *of the Conveyancing and Law of Property Act*, 1881, *by reason of his conveyance to B. "as beneficial owner,"*

Held, that the existence of the mortgages created by B., which constituted a defect in the defendant's title, arose from an act done by the defendant to which his implied covenant extended, and that he had, therefore, committed a breach of such covenant; and that, inasmuch as the covenant was one which ran with the land, and the plaintiff sued as assignee of the land in respect of privity of estate as distinguished from privity of contract, the defendant could not successfully set up the fraud of B., by which the breach had been induced, as an answer to the plaintiff's claim.

Decision of Romer, J., *reversed.*

Appeal from a decision of Romer, J.

The facts are considered to sufficiently appear from the headnote and the judgments of the Lords Justices.

Romer, J., held that the defendant had not committed a breach of covenant.

The plaintiff appealed.

Haldane, Q.C., and *W. R. Sheldon*, for the appellant.—The defendant has committed a breach of covenant. He has himself done something which prevents his having a good title to convey so as to give quiet enjoyment of the land free from incumbrance. He has not given what he bargained to give, and, if a man bargains to give what he has not, to give, so much the worse for him.

Neville, Q.C., and *Macnaghten*, for the respondent. No breach has been committed. If the appellant's contention is right, it comes to this, that the covenant for title is an absolute warranty, which it is not. *Browning* v. *Wright*, 2 Bos. & P. 13 (see per Lord Eldon, C.J., at p. 22, and per Buller, J., at p. 2[illegible]); Sugden Vend. and Purch., 14th ed., p. 605, ch. [illegible], s. 3, sub-section 3. The covenant is obviously limited by the introductory words of the clause. The defendant was a purchaser for value from Baylis. The surrender which he took was perfectly good, he got back the term he had created, and the concealment of the sub-leases was a fraud and a crime—it is a misdemeanour by statute—and he could not protect himself against a crime. It was not the defendant's act or in any way through him that the mortgages were fraudulently concealed. [BOWEN, L.J.—He parted with the right to possession and did not get

(a.) Reported by ARTHUR LAWRENCE, Esq., Barrister-at-Law.

back: was not that something "omitted" within his covenant?] No; conveyancers put in or leave out the word "omitted" indifferently; they say, "done, omitted, or knowingly suffered" and "done or knowingly suffered" with indifference: see Davidson's Precedents. [BOWEN, L.J.—I do not feel sure that they do.] The presence of the word merely means that the covenantee must use all reasonable care as a business man, and that the defendant has done. He "suffered" rather than "omitted" something and then unless he has "knowingly suffered" the covenant does not apply. Again, if there has been a breach, the plaintiff is not in a better position than his assignor, Baylis, the original covenantee: *Taylor* v. *Needham*, 2 Taun. 282; Baylis has incapacitated himself by his fraud, and his assignee is equally incapacitated.

Haldane, Q.C., in reply.—What word is more apt than "omitted" to express what the defendant has here actually done, in failing to get in the outstanding mortgages or to provide against them?

Cur. adv. vult.

February 3.—LINDLEY, L.J., read a written judgment, to the following effect:—By a deed dated June 16, 1887, the defendant, Sabin, conveyed some land to a Mr. Baylis, in fee for valuable consideration. Sabin, who was the vendor, was tenant for life under his father's will, and conveyed under the powers conferred on tenants for life by the Settled Land Act; he conveyed as "beneficial owner." He did not expressly enter into any covenants for title; but the vendor's covenant for title set out in section 7 (1) A of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), must by that Act be treated as contained in the conveyance. The plaintiff is the present owner of the land; he claims through Baylis, and contends that he is entitled, as Baylis's grantee of the land, or, in other words, as his assign, to the benefit of the covenant for title to which I have referred. This action is brought by the plaintiff against the defendant for a breach of that covenant. The alleged breach is that when Sabin conveyed to Baylis the property was subject to three outstanding mortgages and that Sabin, therefore, was not in a position to convey the land in fee free from incumbrances, which, the plaintiff contends, is what Sabin professed to do. The existence of these incumbrances is indisputable. They were unknown to Sabin when he conveyed to Baylis. They had been created by Baylis himself, and must have been known to him, and have been concealed from Sabin. They arose in this way. On the 24th of June, 1885, Sabin, who was tenant for life of the land in question, granted a lease to Baylis for ninety-nine years. In 1885 Baylis executed three mortgages of the land so leased to him. These mortgages were sub-leases by way of mortgage. On the 5th of June, 1887, by a deed indorsed on the lease of the 24th of June, 1885, Baylis, as beneficial owner, surrendered that lease to Sabin. The sub-leases, of course, were not merged or extinguished by this surrender, and they are the incumbrances against which the plaintiff seeks to be indemnified by Sabin.

Two questions were discussed—viz. (1) Whether Sabin's covenant extended to these incumbrances? (2) If it did, then whether the plaintiff, who claims through Baylis, is in a better position than Baylis would be himself if he were suing on the covenant. The first question was decided against the plaintiff by Romer, J., and from that decision this appeal is brought. On looking at the covenant set out in section 7 (1) A of the Conveyancing Act, 1881, it will be seen that the covenants for right to convey, for quiet enjoyment, freedom from incumbrances, and for further assurance are not four separate and distinct covenants, but parts of one entire covenant beginning with and controlled throughout by the words, "That notwitstanding anything by the person who so conveys or any one through whom he derives title otherwise than by purchase for value." These words render a vendor's covenant a qualified covenant, and not an absolute warranty of title, as is the covenant by a mortgagor who conveys as beneficial owner (see clause C of the same section). The statute has, in this respect, following the long-established and well-known practice of conveyancers, as may be seen from *Browning* v. *Wright*, 2 Bos. & P. 13, *Church* v. *Brown*, 15 Ves. 263, and the ordinary forms of conveyances. But, although a vendor's covenant for title is not an absolute warranty of title, it is very wide. The acts and omissions covenanted against are reducible to four heads—viz., (1) the acts and omissions of the vendor himself; (2) the acts and omissions of persons through whom he claims otherwise than by purchase for value; (3) the acts and omissions of persons claiming through him; (4) the acts and omissions of persons claiming in trust for him. These last two are, it is true, not enumerated in the words at the beginning of the covenant, but they are introduced afterwards, and may be very important.

In this particular case the acts and omissions of persons claiming in trust for Sabin may be disregarded as immaterial. The acts and omissions of persons through whom Sabin claims—*i.e.*, Baylis—may be also passed over for the present, because Sabin, so far as he claims through Baylis, claims through him by purchase for value. Let us then leave out the second and fourth of the above heads, and see how Sabin's covenant will then stand. It will run thus—"That notwithstanding anything by the person who so conveys (*i.e.*, Sabin) made, done, executed, or omitted or knowingly suffered, the person who so conveys (*i.e.*, Sabin) has full power to convey the subject-matter expressed to be conveyed, and that, notwithstanding anything as aforesaid, that subject-matter shall remain to and be quietly entered upon, received and held, occupied, enjoyed, and taken by the person to whom the conveyance is expressed to be made (*i.e.*, Baylis) and any person deriving title under him (*i.e.*, the plaintiff David), and the benefit thereof shall be received and taken accordingly without any lawful interruption or disturbance by the person who so conveys (*i.e.*, Sabin) or any person rightfully claiming or to claim by, through, or under the person who so conveys (*i.e.*, Baylis's incumbrancers claiming immediately through him, but also claiming through Sabin), and that freed and discharged from or otherwise by the person who so conveys (*i.e.*, Sabin) sufficiently indemnified against all such estates, incumbrances, claims, and demands as either before or after the date of the conveyance (*i.e.*, Sabin's conveyance) have been or shall be made, occasioned, or suffered by that person (*i.e.*, the person who so conveys—*i.e.*, Sabin) or by any person rightfully claiming by, through, or under the person who so conveys (*i.e.*, Sabin); and, further, that the person who so conveys (*i.e.*, Sabin) and every other person rightfully claiming any estate or interest in the subject-matter of the conveyance by, through, or under the person who so conveys (*i.e.*, Baylis's incumbrancers, claiming immediately through him, but mediately through Sabin) will from time to time and at all times after the date of the conveyance (*i.e.*, Sabin's conveyance), on the request and at the cost of any person to whom the conveyance is expressed to be made (*i.e.*, Baylis) or of any person deriving title under him (*i.e.*, the plaintiff), execute and do all such lawful assurances and things for further or more

perfectly assuring the subject-matter of the conveyance to the person to whom the conveyance is made (*i.e.*, Baylis), and those deriving title under him (*i.e.*, the plaintiff), as by him or them or any of them shall be reasonably required." This covenant in terms extends (1) to the term created by Sabin himself, and (2) to the underleases created by Baylis, who claimed through Sabin.

Let us consider these a little more closely. Although the term created by Sabin in favour of Baylis was afterwards surrendered and no longer exists as a separate and distinct term, still it is not wholly extinguished even at law. The surrender of the term only operated as an assignment of the surrenderor's interest in it—see Co. Lit. 338b; 1 Wm. Saund. 235c, note m; *Davenport's case*, 8 Co. 145b; *Mellor* v. *Watkins*, L. R. 9 Q. B. 400, 22 W. R. Dig. 127. The term was not merged in the sense of being extinguished for all purposes. The right to the possession of the land, to hold and enjoy it, created by Sabin still exists, although for purposes of securing money only; but the continued existence of this right constitutes a defect in Sabin's title, and it is a defect of his own creation arising from an act done by himself. Further, the incumbrancers claim through Sabin himself, though their claim through him is based immediately on what was done by his lessee. The plaintiff's case is therefore brought directly within the words of those parts of Sabin's covenant which relate to quiet enjoyment and freedom from incumbrances and further assurance. The incumbrancers "claim by, through, or under the person who so conveys"—*i.e.*, the vendor Sabin. So that this case is really brought within the words of every part of the covenant, confining it throughout to the acts of Sabin and of persons claiming through him.

This view of the case renders it unnecessary to decide whether Sabin's omission to get in the underleases would of itself amount to a breach of his covenant. Upon this point, therefore, I will say no more than that as he knew nothing about them he did not knowingly suffer them to remain outstanding; and although in one sense he omitted to get them in, I see no answer to his counsel's contention that if a vendor who takes all reasonable care is liable for not getting in an incumbrance of which he knows nothing the statutory covenant would really be a warranty, which it clearly is not. But, even if Sabin is not liable for his own omission to get in these underleases, I am by no means clear that he is not liable for Baylis's omission to get them in. Sabin's covenant extends not only to the acts but also to the omissions of those who claim under him; and the fraudulent concealment from him of these incumbrances does not, in my opinion, affect the construction of this part of the covenant, and does not deprive the plaintiff of any rights which he would otherwise have against Sabin.

It must not be overlooked that this is not a case in which a vendor creates an incumbrance, then sells the fee, then repurchases, and afterwards sells again with the ordinary covenant for title. The covenant by a vendor in fee is not understood as extending to acts done previously to the last preceding sale. On each sale the title is investigated, and conveyancers are content with a series of covenants of title each of which covers the time which has elapsed since the last covenant from a vendor in fee. The covenants set out in the Conveyancing Act must be construed with reference to the ordinary course of business in sales of land and to the practice of conveyancers. This is the true answer to many of the cases ingeniously suggested in argument with a view to show that the construction adopted by Romer, J., was correct.

But reliance is placed upon the protection afforded to Sabin as a purchaser for value from Baylis. The words "otherwise than by purchase for value" have, however, no reference to the covenantor's own acts or omissions since the last sale of the fee, nor to the acts or omissions of persons claiming through him. Those words are confined to acts or omissions of persons through whom he claims since the last sale of the property. They would protect Sabin from liability in respect of what Baylis did if the only connection between them was that Sabin derived title through Baylis, but the words in question have no application to his liability for what he did himself nor to his liability for the acts of persons claiming through him, and these include Baylis himself. The defence based upon the words "otherwise than by purchase for value" cannot be sustained unless the true construction of the whole covenant is that an incumbrance specially excepted from one class of acts and omissions covered by it is also excluded from the other classes, or, in other words, from the whole covenant. But such a construction is, in my opinion, inadmissible; it is inconsistent with the constant use of the disjunctive "or," which is employed in order to enlarge and not to diminish the acts and omissions covenanted against. Let us suppose that the term had been granted, not to Baylis, but to a third person who created incumbrances, and then, concealing them from Sabin, surrendered the term to him, and that he then conveyed the fee to Baylis, who afterwards conveyed it to the plaintiff. Had that been the case the defendant would, in my opinion, be plainly liable on his covenant. I cannot see that he is less so by reason of Baylis being the grantee of the term and the creator of the incumbrances.

It was also urged for the defendant that the injury and damage to the plaintiff were the direct result of what Baylis did, and not of what the defendant did, and that the damages suffered by the plaintiff were too remote to be attributable to the defendant's breach of his covenant. But the damages sustained by the plaintiff are directly occasioned by the inability of the defendant to make a good title, and that inability arises from his own act as well as from the acts of a person claiming through him, as already pointed out. From this point of view the damage sustained by the plaintiff is not too remote.

Having, for the above reasons, arrived at the conclusion that upon the true construction of the covenant Sabin has committed a breach of it, I pass on to consider whether he can avail himself as against the plaintiff of any defence which he would have at law against Baylis if Baylis were the plaintiff in the action. Let us first consider the effect of Baylis's fraud on Sabin when Sabin conveyed the fee to him. The fraud committed by Baylis in concealing the incumbrances when he surrendered the term and took a conveyance of the fee did not prevent the fee from passing to himself. Moreover, the covenant for title contained in the deed conveying the fee was not void, but voidable only; it was Sabin's deed and covenant; *non est factum* could not have been pleaded by him to an action brought against him upon it even by Baylis himself (*Whelpdale's case*, 5 Co. 118b). Sabin might have pleaded fraud and rescission of contract as a defence to such an action, or he could have brought a cross action for damages against Baylis, or have counter-claimed for damages against him. But it is plain that Sabin could have no cross action or counter-claim against the plaintiff for damages; and rescission of the sale of the land to Baylis is not now possible, nor does the defendant seek to rescind it. The covenant with Baylis was voidable against him, but became unavoidable after he sold to the plaintiff.

Let us next consider the position of the plaintiff. The plaintiff's right to sue in this case is a

right to sue in his own name at common law as grantee of the estate in the land to which the benefit of the defendant's covenant for title is an incident: see *Middlemore* v. *Goodale*, 1 Ro. Ab., 521 K. Pl. 6; s. c. Cro. Car. 503-505, and 1 Smith's L. C., 8th ed., p. 87. And for the reasons I have already given, fraud on the part of the person through whom the plaintiff claims cannot furnish a defence to an action on such a covenant, nor is there any case which shows that it can. Although the benefit of the defendant's covenant with Baylis runs with the land, and the plaintiff can sue on it, the fraud committed by Baylis on the defendant was personal to Baylis, and does not run with the land, and does not in any way affect the plaintiff. At one time I had some doubt whether the plaintiff could be in a better position at law than the original covenantee through whom he claimed. But on reflection I have come to the conclusion that he is; for the right to sue at common law on a covenant running with the land depends on and is a consequence of the ownership in the land. The action is brought in respect of privity of estate as distinguished from privity of contract, and is not governed by the same rules as an action by the assignee of a covenant grounded on privity of contract: see *Lewis* v. *Campbell*, 8 Taunt., 715; *Kingdon* v. *Nottle*, 4 M. & S. 53; *Thursby* v. *Plant*, 1 Wm. Saund., 234 a and b), which, however, was an action on the statute 32 Hen. 8, c. 34, by the assignee of the reversion against the lessee. In equity it is hardly necessary to observe that the plaintiff's right to sue is unassailable. The plaintiff is a purchaser for value of the legal estate without notice of Baylis's fraud, and the defendant cannot set up any equitable rights based on such fraud as a defence to the action.

The judgment, therefore, must be reversed and be entered for the plaintiff, with costs here and below, and there must be an inquiry as to damages. The result, although arrived at by technical reasoning, is conformable to good sense and justice; for Sabin in fact professed to convey more than he had a right to convey—viz., an estate free from incumbrances created by himself or by any person claiming under him. Subsequent purchasers, including the plaintiff, paid for such an estate, but did not get it. As between the plaintiff and the defendant it seems, therefore, only right and just that the loss sustained by the purchaser should be borne by the vendor, although no blame is attributable to either of them. Sabin in his turn is entitled to redress against Baylis, but I fear that this right to redress has no practical value.

BOWEN, L.J.—That the benefit of the implied covenant created by section 7, sub-section 1, of the Conveyancing Act, 1881, runs with the land cannot be disputed. The real questions to be discussed are, first, whether there has been, on the part of the defendant, a breach of his covenant; and, secondly, whether the defendant can now avail himself of the fraud of Baylis (the plaintiff's predecessor in title) as an answer to the action. After much consideration and some fluctuation of view I find myself, in the end, of the same opinion as that which I entertained at the conclusion of the arguments.

At the outset it is necessary to determine whether there has been any breach at all of the covenant. The learned judge below held that there had been none, upon the ground that the incumbrances, consisting as they do of the sub-leases executed by Baylis, were in no sense the act of the defendant. But the point is not, as it seems to me, whether the incumbrances are themselves the act of the defendant, but whether the defendant's conveyance does all that the defendant covenanted that it should. By virtue of section 7 he has covenanted that he had full power to convey, notwithstanding anything done by himself which is calculated to affect the virtue of his conveyance. What has he himself done? In 1885 he parted with a term of years in the land and with the right of possession in the land during that term. But for his parting with the term—which he never re-acquired—he would have had a good fee simple in possession to convey to Baylis. He parted with it, and as he never got it back he was unable to convey the fee with possession. It is a mere conveyancing illusion to suppose that the defendant ever by the so-called surrender of 1887 got back the term which he had granted so as to extinguish it. He only recovered it mangled by the sub-leases and shorn of all right to possession. During the time of the duration of these sub-leases he had no right of possession to give, yet he purported to sell it, and covenanted that he had a good title to do so, notwithstanding his own acts.

In opposition to this view it was argued that the damage caused by the breach arose, not from the defendant's act in parting with the term, but from incumbrances subsequently created by another person. But here again one must not lose sight of the real issue, which is not whether the act done by the defendant in parting with the term led directly, and as a natural consequence, to the damage suffered by the plaintiff. No doubt between the defendant's parting with the term in 1885 and the damage occasioned to the plaintiff there was an intermediate cause—a *novus actus interveniens*—without which no damage would have occurred. But the action is not for damage caused by what the defendant had done in 1885, but for breach of limited covenants of a later date for title, for quiet enjoyment, and for freedom from incumbrances. The plaintiff has not got such title, is disturbed in his enjoyment, and is hampered by incumbrances, and the act of the defendant in 1885 is a cause *sine quâ non*, an act notwithstanding which, or against which, the covenantee was to be secured.

The above interpretation of section 7, sub-section 1, leads, no doubt, to some apparent anomalies. If the defendant had never had any interest in the land before he acquired the term from Baylis in 1887 he would not have been liable for the mischief arising from these prior incumbrances. Is the defendant, it will be asked, to be in a worse position because he had previously possessed the fee, or the term, and then parted with it in 1885 for a time to a person who defrauded him? Why—it will be said—is he to bear the burden of the fraud of another person in one case more than in the other? The answer seems to me to be that the Legislature has so chosen to enact. The language hardly admits of escape. What the defendant has "done"—to use the expression of the section—was to part with the term and the right to possession. Let us therefore suppose that for the words "anything done" we were to substitute in the statutory covenant an equivalent describing in detail the thing which has been actually done. The defendant will then have covenanted to make a good title to the fee simple in possession, notwithstanding the fact that in June, 1885, he parted with a term involving the right to possession itself. His only answer can be that though he parted with the term he would have recovered it intact but for a fraud committed on him. This is not a defence to an action by a covenantee except so far as the fraud disqualifies the plaintiff from suing. There is in other words a breach of covenant, but one which has been induced by a fraud; it remains to be seen whether the defendant can set up a defence founded on this fraud against a subsequent *bonâ fide* purchaser of the land.

I answer to the first inquiry by saying that there has been a breach by the defendant of the statutory covenant.

We have to consider next whether, if Baylis himself had been the plaintiff, he could, after the fraud which he had committed, have sued the defendant in respect of such a breach, and, lastly, whether, if Baylis could not do so, the present plaintiff is involved in any similar difficulty. A contract of sale procured by a purchaser's fraud is not void at law, but voidable. Even as against Baylis the defendant could not have pleaded that the contract of sale had been procured by fraud without also electing to rescind the contract as a whole and returning the purchase-money. A defrauded party cannot repudiate a contract in part only; he cannot pick out the plums of a bargain into which he has been misled and reject the remainder. But there is another and a different principle of law and equity which the defendant, without rescinding the contract, might, as between himself and Baylis, have successfully invoked. No person can successfully sue for a breach of covenant when the breach has been occasioned by his own fraud. To take advantage of such a breach would be a dishonesty, and the maxim, "*Ex turpi causâ non oritur actio*," though usually applied to a different class of cases, in fact covers this. To hold otherwise would be to allow a man to recover damages through, and to make a profit out of, his own fraud. To any action on the covenant by Baylis the defendant might therefore have pleaded, not, indeed, that the contract was induced by Baylis's fraud—a plea which could only be pleaded on the terms of rescinding the contract as a whole—but that the breach of the contract had been induced by it. Such a defence, however, is one that would be personal to Baylis, a personal bar or exception only rendering him unfit in the eyes of the law to sue for this particular breach. And as Baylis could not sue for this particular breach, so neither could he assign the rights to be protected against this particular breach to another. If the present plaintiff had simply been an assignee of the rights of Baylis under his special covenant to be protected against this particular breach, the plaintiff, as such assignee, could not have been in a better position than his assignor. But the plaintiff is not suing as the assignee of a *chose in action*, but as the assignee of the land itself. His cause of action is based on the original liability of the covenantor to all persons into whose hands the land may come. As against such an assign of the land no plea can prevail which is in the nature of a personal bar only to the original covenantee. It would, indeed, be a grave matter to add such an element of hidden danger to titles of landed property, as would arise from sanctioning the idea that the covenants of a conveyance which run with the land cannot be invoked by a *bonâ fide* purchaser against some breach traceable to and caused by a fraud on the part of the original covenantee. The benefit of the covenant runs with the land, but the burden of the fraud does not. On this point also the argument of the respondent seems to me, therefore, to fail; and the appeal must accordingly be allowed, and the order be drawn in the form suggested by my brother Lindley.

A. L. SMITH, L.J.—The facts may be shortly stated as follows.

On the 24th of June, 1885, the defendant Sabin, who, for the purposes of this case, may be taken as being owner in fee, granted to Baylis, a builder, a lease of certain land at Hurstpierpoint for the term of ninety-nine years. Baylis thereupon, to secure present advances, created three mortgages by way of sub-demise. On the 5th of June, 1887, Baylis, as beneficial owner and for valuable consideration, purported to surrender the term of ninety-nine years to Sabin; but fraudulently concealed from him the fact that he had created these three mortgages. And on the 16th of June, 1887, Sabin, as beneficial owner, believing that he was owner in fee, conveyed the land to Baylis in fee. Baylis, as beneficial owner, subsequently conveyed to the plaintiff in fee, fraudulently concealing from him, as he had done from Sabin, the existence of the mortgages which were then, and still are, subsisting.

That both the plaintiff and the defendant could sue Baylis is undeniable, but Baylis is a bankrupt and not worth suing, and the question raised is whether the plaintiff, as assignee of the estate from Baylis, can sue Sabin for breach of his covenant contained in the conveyance by him to Baylis of the 16th of June, 1887, wherein Sabin, "as beneficial owner," conveyed to Baylis in fee.

There is no question as to the covenant running with the land so as to enable the plaintiff to sue upon it as assignee of the estate. The question is, Was Sabin, in the circumstances above stated, committing any breach of his covenant with Baylis, and, if so, can he be sued by the plaintiff for such breach? Romer, J., has held that he has not committed any breach, and hence the present appeal.

It becomes necessary to consider section 7 (1) A of the Conveyancing and Law of Property Act, 1881, for the covenant contained in this section is the covenant entered into by Sabin when he conveyed as "beneficial owner" to Baylis. This section, when applied to the admitted facts of the case, reads as follows:—

1. That, notwithstanding anything made, done, executed, or omitted, or knowingly suffered by Sabin himself, he has full power to convey the subject-matter as expressed to be conveyed to Baylis—*i.e.*, to Baylis in fee.

2. That, notwithstanding anything made, done, executed, or omitted, or knowingly suffered by Sabin himself, the subject-matter should be quietly enjoyed by Baylis, and any person deriving title under him, without any lawful interruption (1) by Sabin himself, (2) by any person rightfully claiming through Sabin, (3) by any person rightfully claiming through anyone (other than a person who claims in respect of an estate subject whereto the conveyance is expressly made) through whom Sabin derives title other than by purchase for value. (This last does not apply to this case.)

3. That Sabin would indemnify Baylis against all such claims—*i.e.*, (1) (2) (3) above stated.

4. That Sabin, and any person rightfully claiming any estate in the subject-matter (other than an estate subject whereto the conveyance is expressly made) through Sabin, would execute all lawful assurances.

It cannot be disputed that Sabin has covenanted with Baylis (*a*) that he (Sabin) had not made, done, or executed anything which limited his full power to convey to Baylis in fee; and (*b*) that, notwithstanding anything made, done, or executed by Sabin, Baylis, and any person deriving title under him, should quietly enjoy the subject-matter conveyed without lawful interruption by anyone rightfully claiming through Sabin. I have left out the words in the section "omitted or knowingly suffered," for the words "made, done, or executed" raise the point I have to consider.

It is said that Sabin is liable upon this covenant, firstly, because Sabin created the term for ninety-nine years in favour of Baylis which he had never got in, and thus he had made, done, or executed that which limited his power of conveying in fee to Baylis; and, secondly, that, by reason of Sabin's acts, the

mortgagees of Baylis could rightly claim through Sabin, and thereby lawfully interrupt Baylis and anyone deriving title under him—that is, the plaintiff—in the quiet enjoyment of his estate.

Now it appears to me to be clear, if Sabin, being owner in fee, had created the term of ninety-nine years in favour of a third person, reserving to himself the reversion expectant upon the determination of the term, and before getting it in had conveyed as beneficial owner to Baylis in fee, that Baylis could have sued Sabin upon his covenant, because Sabin would then have made, done, or executed the very thing which disabled him from conveying to Baylis in fee. In such a case the reason why he had not got the term in would be immaterial, and it would be no answer for Sabin to say to Baylis, "I thought I had got it in, but have been deceived by the third person," for if, in fact, he had not got it in, and had conveyed as beneficial owner to Baylis in fee, he, Sabin, would have broken his covenant with Baylis. But it seems that in the present case Sabin did not create out of his estate a term in favour of a third person, but did so in favour of Baylis; and the question arises, Does this fact, cause that which otherwise would, in my judgment, have been a breach of the covenant if the term had been created in favour of a third person not to be a breach when created in favour of Baylis? The breach is for having made, done, or executed precisely the same thing in each case, whereby he (Sabin) was unable to convey in fee. Romer, J., came to the conclusion that the act which incapacitated Sabin from conveying to Baylis in fee was not anything made, done, or executed by Sabin, but was the creation of the mortgages by Baylis, and he likened the present case to a young man selling his estate in fee and then, fifty years afterwards, buying it back after many dealings with it in the interval by the owner for the time being, and he said that under this covenant the young man would not be liable for such dealings when reselling as beneficial owner. In this I agree, for in such case the young man would not have made, done, or executed anything, while he was retaining possession of his estate in the land, whereby he was subsequently prevented from conveying in fee. But the present case is not the case of a man selling his estate out and out, and afterwards repurchasing it, it having been dealt with by others in the meantime, in which case I agree the covenant would not apply, but it is the case of a man who whilst he is owner of an estate in fee carves out of it a term retaining the reversion expectant upon the determination of that term in himself, and then conveying as beneficial owner in fee with the term created by him still outstanding. It seems to me, with deference to the great experience of Romer, J., in these matters, that the case put by him is not in point, for in the one case the vendor, whilst retaining possession of the estate, has done nothing to incapacitate himself from conveying in fee, whilst in the other he has. As I have before stated, if he (the vendor) has made, done, or executed that which prevented him subsequently conveying as beneficial owner in fee—viz., as in this case creating the term—the reason why he has been unable to get the term in is immaterial when considering whether the covenant has been broken or not.

In my judgment, whether the term was created in favour of a third person or in favour of Baylis, Sabin has committed a breach of his covenant. He has covenanted with Baylis that he had title to convey to him in fee free from incumbrances, whereas as a matter of fact he had not. Why, then, has he not broken his covenant? It appears to me that he has.

But I agree that, though he has broken his covenant, no effective action could be maintained by Baylis against him for such breach; firstly, because Sabin could have pleaded to such an action that he was induced by the fraud of Baylis to enter into the covenant, and that he, Sabin, had rescinded the contract upon discovering the fraud (if he had done so); secondly, because Baylis could only have recovered nominal damages from Sabin—though Baylis did not get the fee under the conveyance by Sabin to him of the 16th of June, 1887, as Sabin had covenanted, yet, coupling that conveyance with the conveyances which had theretofore passed between Sabin and Baylis, as a matter of fact the fee which Sabin once had had passed out of him into Baylis and his nominees, and Baylis's damages would be *nil;* and, thirdly, because Sabin in such action could have counter-claimed against Baylis upon the covenant which he gave when he purported to convey the term as beneficial owner to Sabin on the 5th of June, 1887, for any damages Sabin might sustain by reason of the breach of that covenant by Baylis. For these reasons it appears to me that Sabin did commit a breach of his covenant with Baylis, but by reason of the personal acts of Baylis he (Baylis) is prevented from effectively prosecuting an action for such breach against Sabin.

The point now arises whether a plaintiff who sues as assignee of the estate for breach of a covenant running with the land is prevented from suing the original covenantor (Sabin) for a proved breach of his covenant, because the original covenantee (Baylis) has committed personal acts which have prevented him from taking advantage of these breaches; or, in other words, is a plaintiff who sues as assignee of the estate for a proved breach of a covenant running with the land affected by defences purely personal to the original covenantee. In such an action the plaintiff does not sue by reason of privity of contract, but by privity of estate, and this differentiates this case from that put in argument—viz., that an assignee suing by reason of privity of contract is usually in no better position than his assignor. Lindley and Bowen, L.JJ., have fully dealt with this point, and I have nothing to add to what has been said thereon; and for the reasons they have given I am of opinion that the personal act of the covenantee (Baylis) which would prevent him effectively suing the covenantor does not debar an assignee who sues not upon privity of contract but upon privity of estate from suing and recovering upon a breach of covenant committed by the original covenantor.

I now come to a further breach of covenant by Sabin which the plaintiff claims that Sabin has also committed—viz., that for quiet enjoyment. It is said that by reason of Sabin's act in creating the term the mortgagees of Baylis rightfully claiming though Sabin can lawfully interrupt the plaintiff in the possession of his estate to which he derives title under Baylis; and that Sabin has covenanted against this. I can see no answer to this point if it be the true view, as I think it is, that Sabin committed an act in breach of his covenant in creating and not getting in the term before he conveyed as beneficial owner to Baylis in fee. Suppose that the mortgagees were to bring ejectment against the plaintiff, what defence would he have? They would produce their mortgage deeds and prove that they were existing sub-demises of the term which Sabin, when owner in fee, had created. They could prove that Baylis had lawfully created these sub-demises when he did, and that they were valid and subsisting. What answer could the plaintiff have to such an action? These mortgagees in their action against the plaintiff would rightfully claim through Sabin and would bring themselves within Sabin's covenant for quiet enjoyment to Baylis and

The agreement, however, did not contain any express stipulation as to copyright, nor any stipulation by the defendants not to engage in a similar business on behalf of themselves or others after their employment by the plaintiff had terminated. The defendants, having ceased to be employed by the plaintiff, proposed to supply to a rival publication copies of the headings and advertisements appearing in the plaintiff's work.

Held, that the "headings" in the plaintiff's publication were a good subject-matter for copyright; that, on the facts, the reasonable inference was that the headings were composed on the terms that the copyright therein should belong to the plaintiff; and that the plaintiff was entitled to an injunction to restrain infringement of his copyright in the "headings."

Semble, *that the plaintiff would also be entitled to copyright in respect of the collocation and arrangement in his work of a series of the advertisements.*

Held, also, that it was a reasonable inference from the nature and object of the defendants' employment that all documents and materials prepared and obtained by the defendants in the course of that employment were for the purposes of the plaintiff's publication only, and that the plaintiff was entitled, notwithstanding that his employment of the defendants had come to an end, to restrain the defendants making any use of such documents or materials for any other purpose—the plaintiff's right in this respect depending, not in any way on copyright, but on the ground that it would be contrary to the good faith implied by the nature and object of the defendants' employment that the defendants should use documents or materials compiled while in the plaintiff's employment for any other purpose than that of the plaintiff's publication.

Reuter's Telegram Co. *v.* Byron, 43 *L. J. Ch.* 661; Abernethy *v.* Hutchinson, 3 *L. J.* (*O. S.*) *Ch.* 209; *and* Morison *v.* Moat, 9 *Ha.* 241, *discussed.*

Appeal by the defendants from the decision of Chitty, J.

The plaintiff was the proprietor and publisher of a book called the "International Guide to British and Foreign Merchants and Manufacturers," a portion of which (called the "Continental Section") was devoted to Continental tradesmen; and it was with reference to this portion of the work that the present case arose. The whole work had been registered by the plaintiff at Stationers' Hall.

The Continental section of the plaintiff's work was arranged under special headings arranged in alphabetical order, descriptive of various trades and articles of manufacture; each of these headings were printed in four languages—viz., English, French, German, and Spanish; and under each heading were printed the names, in alphabetical order, of such foreign traders as desired their goods to be advertised in the work, with their addresses, trade-marks, and other similar illustrations. These advertisements were also in the above four languages.

The plaintiff had employed travellers or canvassers in order to obtain these advertisements. By the terms of the agreement entered into between the plaintiff and each such traveller, the plaintiff agreed to employ the traveller for the purpose of obtaining these advertisements in a particular allotted district, and the traveller agreed to devote himself therein exclusively to the plaintiff's service, receiving by way of remuneration a very high percentage on the cash received from the traders for such advertisements, and being bound to furnish, free of charge, to the plaintiff all blocks (for illustrations, &c.) and translations necessary for producing the advertisements. None of the agreements, however, contained any stipulation that the traveller should not on the termination of the agreement engage in a similar business either on his own account or on behalf of any other person.

The defendants, two brothers named Evans, had been employed by the plaintiff as travellers, under such agreements. The agreements with the defendants terminated in April, 1892.

Shortly afterwards a publication called the "Commercial Directory" was proposed to be started. This publication was intended to contain also a Continental section, and was a rival publication to that of the plaintiff.

The defendants assisted in the preparation of the Continental section of this proposed rival publication; and it appeared that the materials from which certain printed specimen copies of the proposed rival publication were produced consisted of printed portions cut out of the "Continental Section" of the plaintiff's work, with the addition of written matter supplied by the defendants; the result being that these specimen printed copies of the rival publication were almost a *verbatim* reprint of the plaintiff's Continental section.

The plaintiff thereupon instituted this action against the defendants Evans, and the printers and publishers of the proposed rival publication, praying an injunction to restrain the defendants Evans from selling or communicating to the rival publishers, and the rival publishers from publishing or using, and the printers from printing or copying, any copies or blocks of advertisements or trade-marks procured by, or then or late in the possession of the defendants Evans as agents of the plaintiff; or any advertisements copied from or only colourably differing from any of the advertisements in the plaintiff's publication; and from otherwise infringing the plaintiff's copyright therein.

A motion for an interlocutory injunction came on for hearing on the 12th of August, 1892, before Chitty, J., who granted an interlocutory injunction restraining the defendants Evans and the rival publishers, their servants and agents, from printing, selling, or publishing any copy or copies of so much of the plaintiff's book as consisted of headings (not forming part of advertisements therein), so, or in such a way, as to infringe the plaintiff's copyright in such headings; and, further, from displaying or using, for the purpose of obtaining advertisements for any work other than the plaintiff's work, so much of the copies of the rival publisher's book already printed as consisted of such headings, and from using blocks or materials obtained by the defendants Evans, or either of them, whilst in the employment of the plaintiff and for the purposes of the plaintiff's work, or any copies thereof, for the purposes of any work other than the plaintiff's; but the injunction was not to extend to prevent the defendants, or any of them, making legitimate use of the plaintiff's work, or any part thereof, for the purposes of obtaining advertisements or otherwise.

The defendants Evans appealed.

Section 18 of the Copyright Act, 1842 (5 & 6 Vict. c. 45), so far as material, enacts "that when any publisher . . . shall carry on or be the proprietor of any encyclopædia, review, . . . or work published in a series of books or parts, or any book whatsoever, and shall have employed or shall employ any persons to compose the same . . . or any portions thereof for publication in or as part of the same, and such work . . . or portions shall have been or shall hereafter be composed under such employment, on the terms that the copyright therein shall belong to such proprietor, publisher, or conductor . . . and paid for by such proprietor, publisher, or conductor, the copyright in every such encyclopædia review, . . . and work published

in a series of books or parts, and in every . . . part . . . and portion so composed and paid for, shall be the property of such proprietor, publisher, or other conductor, who shall enjoy the same rights as if he were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this Act. . . . Provided also that nothing herein contained shall alter or affect the right of any person, who shall have been or who shall be so employed as aforesaid, to publish any such his composition in a separate form, who by any contract express or implied may have reserved or may hereafter reserve to himself such right; but every author reserving such right shall be entitled to the copyright in such composition when published in a separate form, according to this Act, without prejudice to the right of such proprietor, publisher, or conductor as aforesaid."

Farwell, Q.C., and *Ribton*, for the appellants.—The plaintiff has no copyright in the "headings." The defendants and other canvassers employed by the plaintiff were really the authors or composers of these "headings." Under section 18 of the Copyright Act, 1842, the plaintiff, as publisher, would only be entitled to copyright in the "headings" if it were a term of the employment between the plaintiff and the persons employed by him that the copyright in the headings should belong to the plaintiff. There is no such term contained in the agreement under which the defendants were employed; and the *onus* of proof that that was a term of the employment lies on the plaintiff: *Walter* v. *Howe*, 29 W. R. 776, 17 Ch. D. 708. [LINDLEY, L.J., referred to *Sweet* v. *Benning*, 3 W. R. 519, 16 C. B. 459, and read the passage (at p. 484) in the judgment of Maule, J., in that case, beginning with the words "it was urged that these reports were not within," and ending "the reports in question."] Then, on the question of agency, apart from copyright, the agreement between the plaintiff and the defendants was in writing, and it contains no stipulation that the defendants are not to engage or assist in a similar business on the termination of their employment with the plaintiff; a negative stipulation to that effect cannot be read into a written document. There was nothing confidential in the materials collected—viz., the advertisements—by the defendants while in the plaintiff's employment; the materials were collected for the purpose of being made public; the defendants, therefore, cannot be restrained from using on their own behalf the materials so collected: *Reuter's Telegram Co.* v. *Byron*, 43 L. J. Ch. 661. [KAY, L.J., referred to *Albert (Prince)* v. *Strange*, 1 Mac. & G. 25, and *Merryweather* v. *Moore*, 40 W. R. 540, [1892] 2 Ch. 518.] The injunction as granted would prevent the defendants using or publishing any new copy of any block, even though at the request of the advertiser himself. It is not contrary to good faith for the defendants to use the information they acquired while in the plaintiff's employment. Conveyancers' pupils are in the habit of taking copies of the conveyancers' precedents and using them afterwards for their own purposes, and possibly in competition with the conveyancers from whom they obtained the information.

Abernethy v. *Hutchinson*, 3 L. J. (O. S.) Ch. 209; *Morris* v. *Ashbee*, L. R. 7 Eq. 34, 19 W. R. Ch. Dig. 34; and *Kelly* v. *Morris*, 14 W. R. 496, L. R. 1 Eq. 697, were also referred to.

Byrne, Q.C., and *Morshead*, for the plaintiff, the respondent, were not called on.

LINDLEY, L.J.—[The Lord Justice stated the facts, and proceeded:—] There is no stipulation in the agreement between the plaintiff and the defendants that the defendants shall not engage in a similar kind of business. But the plaintiff relies for protection against what the defendants propose to do for the rival publication, first of all, upon his (the plaintiff's) copyright in his publication; and, secondly—as regards the use by the defendants of the blocks and materials—upon the principles of the law, not of copyright, but of agency.

First, as to the copyright. Chitty, J., has restrained the defendants from printing, selling, or publishing any copy or copies of so much of the plaintiff's book as consists of headings, not forming part of the advertisements therein, so, or in such a way, as to infringe the plaintiff's copyright in the headings. The defendants (the present appellants) contend that that part of the order is wrong, on the ground that the plaintiff has no copyright in that part of his work which is called "headings." The defendants say that that is not a subject-matter of copyright; and that, even if it were, there is no proof such as required by section 18 of the Copyright Act (5 & 6 Vict. c. 45) that the parts which Chitty, J., has protected of the plaintiff's work, have been published upon the terms that the copyright in them is vested in the plaintiff. As regards the point as to copyright in general—without for the moment considering the question as to section 18 of the Act—I rather think that Chitty, J., has not gone quite far enough. I do not myself see the difficulty in having a copyright in a *sheet* of advertisements. I do see a difficulty in having a copyright in a single advertisement, because, as Chitty, J., pointed out, that might prevent the advertiser from republishing his advertisement in another paper, which would be absurd. But to say that it follows from that that the proprietor of a publication—such as the *Times*, for example—has no copyright in a sheet of advertisements, so that he cannot restrain anyone from copying that sheet, appears to me, a very different proposition. A person having a copyright in a book has not a copyright in every word of it; he cannot restrain other persons using words to be found in his book. That is obvious enough; but it appears to me that Chitty, J., rather overlooked the difference between the right to publish a sentence out of the sheet of a paper and the right to publish a whole sheet. It is not necessary, however, to decide this point, and I do not decide it, as the plaintiff here does not claim an injunction larger than Chitty, J., has granted him.

As regards the particular portions—the "headings"—which Chitty, J., has protected, I do not think there is any real difficulty. It appears to me that the plaintiff has an exclusive right to the publication of those "headings," with the translations, and so forth—not that he can restrain other people from publishing the same sort of thing if they go about it in the right sort of way—but he has a right to restrain other people from copying his book. There is so much in common to the plaintiff's book and to other books of the same sort that they very likely will contain the same sort of information. It is like the case of a person who publishes a map of a particular country; another may publish a map of the same country, although the two maps may be exactly alike; but the first person can restrain the other from copying his map, which is a totally different thing.

I see no difficulty, either, in that part of the argument which turns on section 18 of the Copyright Act. [The Lord Justice read section 18 so far as material, and proceeded:—] Mr. Farwell's argument is that the plaintiff has not obtained the copyright in these headings, because he has not shown that they have

been published upon the terms that the copyright therein should belong to the plaintiff. I think he is right in saying that the burthen of proof lies upon the plaintiff to show that they have been; but the statute says nothing at all about the kind of evidence to be resorted to for the purpose of proving that an article has been published on these terms. If there is no express agreement about it, it is left to inference. What is the inference to be drawn in a case of this sort, where regard must be had to the kind of article, which in the present instance consists of the "catch-words" or headings, with translations? I take it that the passage in the judgment of Maule, J., in *Sweet* v. *Benning*, 16 C. B., at p. 484, which I referred to in the course of the argument, may be fully acted upon—viz., that, *primâ facie* at all events, in the absence of evidence to the contrary, it may be inferred from the fact of employment and payment that one of the terms was that the copyright should belong to the persons employed and paid. That is not the necessary inference, but in a case of this sort, where any other inference would be, I should say, unbusinesslike, I should not hesitate myself to draw that inference. That is not acting on the terms of an agreement, it is merely drawing an inference of fact from the employment and payment and from the kind of work which the one person was doing for the other. Having regard to those materials, the inference I should draw would be that this was done upon the terms that the copyright and all these things, which are of no use to anybody but the plaintiff, should be his. Therefore, so far as the copyright is concerned, it seems to me that Chitty, J., was perfectly right.

Another point is that this injunction goes on to restrain the defendants from using blocks or materials obtained by the defendants while in the employment of the plaintiff and for the purpose of his work, or any copies thereof, for the purpose of any works other than the work of the plaintiff. This point gave rise to some controversy, and it was pointed out that the expression "any copies thereof" might go a little too far, because those words unqualified would cover the case (which nobody thought of covering) of the advertiser getting back his block from the plaintiff (the block belonging to the advertiser), and, having got it back, applying to the defendant to print it, which, of course, the advertiser would have a perfect right to do. Mr. Byrne, however, not objecting, that difficulty will be obviated by adding, as a qualification to those words, that the order is not to prevent the defendants, or any of them, from publishing any copy of any block at the request or by the direction of the owner thereof.

That leaves only one matter still to be considered—viz., that part of the injunction which restrains the defendants from using blocks or materials. Mr. Farwell argued that the injunction goes too far as regards "materials"; but the whole—both blocks and materials—is qualified by this, that they are obtained by the defendants while in the employment of the plaintiffs and for the purpose of the plaintiffs' work. That raises the question—and it is one which has nothing to do with copyright—whether any agent has a right to use materials obtained by him in the course of his employment, and for his employer, against the interest of that employer. I am not aware of any such right. It appears to me that it would be contrary to the relation which exists between principal and agent. It is contrary to the good faith of the employment, and good faith underlies the whole of an agent's obligation to his principal. Subject to one observation which I will presently make, I should say that no case can be found which is contrary to the general principle upon which this injunction is framed. I do not think an agent has a right to employ, as against his principal, materials which the agent has obtained only for his principal and in the course of his agency. Such materials are the property of the principal in this sense, that the principal has such an interest in them as entitles him to restrain the agent from the use of them except for the purpose for which they were got. It is said that the case of *Reuter's Telegram Co.* v. *Byron*, before the late Master of the Rolls, is contrary to that. I think that case goes rather too far. If that case rests upon this—viz., that the application was merely interlocutory, and the Master of the Rolls, was not satisfied that the case was plain for an injunction—then it need not be questioned; but if it goes further than that, then there can, I think, be no doubt that the true principle was applied in that case more narrowly than it ought.

But in the present case I see no reason for questioning this part of the injunction; and, therefore, with the addition I have mentioned by way of qualification to the words "or copies thereof" in the order, this appeal must be dismissed, with costs.

BOWEN, L.J.—I am of the same opinion. First, with regard to the headings. That the headings are the subject of copyright I do not think can be disputed. They are the result of literary labour both as regards the composition of the headings themselves, and their collocation and concatenation in the book. If they are the subject of copyright, in whom is the copyright? For that purpose we have to look to section 18 of the Act of 1842.

They were composed by persons who were employed and paid to compose them by the plaintiff. They are parts of a book. Mr. Farwell urged that the plaintiff was not entitled to the copyright in them, because the persons who composed them were not shown to have composed them on the terms that the copyright should belong to the plaintiff. To my mind, as between the plaintiff and the defendants, that point might easily be disposed of by saying that in the agreement between the two *primâ facie* evidence is afforded that the book and parts of the book thereafter belong to the plaintiff; by which, as a matter of business, one would understand that as to those of them which were susceptible of copyright, the copyright, as between the two, must be taken to belong to the plaintiff. But quite apart from the evidence *inter partes* which is in the nature of admission, it seems to me that the same result follows from a really intelligent application of the way in which these headings came into existence. Did they come into existence on the terms that the copyright should belong to the proprietor? It is clear law that the terms which are necessary as a condition precedent to the vesting of the copyright under section 18 need not be terms that are in writing. It is equally clear law that they need not be terms that are expressed; they are terms which may be either expressed, or which may be gathered from the transaction. For that proposition, if authority be necessary, *Sweet* v. *Benning* is a sufficient authority. But I do not apprehend that it could be doubted that that would be the true interpretation of the section apart from authority. From where are you to collect the terms? You are to collect the terms from what passed between the parties it is true—*i.e.*, in this case between the plaintiff and the persons whom he employed—but one may also collect the terms from the nature of the business itself. It seems to me to be impossible, as a matter of business, to suppose that these headings were composed and furnished to the plaintiff upon any other terms than that he was to have the copyright in them, because otherwise, having furnished them to the

plaintiff, those who composed them might have published them themselves, and defeated the plaintiff's object. It appears to me that the headings are matters in which copyright can exist, and that the plaintiff is entitled to copyright in them.

With regard to the prints and illustrations, it is equally clear law that the prints—and I am not referring to separate prints, but to prints which are part and parcel of the book—are covered by the law of copyright, and I should have thought that the prints in this book, as distinct from the prints separate from the book (which is a totally different thing) were the subject of copyright; and I should have said, in the same way, that in this book they are the copyright of the plaintiff.

With regard to the advertisements—though it is not necessary to decide that—I am by no means satisfied that Chitty, J., did not take on this interlocutory motion rather a narrower view of the law of copyright as it applies to those advertisements than perhaps he would take at the hearing. It is perfectly true that each separate advertisement may not have become in its separate form, and as a distinct entity, the copyright of the plaintiff, but in respect of the collocation and concatenation of the advertisements, nevertheless, he would have a copyright—just as I believe the proprietor of the *Times* would have a right of action against any other paper that took the whole (or a substantial part of the whole) sheet of the *Times* with the advertisements as therein arranged, and reprinted and republished it in their columns after the *Times* had once had it, although the proprietors of the *Times* might not have a right of preventing any person, who furnished them with an advertisement, inserting the advertisment in some other paper, because I think that the terms upon which they received the advertisement would be obvious, and would show that it was not intended to vest the copyright in them in respect of that. But it is not necessary to decide this point as to the advertisements, as it is not really before us at present.

Then we come to the second part of the case. Ought not the plaintiff to be allowed to restrain the defendants from using such blocks and materials, or copies, as they obtained while in the employment of the plaintiff and for the purposes of the service and of the work which they had to do—that is to say, which they obtained really for the purpose of doing their duty to the plaintiff? Ought not the plaintiff to be able to restrain the defendants from using those materials and those documents in competition with the plaintiff himself afterwards? It is not a question of copyright. I agree that copyright must be kept out of sight altogether; nor is it, I may observe, a simple question of the absolute property at law in the documents themselves or in the blocks themselves. It is a question of whether the plaintiff—whatever the property in the documents or the materials may be—has not sufficient special property in the matters to entitle him to restrain the use of them against himself, when they were really obtained in the course of the agents' employment for his (the principal's) own use. That depends entirely, I think, upon the terms upon which the employment was constituted upon which the fiduciary relation of principal and agent came into existence. The other Lords Justices have already, in the course of the argument, expressed what I fully believe to be the correct view—that there is no distinction between law and equity as regards the law of principal and agent. The common law, it is true, treats the matter from the point of view of an implied contract; because it assumes that there is a promise to do that which is part of the bargain, or can be fairly implied as part of the good faith which is necessary to make the bargain effectual. What is an implied contract or an implied promise at law? Why it is that promise which the law implies and authorizes us to infer, in order to give the transaction that minimum of equity which the parties must have intended it should have, and without which the transaction would be unintelligible and futile. I agree that there may be cases of businesses in which the terms would differ, and where the terms as to the use which might be made of materials obtained might be necessarily different.

But let us take the case of this business as a business of an ordinary kind. An employer gives his agent the means (by employing him) of obtaining in his name, and for the purposes of the contract, certain materials and certain information which has been committed, for the purposes of that contract, to writing. Is it intelligible that the bargain made between the principal and agent should be any other than one which implies that the agent was not—having obtained this under the cover of this agency—to turn round and use the materials against his employer as soon as the agency is determined? It seems to me that in this case the proper inference to be drawn would be that it was part of the understanding that these materials were not to be used otherwise than for the purposes of the employment in the course of which they were obtained. It is true that you must find out the terms here, as elsewhere, partly from the written document and partly from all the surroundings of the written document, such as the nature of the transaction with regard to which the document is brought into life. But it is not true to say that because you cannot find it in the written document itself, or by any implication to be extracted from the words used, that therefore you are not to imply it. You must take the words used with reference to the subject-matter about which they are used, and taking the subject-matter and the document together you must ask yourself what is the necessary implication to be drawn.

Nothing could be a clearer illustration of the way in which you are to treat this examination of the inference of fact to be drawn than the well-known cases cited in the argument in this case. One of these, *Abernethy's case*, is a typical instance. There a student attending Abernethy's lectures proposed afterwards to publish the lectures for profit. That case was very near the dividing line. The question there depended upon what was the real relation which must have been understood by both parties to have been created between the student and the lecturer. Was it possible to suppose that the student was to be at liberty to destroy the value of the lectures, to the lecturer, by publishing them for profit afterwards? The Lord Chancellor thought not, and on that line the case was decided. Mr. Farwell put another case by way of illustration, the case of a pupil in a conveyancer's chambers. It is true that the pupil carries away the conveyancer's precedents for his own use and profit afterwards, but that is because it is the understanding between the parties. The pupil goes to learn and to carry away precedents for his own use and profit afterwards by a purely traditional understanding of the profession; and that case accordingly would fall on the other side of the line. It does not, however, follow from that, that a student who goes to a conveyancer could take all the precedents of the conveyancer and publish them in a book as against the conveyancer afterwards; that would fall more on the line of *Abernethy's case*. You must look at the whole transaction, and consider what the parties must at least have intended, in order to give the transaction any business-like efficiency at all. If you see that it could

not have been intended by the parties that the agent should be allowed to deal with materials in this way, then the law will imply that that was part of the bargain. It was said by Mr. Farwell that it must have been intended that the confidential fetter imposed upon the use of these documents should terminate as soon as the book was published, for which they were being compiled; otherwise, that we should be importing the question of copyright into the discussion of this branch of the case. On the contrary, it is by insisting on that view that he imports the idea of copyright into this branch of the case. That question has nothing to do with it. It is perfectly true that you must look at the whole transaction to see what the documents and materials had been collected for; but that would by no means sufficiently protect the employer if the agent was to be left free to do what he liked with the materials the moment the volume was published. That argument, it seems to me, does not apply.

The only case at all inconsistent with the law as expressed, in my opinion, by the Legislature, and as I have tried to explain it, is *Reuter's Telegram Co.* v. *Byron*. The actual decision in that case was doubtless right, but I do not think that the language which Sir George Jessel is reported to have used can be supported as sound law. It seems to me that if the language of Sir George Jessel is to be read as justifying the action of the defendants in that case as a matter of law or as a matter of equity, it cannot be justified to the extent to which that learned judge goes. I cannot find that *Reuter's case* has ever been cited as an authority since; but whether cited as an authority or not, it is not a case the language of which I should myself be at all prepared to follow.

KAY, L.J.—I am of the same opinion.

In the first place, I have no doubt that the headings used in this book of the plaintiff's are themselves the subject of copyright. The headings are a short description of the particular trades which are there gathered together; but each separate heading of those is put so that the proper catchwords occur first in alphabetical order in the book, and each of those headings is repeated in three other languages after the English heading has been put there. I am not quite satisfied at present that the defendants themselves, or persons in their position, furnished the whole of these headings. Mr. Farwell did not satisfy me that the evidence showed that the defendants, or any agent of the plaintiffs, furnished or had anything to do with the English headings. However, each English heading was certainly translated by persons in the position of agents of the plaintiff, and these translations were supplied by persons who were employed to do it for that purpose. Suppose all the headings — English, French, German, and Spanish, which are the languages used — were supplied by the defendants, and were arranged for that purpose by the plaintiff. They are published in the plaintiff's book in a certain alphabetical order, and in each case are followed by a series of advertisements, rightly coming under each particular heading. Mr. Farwell contended that if there were any copyright whatever in these headings—which I understand he denied—it must be the copyright of the persons who composed them, because, in order to make them the copyright of the owner of the book, it is necessary, under section 18 of the 5 & 6 Vict. c. 45, for the owner of the book to prove that it was a term of the arrangement between him and his agent, the composer, that the copyright should belong to the owner of the book. I will accept that statement of the law. In the first place, these headings are, from their nature, the subject of copyright. There is sufficient literary labour involved in the production of them to make them properly the subject of copyright. I will assume that the whole of the English composition of these headings and all the translations into the other languages were prepared by an agent of the plaintiff. Neither the statute, nor any principle of law that I am aware of, makes it necessary that the terms, as between the owner of the book and the person he employs as composer that the copyright should belong to the owner of the book, should be in writing. In fact, the decisions are to the contrary. The decisions show that you may establish that in any way by the usual rules of evidence. In the present case we have to deal with a very bulky book, with numerous things in it prepared doubtless by numerous hands: one person possibly furnishing the headings and others furnishing the translations. We are not informed precisely how it was done, but probably it was done in some such way. Surely the "fair" inference from the facts of the case is that the person who goes to the expense of printing and publishing this book, as between him and the agents whom he may have employed to assist him in the compilation of it, will have whatever property the law will give him in that book in himself. In the absence of any distinct evidence to the contrary, the *primâ facie* inference which I should certainly draw in this case is, that the terms of the employment of the several agents involved this, that the copyright in that production, which was to be treated as the subject of this book, should belong to the owner of the book.

I will add a few words on the other part of the case, which involves a perfectly different question, which has nothing whatever to do with copyright.

The defendants were persons employed by the plaintiff upon the Continental part of this book, which is a small part comparatively. They were employed in various countries of Europe to travel about and to obtain from manufacturing producers of all sorts and kinds authority from them to enter, under the particular heading to which their respective businesses related, advertisements of the names and addresses of the manufacturers, and in some cases of the trade-marks of those particular individuals whom I will call advertisers in this book; and each person who chose to furnish his name and address and sufficient particulars could obtain the insertion of an advertisement under the proper heading in this book on the payment of a certain sum which the agent—he is called agent in the contract—was to receive. He was to receive it, of course, on behalf of his principal, but as between his principal and himself it was part of the agreement that he should deduct and retain from that a very large commission—a percentage of 65 per cent. in one case and 62½ per cent. in the other case. In doing what had to be done by the agent there would come into his hands various materials. He would probably have a note-book containing all the information collected from the people whom he canvassed, and he would also get certain blocks from which the trade-marks and things of that kind were in some cases printed in these advertisements. His duty was to put these advertisements into shape, from such materials as he obtained; sometimes, it is true, they might be a mere copy or translation of a foreign advertisement given him by the particular advertisers. Whatever the materials were, his duty was to put them into shape and translate them into English, and then to transmit them to the plaintiff, his employer, to be printed under the proper heading in this book. That was the process. I suppose that each of these defendants had a note-book which contained practically all the materials which he has supplied to this book, including the headings

which he may have copied into his note-book. The part of the injunction complained of on this point is the restraining the defendants from displaying or using for the purpose of obtaining advertisements for any book other than the plaintiff's work, so much of the copy of the plaintiff's book already printed as consists of the headings, and from using (and this is the part now complained of) blocks or materials obtained by the defendants, or either of them, while in the employment of the plaintiff and for the purpose of the plaintiff's work, or any copy thereof, for the purpose of any work other than the plaintiff's work.

It was asked, on behalf of the defendants, why should they not retain these note-books, having now left the plaintiff's employ, and use them in order to find out the persons abroad with whom they had formerly entered into engagements, and to obtain from those advertisers authority to put advertisements of theirs into a publication to be used as a rival to the plaintiff's book? The answer is a very simple one. All those materials were obtained while you, the defendants, were acting as the plaintiff's agents, while you were in that confidential relation to him, and for the purpose for which he employed and paid you—viz., of compiling this book of the plaintiff's; and, therefore, to allow you to use any of those materials for your own purposes would be allowing you to use them for a purpose for which they were not compiled; you being, when you compiled them, in the position of the plaintiff's agent, and there being a confidential relation between you and the plaintiff.

Turning to one of the leading cases on this subject, I will read the language of Turner, V.C., in *Morison* v. *Moat*, 9 Ha. 241, at p. 255: "That the court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have, indeed, been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract, or in others again it has been treated as founded upon trust or confidence, meaning, as I conceive, that the court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given the obligation of performing a promise on the faith of which the benefit has been conferred; but upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it." Then the judgment goes on to give several instances, many of them being cases where a man, being in the employment of another, has discovered the secrets of the manufacture of that other person, or has surreptitiously copied something which came under his hands while he was in the possession of that trust and confidence, and he has been restrained from communicating that secret to anybody else, and anybody who obtained that secret from him has also been restrained from using it. [The Lord Justice then read the passages (9 Ha., at p. 256) in the judgment of Turner, V.C., in *Morison* v. *Moat* commenting on *Abernethy's case* and *Prince Albert* v. *Strange;* and continued:—] I think, therefore, that the doctrine does extend to every case in which a man has obtained materials—and I use that word advisedly, because it would be very difficult to grant an injunction to prevent a man using his knowledge—while in the position of agent for another, and which were obtained by him in the course of that agency to use for the purposes for which his principal had employed him. In such case it is not going too far to say that he shall not use those materials for any other purpose than the purpose for which he was employed to obtain them, and the employer, if he can make out that the intended use is one which would tend to damage him, has a distinct right to an injunction against the agent.

Mr. Farwell has ingeniously asked that, assuming that the doctrine would extend to prevent the use of materials obtained for the purpose of the principal's publication, why should not the agent be at liberty to use them after the publication of the principal has been issued to the world? I would answer that question in the words used by Turner, V.C., in another part of his judgment in *Morison* v. *Moat*. [His lordship read the passage (9 Ha., at p. 258) commencing with the words, "It was much pressed," and ending with the words "good title against the defendant," and proceeded:—] That seems to me a complete answer. The jurisdiction against the defendants exists because these materials which they want to use, were obtained by them while they were in the position of agents for the plaintiff. Even if it were established that the plaintiff could not prevent anybody else in the world from publishing or using these materials which the plaintiff wishes to prevent the defendants from using, that would be no answer to the plaintiff's claim for an injunction against the defendants, because the defendants, from the position in which they were, are put under a duty towards the plaintiff not to make this use of the materials. Subject to the verbal correction made in the order by Lindley, L.J., I do not think that the order of the court below goes at all too far. [His lordship added that on the evidence before the court, the inclination of his view as to whether any copyright existed in the advertisements or in the publication of the advertisements collected and arranged as they were, was that there was a copyright in them, but he considered it unnecessary to express any confident opinion on that point.]

Appeal dismissed.

Solicitors for the appellants, *Rye & Eyre.*

Solicitor for the respondent, *Cecil J. Rawlinson.*

From Q. B. Div. (Lord Esher, M.R., and Bowen and A. L. Smith, L.JJ.) — Jan. 31.

ELLIS v. GOULTON AND ANOTHER. (*a*.)

Principal and agent—Sale of land—Vendor and purchaser—Payment of deposit to vendor's solicitor—Recovery of deposit on sale going off—Liability of solicitor—Following trust money.

Upon a sale of land the purchaser, in accordance with the conditions of sale, paid to the vendor's solicitor, as agent for the vendor, a deposit upon the purchase-money. The vendor being unable to make a good title, the sale went off, and the purchaser sued the vendor's solicitor to recover the deposit money.

Held, that, as the solicitor received the money solely as agent of the vendor, the action would not lie against him at the suit of the purchaser.

Appeal by the defendant Jackson from the judgment of Cave, J., in an action to recover a sum of £100 which had been paid to Jackson by the plaintiff as a deposit upon the purchase of certain land.

The defendant Goulton was the vendor and the defendant Jackson acted as his solicitor in the matter of the sale.

The land was put up for sale, one of the conditions of sale being that the purchaser should pay to the vendor's solicitor, as agent for the vendor, a deposit of £10 per cent. upon the purchase-money.

The plaintiff purchased the property, and paid to

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

the defendant Jackson £100 as a deposit, and Jackson signed a memorandum of receipt as agent for the vendor. The latter being unable to make a good title to the property, the plaintiff brought this action to recover the deposit.

It appeared that Jackson did not pay this sum to Goulton, but retained it against disbursements made by him on account of Goulton; but it appeared also that Jackson, in an account which he sent in to Goulton, did not include this sum of £100.

There was evidence that when the sale went off Goulton directed Jackson to repay the deposit to the plaintiff.

At the trial Cave, J., directed a verdict for the plaintiff as against Jackson as well as against Goulton, and gave judgment accordingly.

The defendant Jackson appealed.

Finlay, Q.C., and *Tindal Atkinson*, for Jackson.—The deposit was received by Jackson as agent for Goulton, and, therefore, it is the same as if it had been paid to Goulton. The contract was made by the plaintiff with Goulton, and Jackson cannot be made liable to the plaintiff.

They referred to *Edgell* v. *Day*, 14 W. R. 87, L. R. 1 C. P. 80; *Bamford* v. *Shuttleworth*, 11 A. & E. 926; *Stephens* v. *Badcock*, 3 B. & Ad. 354.

Channell, Q.C., and *T. Willes Chitty*, for the plaintiff.—This money was to be returned to the plaintiff if the sale went off. Jackson received it on those terms. There was a fiduciary relation between the plaintiff and Goulton, and this money can be followed. The money was kept separate and capable of ascertainment by Jackson, and, therefore, can be followed in his hands. It was omitted by him from the account he sent in to Goulton.

They referred to *In re Hallett's Estate, Knatchbull* v. *Hallett*, 28 W. R. 732, 13 Ch. D. 696.

Lord ESHER, M.R.—The defendant Goulton had some property, which he desired to sell, and he employed the defendant Jackson, a solicitor, to carry out the sale. The property was sold subject to certain conditions, one being that the purchaser should pay a deposit upon the purchase money. If the deposit had been paid to the auctioneer, inasmuch as an auctioneer acts for both vendor and purchaser, he would receive it on behalf of both to be handed over to one or other of them in one or other event. In this case, however, the deposit was paid to Jackson, who was the vendor's solicitor, as agent for, and on account of, the vendor. That was a payment to the vendor himself through the hands of Jackson, who received it for the vendor. Title to the property not being made out, the purchaser became entitled to have the deposit repaid to him. Under these circumstances Jackson never was in the relationship of agent to the purchaser. He was acting solely as agent to the vendor. There was no relationship at all between Jackson and the purchaser, and consequently there was no fiduciary relation between them. It is said, however, that what happened between Jackson and the vendor made Jackson liable as trustee of the deposit for the purchaser. The answer to that is that as between Jackson and the purchaser there never was any contract, whether of bailment or otherwise, nor was there any relation, as principal and agent, between them, and no authority has been cited to us to show that there was any fiduciary relation between them. In the cases that have been cited the distinction is pointed out between a stakeholder, who is the agent of both parties, and a person who is agent for one of the parties only. The question of following trust money only arises where a fiduciary relation exists. In this case there was no fiduciary relation. The judgment as against the defendant Jackson must therefore be reversed and judgment must be entered for him.

BOWEN, L.J.—I am of the same opinion. When a purchaser makes a deposit he may make a special agreement that the person to whom the deposit is paid shall hold it as agent for both vendor and purchaser. That would make the person who receives the deposit a stakeholder. In the present case the deposit was paid to the vendor's agent without any such agreement, and that is the same thing as if it had been paid to the vendor himself. If so, it is impossible to treat the money in the hands of the agent as impressed with any trust for the purchaser. The solicitor of the vendor is not in the position of a stakeholder, nor is there any privity of contract between him and the purchaser. The cases of *Bamford* v. *Shuttleworth* and *Edgell* v. *Day* show this.

It is said, however, that the facts here show that this money was impressed with a trust in favour of the purchaser, and that accordingly the money can be followed. In the first place, there was no fiduciary relation at all here. In the next place, even if there was a fiduciary relation, money can only be followed as long as it is kept separate in the sense of being capable of ascertainment. This money was not kept separate by the defendant Jackson at all, but was spent by him for his principal on the faith of the money being available in his hands. There was no separate existence of this fund, and therefore, even if the equitable doctrine of following trust money applied, the doctrine could not be applied here.

A. L. SMITH, L.J.—I am of the same opinion. This money was received by Jackson solely as the agent of the vendor. How is it sought to make Jackson liable? He cannot be sued in contract. It is said that Goulton was in a fiduciary position towards the plaintiff, and that the plaintiff can follow the money in the hands of Jackson. But before money can be followed a fiduciary relation must exist, which is not the case here. Further, this money did not remain as money in Jackson's hands, and therefore in any case cannot be followed.

Appeal allowed.

Solicitors for the plaintiff, *Harvey & Capron*, for *Kenyon & Son*, Thorne.

Solicitor for the defendants, *H. R. P. Brooke*.

High Court of Justice.

Chan. Div. Chitty, J. — March 15.

STEVENS v. TREVOR-GARRICK. (a.)

Married woman—Separate estate—Settlement by husband and wife—Infancy of wife—Subsequent repudiation—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *ss.* 2, 19.

The 19*th section of the Married Women's Property Act*, 1882, *enacts that nothing in the Act shall interfere with or affect any settlement or agreement for a settlement respecting a married woman's property.*

Any property of a woman married after the commencement of the Act which would have been bound, apart from the Act, by an assignment of the husband alone in a settlement, is still bound by such assignment in virtue of the

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

19th section, notwithstanding the second section of the Act, which makes the property of a woman married after the Act her separate property.

Hancock *v.* Hancock, 36 *W. R.* 417, 38 *Ch. D.* 78, *applied and followed.*

In re Queade's Trusts, 33 *W. R.* 816, *W. N.*, 1884, 225, *not followed.*

Summons.

By an ante-nuptial settlement, dated in April, 1890, the parties to which were the intended husband, the intended wife, who was then an infant, and the trustees, after reciting that the intended wife would upon her marriage become entitled to £1,000 payable by way of dowry out of the Bombay Civil Service Fund, but that such sum should be retained by the India Office until she should attain the age of twenty-one years, and recitingan agreement that the £1,000 should be assigned to the trustees upon the trusts therein declared concerning the same, the intended wife and the intended husband respectively assigned to the trustees the £1,000, to be held by them upon the usual trusts for the benefit of the intended wife, her husband, and children. This settlement was not made under the Infants' Settlement Act, 1855.

The marriage was shortly afterwards solemnized, and notice of the above assignment of the £1,000 was given by the trustees to the India Office.

In October, 1891, the wife attained the age of twenty-one years, and thereupon disaffirmed the said settlement, and by a deed poll of the 19th of May, 1892, she formally repudiated and disavowed the same, and declared her execution of the indenture of settlement to be null and void.

The rules of the Bombay Fund did not make the £1,000 payable to the wife for her separate use. The wife claimed, notwithstanding, to be absolutely entitled to it; but the authorities at the India Office declined, under the circumstances, to pay it either to her or to the trustees. The trustees then brought the present action against the husband and wife for the purpose of obtaining the opinion of the court upon the question; and the present summons was taken out by the plaintiffs in the action, asking for a declaration that the plaintiffs as trustees of the said indenture of settlement, were entitled to the £1,000.

Vernon R. Smith, for the plaintiffs.—This fund would only have been the separate property of the wife by virtue of section 2 of the Married Women's Property Act, 1882, making the property of a woman married after the Act her separate property. But section 19 of the Act says that nothing in the Act is to interfere with any settlement; and the effect of that section in connection with section 2 is that this fund is bound by the husband's assignment notwithstanding the Act, as is shown by *Hancock* v. *Hancock*, 36 W. R. 417, 38 Ch. D. 78. That was a decision of the Court of Appeal on the effect of section 19 in connection with section 5, but the reasoning is quite as applicable to section 2. See also *In re Johnson, Moore* v. *Johnson*, 39 W. R. 509, [1891] 3 Ch. 48; *In re Stonor's Trusts*, 24 Ch. D. 195, 31 W. R. Dig. 169; *In re Whitaker, Christian* v. *Whitaker*, 35 W. R. 217, 34 Ch. D. 227. The trustees are, therefore, entitled to the fund.

Brinton, for the defendants.—The fund, if settled at all, is settled by the husband, and not by the wife, and that the wife's separate property should be bound in such a case could never have been intended by the Legislature, see *In re Queade's Trusts*, 33 W. R. 816, W. N. 1884, 225. [CHITTY, J.—That case was not approved of in *Hancock* v. *Hancock*.] There being now no settlement by the wife, there is no settlement within the meaning of section 19; and this fund belongs to her absolutely by virtue of section 2.

CHITTY, J.—The 19th section relates to settlements made or to be made, to be made that is at any time after the passing of the Act, not only to settlements made before the Act.

The settlement here was made before the marriage. The wife became entitled after marriage to a sum of £1,000, which was not settled to her separate use, and would have been her husband's, apart from the Act, had there been no settlement. Both assigned the fund to the trustees. The lady was an infant at the time, and now disaffirms the settlement. It was argued that there was no settlement here within the meaning of section 19. In my opinion there is a settlement which, apart from the Act, would be a valid settlement by the husband. The Court of Appeal has held that the words "Nothing in this Act contained" in section 19 include section 5, see the judgment of Cotton, L.J., in *Hancock* v. *Hancock*. The reasoning of that judgment is as applicable to section 2 as to section 5, and I am bound by the principle of that decision. I cannot say that section 2 is excluded from the operation of section 19 if section 5 is not. The trustees are therefore entitled to this sum of £1,000.

Judgment for plaintiffs.

Solicitors for the plaintiffs, *Lovell, Son, & Pitfield.*

Solicitor for the defendants, *A. J. Nash*, for *Ginn & Matthew*, Cambridge.

Chan. Div. North, J. } Nov. 15; March 18.

In re BEDINGFIELD, NORRIS, AND HERRING. (*a.*)

Vendor and purchaser—Settlement—Power of sale by trustees, with consent of tenant for life—Incumbrances on life estate—Bankruptcy of tenant for life—Concurrence of trustee in bankruptcy and incumbrancers.

The trustees of a settlement were empowered to sell the property comprised therein, with the consent in writing of the tenant for life. They sold the property at a public auction. The tenant for life was bankrupt, and had encumbered his life estate. The trustees refused to procure any consent but that of the tenant for life.

Held, that the concurrence of the incumbrancers and the assignees in bankruptcy of the tenant for life was essential in order to effect the sale.

Adjourned summons.

By a post-nuptial settlement, dated the 3rd of December, 1878, H. W. Nevill assigned the trust funds comprised therein to R. P. Bedingfield and A. J. Norris, as trustees, upon trust for himself for life and as therein mentioned. The settlement empowered the trustees to lay out the funds in the purchase of lands, tenements, &c., at the request of Nevill, to be held by the trustees upon trust for sale with the consent in writing of Nevill during his life. In 1886 Nevill purchased a property known as "The Pines." In August, 1887, Bedingfield and Norris, as trustees of the settlement of 1878, purchased "The Pines" from Nevill. On the 2nd of June, 1892, the trustees sold "The Pines" to Herring at a public auction subject to conditions of sale. The 7th condition was to the effect that Nevill, who in 1886 purchased "The Pines," had executed a post-nuptial settlement with powers to the trustees at his request to lay out the trust funds in land, &c., and hold them on trust for sale with

(*a.*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

Nevill's consent, that no objection should be taken to the title on account of the trustees having purchased from Nevill, and that neither the consent of Nevill nor that of the beneficiaries under the settlement was to be required in the conveyance, but that Nevill's written consent would be given afterwards. In the course of his inquiries the purchaser ascertained that Nevill had incumbered his life estate and had become bankrupt. In his requisitions on the abstract of title the purchaser required the consent of Nevill's trustee in bankruptcy and the incumbrancers on his life interest. The trustees refused to procure such consent, or any but that of Nevill.

This was a summons by the purchaser under the Vendor and Purchaser Act, 1874, for a declaration that the requisitions were not sufficiently answered, that the consent of the trustee in bankruptcy of Nevill and the incumbrancers on his life interest was necessary to effect the sale, and that the purchaser was not precluded by the 7th condition from making such requisitions.

S. Hall, Q.C., and *Micklem*, for the purchaser, referred to *Hardaker* v. *Moorhouse*, 32 W. R. 638, 26 Ch. D. 417; *Cooper* v. *Slight*, 32 W. R. 1015, 27 Ch. D. 565; *Badham* v. *Mee*, 7 Bing. 695, 1 My. & K. 32; *Jones* v. *Winwood*, 3 M. & W. 653, 10 Sim. 150; *Hole* v. *Escott*, 4 My. & Cr. 187, 2 Keen, 444; *Leigh* v. *Ashburton*, 11 Beav. 470; *Morgan* v. *Rutson*, 16 Sim. 234; *Warburton* v. *Farn*, 16 Sim. 625; *Hurst* v. *Hurst*, 1 W. R. 105, 16 Beav. 372; *Hill* v. *Pritchard*, 2 W. R. 297, Kay, 395; *Long* v. *Rankin*, Sugden on Powers, Appx. 895, ed. of 1861; *Eisdell* v. *Hammersley*, 31 Beav. 255, 10 W. R. Dig. 66; *Simpson* v. *Bathurst*, 18 W. R. 772, L. R. 5 Ch. App. 193; *Alexander* v. *Mills*, 19 W. R. 310, L. R. 6 Ch. App. 124; *In re Sebright*, 35 W. R. 49, 33 Ch. D. 429; *Cardigan* v. *Curzon*, 37 W. R. 247, 40 Ch. D. 338; and *In re New Land Development Association* v. *Gray*, 40 W. R. 295, 551 [1892] 2 Ch. 138.

Cozens-Hardy, Q.C., and *Mulligan*, for the vendors, relied on *Walmsley* v. *Butterworth*, Coote on Mortgages, 2nd ed., p. 698; and *Holdsworth* v. *Goose*, 9 W. R. 443, 29 Beav. 111.

March 18.—NORTH, J.—In this case the contention of the vendors was partly rested, in the first instance, on the 7th condition of sale. But that condition was framed for a totally different purpose. It was intended to preclude any objection upon the ground that the person who was entitled to call upon the trustees to purchase was himself the vendor to them, and for that object was clear and efficient. But in my opinion it would have been impossible to take advantage of it to defeat an objection arising out of a subsequent alienation (not disclosed in the conditions) of the vendor's life interest in the purchased property, if, but for such condition, the objection would have been well founded, and Mr. Cozens-Hardy, apparently taking the same view, did not press that objection.

Upon the main question I think it clearly settled by a long course of authorities that, if an owner of a limited interest with power of selling, or requesting, or directing, or consenting to a sale, disposes of his interest, the power is not extinguished, but is still capable of being exercised by him so far as such exercise does not derogate from or interfere with his previous disposition.

I do not think it necessary to refer to any earlier case than *Jones* v. *Winwood*, where an estate was settled to the joint appointment of husband and wife, and, in default, to the use of the husband and wife in succession for life (with intervening remainders to a trustee to preserve), with successive remainders to the sons and daughters in tail and to the husband in fee simple. In 1824 the husband became insolvent, and on his discharge from prison bargained and sold all his real and personal estate to the provisional assignee, who subsequently conveyed it to the plaintiff Jones. In 1828 the husband and wife in exercise of their joint power appointed the property to Brown in fee. Upon a subsequent sale by Jones, Brown, and the husband, to the defendant Winwood, the latter objected to the title upon the ground that the conveyance by the husband destroyed the joint power; and in the action commenced against him for specific performance the Court of Exchequer decided on a case sent for their opinions that the joint power had not been determined, and had been validly exercised, but that such exercise did not affect the husband's original interest (viz., his life estate and ultimate remainder in fee), which had been previously conveyed away by him, as he could not by exercising his power derogate from his own conveyance. This decision was adopted and confirmed by the Vice-Chancellor, and specific performance with costs was decreed against the purchaser: 10 Sim. 150. This case has never been dissented from, but has often been adopted and followed. In *Hole* v. *Escott* the circumstances were very similar, and it was held that a husband could not join his wife in exercising a power of appointment so as to interfere with the rights of the person who had purchased his life estate and ultimate remainder in fee from the assignees in bankruptcy of such husband. In *Warburton* v. *Farn* trustees of a money settlement had power to invest in land, and afterwards to sell, with the consent of the tenant for life. After a purchase of land had been made, the tenant for life sold his life interest. It was held that such alienation did not deprive him of the power of consenting to a subsequent sale by the trustees. It was clear that the power was not destroyed, but was still subsisting, and though it could not be exercised so as to prejudice the rights of the purchaser of the tenant for life's interest, still, as the conveyance to such purchaser expressly recognized the continuance of the right of the tenant for life to consent to a sale, and as, moreover, the purchaser of the life interest offered to concur in the sale by the trustees specific performance was enforced against the purchaser from them. In *Hurst* v. *Hurst* a tenant for life with power of charging portions mortgaged his life interest and covenanted not to exercise that power. He did subsequently exercise it in favour of persons who had notice of the mortgage, and it was held that the power was well exercised, but that the portioners could only come in behind the mortgagee. In *Eisdell* v. *Hammersley* it was held that a power in trustees to sell real estate with the consent of husband and wife, successive tenants for life, was exercisable after the husband's bankruptcy by the trustees with the consent of the tenants for life, and the assigns of the husband's interest, all of whom were willing to concur. In *Simpson* v. *Bathurst* a tenant for life had power to renew leases for lives, taking for his own benefit the fines on renewals. He first mortgaged his life interest, and afterwards became bankrupt. It was decided that the power of renewal was still continuing, but could only be exercised with the concurrence of the mortgagee and of the trustee in bankruptcy. In *Alexander* v. *Mills* trustees had a power to sell real estate at the request and by the direction of the tenant for life, who was also the owner of the ultimate reversion in fee. After he had absolutely conveyed away his whole interest for value the trustees sold the property under their power at the request of both the tenant for life and his alienee to a purchaser who

objected to the title. The Master of the Rolls held that the power was destroyed and incapable of being exercised by reason of such alienation. The Court of Appeal held that the power was not destroyed, but existed, and could be exercised with the concurrence of the alienee. In *Hardaker* v. *Moorhouse* I expressed a doubt whether the concurrence of the alienee was a material part of the decision. Upon further consideration I think it was. But that case has no bearing on the present. Lastly, in *In re Cooper, Cooper* v. *Slight*, where trustees had, with the consent of a tenant for life, a power of advancement in favour of a child, which they wished to exercise, it was held that the power of consenting was not, indeed, extinguished by the bankruptcy of the tenant for life, but could only be exercised with the consent of his trustee in bankruptcy.

In opposition to this series of decisions Mr. Cozens-Hardy relies on two cases—*Walmsley* v. *Butterworth* and *Holdsworth* v. *Goose*. The former case is only reported in the appendix to Coote on Mortgages, 2nd ed., p. 698. The plaintiff there was tenant for life with remainders over. The trustees had a power of sale on his request and direction. The tenant for life first mortgaged his life estate and afterwards contracted to sell to the defendant, who was a willing purchaser, but objected that the power of sale was extinguished by the alienation, and that the defect could only be cured by a reconveyance by the mortgagee before sale or by the mortgagee's joining in the conveyance to the purchaser, either of which courses the mortgagee was willing to take. The court decided (as I understand the report) that the power was not extinguished, and that a good title could be made in the way proposed. But the only question there was whether a title could be made, even with the assistance of the mortgagee. It was not decided or suggested that the consent of the mortgagee, which the vendors offered to procure, was unnecessary or could be dispensed with, nor that a good title could be made without his concurrence, and unless the case goes that length it does not help the present vendors.

In the case of *Holdsworth* v. *Goose* the facts were very similar to those in the last case; there was a settlement of land on husband for life, with a limitation over on his parting with his interest, remainder to the wife for life, with remainders to children of the marriage, and with power to the trustees to sell "at the request and by the direction of the husband and wife during their joint lives." The husband afterwards became bankrupt, and subsequently the trustees, on the joint request of the husband and wife, sold to the defendant. His advisers objected to the title. All parties were anxious to complete, including the purchaser and the assignees of the husband, who offered to give a request in writing or join in the conveyance. A special case stated for the opinion of the court raised two questions—first, whether the power was extinguished by the bankruptcy, and, second, whether the request and direction given by the husband and wife were sufficient to enable the trustees to exercise the power, and whether they could, with or without their consent and direction, make a good title and convey effectually. The Master of the Rolls held that the power remained, that the case was exactly like *Walmsley* v. *Butterworth*, and that the sale by the trustees by direction of the husband and wife, with the consent of the assignees, would give a perfect title, and he added that the first question must be answered in the negative and the second in the affirmative.

The remarks I have made as to *Walmsley* v. *Butterworth* apply to this case also, but Mr. Cozens-Hardy contends that it is an authority in his favour because the second question and answer, expressly affirm that a good title could be made either with or without the concurrence of the assignees. This criticism on the language is correct, but there is no substance in it. The Master of the Rolls expressly said that the sale "with the consent of the assignees" would give a good title. They did consent and were anxious that the sale should go through. The question whether their concurrence could be dispensed with or was immaterial never arose nor was argued or decided, and the argument founded upon the literal construction of the very words of the second question and answer is of no weight.

Applying the authorities to the present case, the trust property is now land, to the rents and profits of which the incumbrancers and assignees of Mr. Nevill are entitled. It is proposed to convert the land into money and to substitute the income arising from the investment of the net proceeds of sale for the rents and profits. For this the consent in writing of Mr. Nevill is necessary. His giving such consent would clearly affect the interests which he, or the law acting for him, have created; and this cannot be done without derogating from Mr. Nevill's dispositions thus made. Under these circumstances I think it clear that the requisitions have not been sufficiently answered, and that the concurrence of the incumbrancers and assignees in bankruptcy of Mr. Nevill in the sale is essential; and as the vendors have declined to procure the consent of those persons they must pay the costs of this application.

Solicitors for the purchaser, *Williamson, Hill, & Co.*, for *Rackham*, Norwich.

Solicitors for the vendors, *Norris & Norris*.

Q. B. Div. (Mathew, J.) Feb. 18, 28.

DRIVER v. BROAD. (*a*.)

Frauds, Statute of, s. 4—Debenture—Debenture charging undertaking and property of company and creating floating security—Contract for sale of such debenture —Necessity for written contract—"Interest in land."

A debenture, issued by a company carrying on the business of candle manufacturers, charged with the payment of principal and interest "the undertaking and all the property of the company, both present and future, including its uncalled capital," and the charge created by the debenture was to be a floating security upon the property and rights of the company.

Held, that a contract for the sale and purchase of the debenture, was a contract for an interest in land within the meaning of the 4th section of the Statute of Frauds, and that the contract must be in writing.

Further consideration by Mathew, J., of an action tried by him with a jury.

The action was for damages for breach of a contract to purchase debentures and shares in a company called Broad's Patent Night Light Co. (Limited).

The plaintiff alleged in his statement of claim that he had suffered damage by breach of a verbal contract for the sale and transfer by the plaintiff to the defendant of twenty debentures for £100 each, one founder's share, and 1,000 £1 ordinary shares in the above-mentioned company, at the price of £2,300.

The defendant, in his defence, denied the making of the contract, and he also pleaded that "the alleged

(*a*.) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

contract (if any) was a contract or sale of land or an interest in or concerning land within the 4th section of the Statute of Frauds, or of goods within the 17th section, and that the requirements of these sections were not complied with."

The jury found that the defendant agreed to buy the plaintiff's shares and debentures, and the question of law was reserved for further consideration whether it was necessary that this contract should be in writing, that is, whether the contract for the sale and purchase of these debentures was a contract for an interest in land within the 4th section of the Statute of Frauds.

It appeared from the memorandum of association that the company was formed for the purpose of acquiring and taking over as a going concern and carrying on the business of night light and candle manufacturers, and with a view thereto to enter into, adopt, and carry into effect, an agreement with the defendant and a Mr. Fowler, who had previously been partners in the carrying on of the business.

The memorandum of association also gave power "to borrow, or raise, or secure the payment of money for the purpose of the company, and for such purpose to mortgage and charge the undertaking, or all or any part of the property or warrants of the company present or after acquired or its uncalled capital, and to create, issue, &c., perpetual or redeemable debentures or debenture stock," and "to sell, convey, or otherwise deal with the undertaking, or all or any part of the property of the company.

In pursuance of the powers contained in the memorandum and articles of association, the company issued, as first mortgage debentures, 300 debentures of £100 each, bearing interest at the rate of 5 per cent. per annum payable half-yearly.

By these debentures the company "hereby charged with the payments aforesaid"—that is, the payment of the principal and interest—"its undertaking and and all its property whatsoever and wheresoever both present and future including its uncalled capital for the time being." The conditions, which were to be read as incorporated with the debentures, provided: "This debenture is one of a series of like debentures issued or to be issued by the company for the aggregate sum of £30,000 in the sums of £100 each, and all which said debentures whatever the date of issue shall rank *pari passu* in point of charge, and the charge hereby created shall be a floating security, and accordingly the company, until the appointment of a receiver or the commencement of a winding up, shall be at liberty, but only in the ordinary course of its business, to sell, deal with, and dispose of the property charged. Provided that this condition shall not authorize the creation of any specific or floating charge ranking equally with or in priority to the said debentures, or any specific or floating charge except subject to the charge thereby created."

The question now argued was whether the debenture was a charge on the land, in which case a contract for the sale of the debentures would be a contract for an interest in land "within the 4th section of the Statute of Fraud, and would require to be in writing.

R. T. Reid, Q.C., and *E. Morten*, for the plaintiff.—The debenture is not a charge on the land, and a contract for the sale thereof is not a contract for an interest in land within the 4th section of the Statute of Frauds, so that the verbal agreement for sale of these debentures and shares is a good agreement. The charge created by the debenture is a charge by way of floating security, and the remedy on a floating security is by the appointment of a receiver, or the winding up of the company: Lindley on Companies, 5th ed., pp. 196-7; Palmer's Company Precedents, 5th ed., p. 476, where the nature of a floating security is explained. The debenture here does not constitute a specific charge upon the property, but it leaves the company at liberty to deal with its property in the ordinary course of its business, and, therefore, it does not constitute an agreement relating to land. There is a number of cases under the Statute of Mortmain (9 Geo. 2, c. 36) showing, in favour of the plaintiff, that a contract for the sale of these debentures is not an agreement for the sale of an "interest in land." These cases are *Walker* v. *Mylne*, 11 Beav. 507; *Myers* v. *Perigal*, 1 W. R. 57, 2 De G. M. & G. 599; *Entwistle* v. *Davis*, L. R. 4 Eq. 272; *Holdsworth* v. *Davenport*, 25 W. R. 20, 3 Ch. D. 185; *Attree* v. *Hawe*, 26 W. R. 871, 9 Ch. D. 337, *In re David*, 38 W. R. 162, 43 Ch. D. 27; *Gray* v. *Smith*, 38 W. R. 310, 43 Ch. D. 208; *Gardner* v. *London, Chatham, & Dover Railway Co.*, 15 W. R. 325, L. R. 2 Ch. App. 201; *Ashworth* v. *Munn*, 28 W. R. 965, 15 Ch. D. 363.

A. T. Lawrence and *J. G. Wood*, for the defendant.—These debentures are a charge upon all the property of the company for the time being. Unless that be so, they are no security at all. They are a charge upon the property, and the charge is by way of a floating security, with power in the company to deal with and to sell the property. By the debenture the property can be sold, but this power of sale does not prevent there being a charge upon the property. What is in this debenture is nothing more than a power in a mortgage that the mortgagor is to remain in possession until default, and being analogous to a mortgage, it is within the 4th section of the Statute of Frauds. The case of *In re David* is a very strong authority for saying that a debenture which mortgages tolls is within the statute, as being an interest in land.

They also referred to the cases already cited for the plaintiff.

Morten in reply.

Cur. adv. vult.

Feb. 28.—The following judgment was delivered by

MATHEW, J.—This was an action brought to recover damages for the refusal, by the defendant, to purchase, amongst other things, certain debentures in a company called the Broad Night Light Company.

The defence was, in the first place, that as a matter of fact there had been no such contract as the plaintiff insisted upon, and, in the second place, that, if there were such a contract, it was a verbal contract only, and that the contract ought to be in writing under the 4th section of the Statute of Frauds.

Now, in order to see what the debentures really were, and whether they constituted a charge upon realty or not, it was necessary in the first place to see what the memorandum and articles of association entitled the directors of the company to do. It is clear, and indeed it is not disputed, that the articles of association conferred upon the directors power to issue the debentures in question. On turning to the debenture, it appeared to be in the modern form, and to create in the first place a charge upon the undertaking, and all the property whatsoever and wheresoever, both present and future, including the uncalled capital of the company. By the conditions, which formed part of the bond, it was provided that the bond should be a floating security in the ordinary way, but not to involve a charge which would prevent the company from carrying on its operations, and there was a proviso that the directors should not be authorized to create any specific or floating charge ranking equally with, or in priority to, the debentures, or any specific or floating charge except subject to

the charge thereby created. Then there were the other ordinary provisions that upon default in payment of the amount of interest, or upon proceedings being taken to wind up the company, there should be the usual power to appoint a receiver, over all the property of the company, and so to enable the debenture-holder to receive payment in priority of the amount of the debenture.

It was strenuously argued for the plaintiff that the debenture in question did not create a charge upon land, that it was only a contract like any other contract, one that might ripen into a judgment and a charge upon property, but of itself conferring no right to recover the amount of the debenture by the realization of any real property of the company.

My attention was called to numerous cases upon the subject, first under the Mortmain Act, and then under the Companies Clauses Act. I regret to say that neither class of authority seems to me to be in point; I am constrained to look at the terms of the particular debenture, and that its terms, when so looked at, involve a charge upon real property, appears to me to be beyond all doubt, and it is not now necessary to refer at length to authority on the subject.

There are two cases which seem to me to lay down the principle applicable to this case. The first is a case which may now be described as an old one—*Toppin* v. *Lomas*, 3 W. R. 446, 16 C. B. 145—where an attempt was made to establish in an action very like the present one that a bond and debenture issued by the Westminster Improvement Commissioners was not a bond creating a charge upon land, and therefore did not require a written contract for sale or purchase. The argument in that case was very much the argument addressed to me here. It was addressed to the Court of Common Pleas ineffectually. It was perfectly clear, although the machinery was different, that such a charge was created upon the land as was intended to be created, as it appears to me, by the terms of this debenture.

The true principle is further illustrated by a recent case of *In re Duvid*, where the debenture, amongst other things, created a charge upon the tolls, and this very remote and limited interest in the realty was held to be sufficient to necessitate a contract in writing, if the debenture were dealt with by contract for sale or purchase.

Upon the authority of these two cases, and of many others that were cited in the course of the argument, which I do not think it necessary to refer to at length, I am of opinion that the defendant is right, and I regret to say that the plaintiff fails.

Under these circumstances my judgment in the case must be for the defendant, and as to the question of costs, I have come to the conclusion that the plaintiff has been unfairly and inequitably dealt with, and that, therefore, each party should pay his own costs of the action, inclusive of the costs of the trial, and that the costs of this argument should be paid by the plaintiff.

Judgment for the defendant.

Solicitor for the plaintiff, *James White.*

Solicitors for the defendant, *Faithfull & Owen.*

Court of Appeal.

From Chan. Div. (Lindley, Kay, and A. L. Smith, L.JJ.) March 27, 28.

In re FRAPE.
Ex parte PERRETT. (*a.*)

Solicitor and client—Costs—Agreement for remuneration—Signature of one party—Taxation after payment—Solicitors' Remuneration Act, 1881 (44 *&* 45 *Vict. c.* 44), *s.* 8.

An agreement for remuneration under sub-sections 1 *and* 2 *of section* 8 *of the Solicitors' Remuneration Act*, 1881, *is sufficiently signed if signed by the person who seeks to repudiate it, and need not be signed by both parties.*

Where such an agreement signed by the client is impeached by him as being, and evidence is brought forward showing that it is, unfair and unreasonable, it is competent to the court, upon a taxation summons by the client, although payment has been made under the agreement, to make an order for taxation, and to direct the taxing master to certify whether or not the agreement is unfair and unreasonable.

Dictum *of* Cotton, L.J., *in* In re Palmer, 38 *W. R.* 673, 45 *Ch. D.* 291, *approved and acted on.*

Appeal from a decision of North, J. (reported *ante*, p. 232).

The question was whether, after payment of a solicitors' remuneration under an agreement entered into between the solicitor and the client under section 8 of the Solicitors' Remuneration Act, 1881, the costs could be taxed.

The facts are considered to appear in the report of the case in the court below sufficiently for the purposes of the present appeal, except that, having regard to the ground upon which the Court of Appeal affirmed the decision of North, J., being different from the grounds on which his lordship had decided the case, it is thought necessary to add that the evidence was conflicting as to the exact circumstances under which the "agreement" for the "£80 agreed costs" was come to; the client alleged that he had accepted it under protest, being in need of money at the time; the solicitor denied that there was such protest or that any undue influence had been used to obtain the settlement; on the contrary, he said that his client appeared perfectly satisfied. It was admitted by both, that at the time of the settlement the solicitor had stated that he thought, if a bill were made out, his costs would exceed £100, but he was willing to accept £80 in settlement of his claim.

North, J., held that the costs must be taxed.

The solicitor appealed.

C. J. Peile, for the appellant.—There ought to be no taxation.

T. L. Wilkinson, for the respondent.—The agreement was unfair and unreasonable. In *In re Palmer*, 38 W. R. 673, 45 Ch. D. 291, Cotton, L.J., expressed the opinion that the 4th sub-section of section 8 of the Act of 1881 gives the court power, where an agreement is impeached as unfair and unreasonable, to refer it to the taxing master to consider the question.

Peile replied.

LINDLEY, L.J.—In this appeal from North, J., the first question is, Does the agreement in question con-

(*a.*) Reported by ARTHUR LAWRENCE, Esq., Barrister-at-Law.

stitute such an agreement as comes within the 8th section of the Solicitors' Remuneration Act, 1881? That section says this: "(1) With respect to any business to which the foregoing provisions of this Act relate, . . . it shall be competent for a solicitor to make an agreement with his client, and for a client to make an agreement with his solicitor, before or after or in the course of the transaction of any such business, for the remuneration of the solicitor, to such amount and in such manner as the solicitor and the client think fit, either by a gross sum, or by commission or percentage, or by salary, or otherwise: and it shall be competent for the solicitor to accept from the client, and for the client to give to the solicitor, remuneration accordingly." That provision made an alteration of the law and enabled an agreement for remuneration to be made between a solicitor and his client which should be binding. The section then goes to say: "(2) The agreement shall be in writing, signed by the person to be bound thereby, or by his agent in that behalf."

Now, what does this mean? Does it mean that the agreement must be signed by both the parties to it? It seems to me that it must be signed by the party who seeks to repudiate it; in the present case the agreement has been signed by the client who seeks to repudiate it, and that is, I think, sufficient.

I cannot help thinking that the phrase "agreed costs" here, although North, J., seems to have been of a somewhat different opinion, means all costs incurred down to the then present time.

We have, then, an agreement binding the client because signed by him. Then the solicitor says there ought to be no taxation of the costs covered by the agreement. Sub-section 4 of section 8 says: "The agreement may be sued and recovered on or impeached or set aside in the like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor; and if, under any order for taxation of costs, such agreement being relied upon by the solicitor shall be objected to by the client as unfair or unreasonable, the taxing master or officer of the court may inquire into the facts and certify the same to the court; and if upon such certificate it shall appear to the court or judge that just cause has been shown either for cancelling the agreement or for reducing the amount payable under the same, the court or judge shall have power to order such cancellation or reduction, and to give all such directions necessary or proper for the purpose of carrying such order into effect, or otherwise consequential thereon, as to the court or judge may seem fit."

It is urged on behalf of the solicitor that the agreement cannot be set aside as unfair and unreasonable unless there is some order or proceeding under which to impeach it. I do not myself think there is anything in that. In *In re Palmer* Cotton, L.J., expressed himself thus: "It is said that, having regard to the 4th sub-section of the 8th section, this agreement ought to be referred to the taxing master. But the appellant has not brought forward any evidence showing that this charge is unfair and unreasonable; and although the 4th sub-section does, in my opinion, give the court power, where an agreement is so impeached, to refer it to the taxing master to consider whether the charge is fair and reasonable, no foundation for such an order has been made. Mr. Farwell has argued that this is a very unreasonable charge, but I do not think that he says it is unfair."

We ought not, on the materials which we have before us, to say that the agreement is unfair and unreasonable, but we can direct the taxing master, on going into the bill, to report as to that. The right order for us to make is to vary, or rather add to, the order of North, J., by directing the taxing master to certify whether the agreement is fair and reasonable, reserving the costs of the taxation, of the appeal, and of the adjournment into court before North, J.

KAY, L.J.—I agree. It seems to me that this is a proper case for taxation after payment. I think that "agreed costs" here mean all costs. The language of the 2nd sub-section is inartificial, probably taken from the language of the Statute of Frauds. It seems to me that if a person seeks to enforce such an agreement and it is signed by the person against whom he seeks to enforce it, the fact of his seeking to enforce it shows that he means to be bound by it himself, and you have the actual signature of the other party; that, in my opinion, is sufficient.

It is competent to us to refer the matter to the taxing master to report as to whether this is or is not a fair and reasonable agreement. The facts are to my mind suspicious.

A. L. SMITH, L.J.—I also agree.

Order appealed from added to.

Solicitors, *Venn & Woodcock*, for *H. D. Frape*, Brighton; *Atkinson & Dresser*, for *Trevor, Pollard, & Co.*, Brighton.

From Chan. Div. (Lindley, Bowen, and A. L. Smith, L.JJ.) — Dec. 5, 6.

RUABON BRICK AND TERRA COTTA CO. *v.* GREAT WESTERN RAILWAY CO. (*a.*)

Railway—Mine owner—Statutory powers—Minerals—Custom of working usual in district—Minerals worked by quarrying—Statutory right of mine owner to enter upon and break up surface land of railway—Trespass—Railways Clauses Consolidation Act, 1845 (8 *Vict. c.* 20), *ss.* 77-79.

The respective rights under the Railways Clauses Act, 1845, *of a railway company, as owner of land compulsorily taken, and of the owner of minerals under such land, are different from, and are not governed by the principles of law applicable to, the respective rights of land surface owners and mineral owners in other cases.*

The owner of minerals lying under or near the land and line of a railway company, which, according to the usual manner of working in the district are won by open quarrying, is, by section 79 *of the Railways Clauses Act,* 1845, *if desirous of working such minerals, and if the railway company are not willing to purchase the same, entitled to enter upon and break up the surface of the land of the railway company for the purpose of winning the minerals, even though the consequence be the destruction of the railway.*

Appeal of the defendant company from the decision of Kekewich, J.

In 1889 the defendant company promoted a Bill in Parliament to obtain power (*inter alia*) to purchase a branch railway, part of which ran over the land of which the plaintiff company were owners. The plaintiff company opposed the Bill, but their opposition was withdrawn upon the terms of an agreement, dated August 10, 1889. Clause 3 of that agreement provided that if the Bill should be passed the defendant company should, before the 13th of September, 1889, serve upon the plaintiff company notice to treat in pursuance of the Lands Clauses Consolidation Act, 1845, for the portion of land occupied by the branch

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

line. Clause 4 provided that, notwithstanding anything contained in the Bill when it became an Act of Parliament, the defendant company should be entitled to purchase under their compulsory powers from the plaintiff company only the land occupied by the branch line. Clause 11 provided that, in the event of the plaintiff company, in pursuance of the powers reserved by the Railways Clauses Consolidation Act, 1845, working the minerals lying under or within forty yards of the branch railway line, the defendant company should be entitled, as and when such minerals were worked out and removed, to enter in and upon the mines so worked for the purpose of constructing, and to construct, such pillars or columns as the defendant company's engineer might consider necessary for the protection of the railway and works, but so that the defendant company, in constructing such works, shall not interfere with the working of the minerals in accordance with the provisions of the said Act: provided that nothing in the said agreement contained should interfere with or affect the right of the plaintiff company to compensation for minerals as provided by the said Act or for any interference with the free working and getting of same.

The Bill passed and became a special Act in 1889.

The defendant company afterwards, under their statutory powers, gave the plaintiff company notice to treat in respect of the land above referred to; the purchase-money paid, which was fixed by arbitration, expressly not including the value of the clay used by the plaintiff company for the purpose of their manufactures, on the ground that such clay was a mineral within the meaning of the Railways Clauses Consolidation Act, 1845; and the land was accordingly, on December 30, 1890, conveyed by the plaintiff company to the defendant company, the mines and minerals, including the clay, being expressly excepted and reserved out of the conveyance.

On January 18, 1892, the plaintiff company gave to the defendant company notice, under section 78 of the Railways Clauses Consolidation Act, 1845, of their intention to work the clay lying under and within forty yards of the railway.

According to the custom of the district, clay, such as was used by the plaintiff company in their manufactures, was worked from the surface, and not by underground workings, the practice being, in the first instance, to remove the surface soil (which varied in depth from three to eight feet) so as to prevent it mixing with the clay, and then to get the clay.

The defendant company were not willing to treat with the plaintiff company for payment of any compensation in respect of the clay, and the plaintiff company accordingly, in pursuance of their notice to work the clay, proceeded, in September, 1892, to do so; and for the purpose of removing the surface soil and the ballast on the land purchased as aforesaid by the defendant company, laid down a tramway (part of which extended over the land of the defendant company), and proceeded to clear and remove the surface soil and the ballast thereon. The defendant company thereupon removed so much of the tram lines as were on their land and replaced the ballast.

The plaintiff company then brought this action praying an injunction to restrain the defendant company from interfering with the plaintiff company in getting the clay from under the railway or in removing for that purpose the surface soil and ballast, and from removing the plaintiff company's tram lines; and damages were also claimed.

Kekewich, J., held that the plaintiff company were entitled to work the clay from under the land purchased as aforesaid by the defendant company; and for that purpose that the plaintiff company were entitled to enter upon the land of the defendant company and to remove the ballast and surface soil lying or being above the clay; and he accordingly granted the injunction.

The defendant company appealed.

Sir Horace Davey, Q.C., Cripps, Q.C., and *Medd*, for the appellants.

Hopkinson, Q.C., and *F. Dodd*, for the respondents.

The arguments and the cases cited appear from, and are fully dealt with in, the judgments of the Lords Justices.

LINDLEY, L.J.—This case raises an important question which has come before the court, I will not say for the first time, but the importance of it is now realized more vividly than it has been before. [The Lord Justice read the order appealed from, and proceeded:—] Now, in all the previous cases in which a railway company has been in litigation with a mine owner, the railway company has been complaining of the loss of support under their railway, and the controversy has always been whether they are to buy the minerals in order to retain and exercise or preserve that right of support. But the peculiarity of this case is that, in consequence of the agreement of August 10, 1889, the railway company do not care anything about the support by the subjacent minerals. They have, under that agreement, a right to support, which renders it immaterial to them whether the clay under the railway is dug out or not. And the whole controversy in this case is not as to the right of the mineral owner to work under the railway, and, if necessary, to let it down, but the controversy is as to the right of the mineral owner to come upon the surface and work his minerals from above downwards. That is the controversy. It is a controversy which, in this acute shape at all events, is so far as I know, substantially a new one.

Now the first point to consider is whether the rights of the parties depend upon the ordinary principles of real property law or upon the statutory enactments contained in the Railway Clauses Consolidation Act, 1845, because their rights will depend very much upon the answer to be given to that question. I proceed, therefore, to investigate how that matter stands. [The Lord Justice then stated the facts as above set out; and commenting on clause 11 of the agreement of August 10, 1889, between the plaintiffs and the defendants, said:—] The railway company therein stipulate for a right which they otherwise would not have—a right to go into the clay pit and support their line as and when the clay is worked out. It is the existence of this clause which puts them in the peculiar position to which I have alluded, and which enables them to say, "We do not care anything at all about right to support by clay, as we have a right of support independently." When you look at the history of this transaction, and at the terms of that agreement, and at the recitals in the conveyance, I think it is obvious and beyond all doubt that the rights of the parties are to be determined, not by the ordinary principles of real property law, but by the clauses relating to mines in the Railways Clauses Consolidation Act of 1845. Once get at that, and you get a very long way, because it is well known now that the rights, as I will call them, of the surface owner and the mineral owner under the Railways Clauses Consolidation Act, are totally different from the respective rights which they would enjoy if it were not for those statutory enactments. Nothing can show that, more plainly than a contrast, which I will not pause to make, of the decisions under the mining clauses in the Rail-

ways Clauses Consolidation Act, and those other cases upon the rights of lessors and lessees under mining leases, or in such cases as those which have arisen on the true construction of Inclosure Acts. The contrast between the two is most marked, and it is impossible to say that cases governed by the Railways Clauses Consolidation Act are governed by the same principles as those which relate to leases or Inclosure Acts or anything of the kind.

We are driven then to the study of the sections relating to mines and minerals in the Railways Clauses Consolidation Act, 1845, that is to say, to that bundle of sections which are prefaced by the words, "And with respect to mines lying under or near the railway, commencing with section 77 and running down to and including section 85. The first of these sections is section 77, which provides that the company shall not be entitled to any mines (I will read it shortly now) under any land purchased by them except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works unless the same shall have been expressly purchased. As I have pointed out, in this particular case the mines were excepted and not purchased by the railway company. Then comes section 78, which I need not read in full, that mines lying near the railway are not to be worked if the company are willing to purchase them. Then comes section 79, which is very important: "If before the expiration of such thirty days the company do not state their willingness to treat with such owner, lessee, or occupier for the payment of such compensation, it shall be lawful for him to work the said mines or any part thereof for which the company shall not have agreed to pay compensation, so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate." Then there are provisions about damage and so on.

Now what does that involve? It certainly involves this, that the mineral owner is entitled, if that section applies, to work his mine under the railway and as close up to it as the minerals extend, although the consequence is to derogate from his own grant and destroy the surface by letting it down, a right which no mineral owner has at common law, under a conveyance worded similarly to the conveyance in this case. Again, a mineral owner has a right to work his mine, not only, as I understand it, from below upwards, but, under certain circumstances, from above downwards. He has a right to work it so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mine in the district where the same shall be situated. What does that mean? It means, I apprehend, that if in any particular spot the minerals come so close to the surface that it is necessary for the beneficial working of those minerals, and, according to the usual manner of working them in the district, that they shall be worked from above downwards, the mine owner has a right to do it. The consequence is in that case the destruction of the surface. The consequence in the other case, which I have already alluded to, is also destruction of the surface. It is destruction in different ways, it is true. It is destruction in the one case by picking the surface up, and destruction in the other case by letting the surface down. The result is the same—destruction of the railway. That appears to me the necessary consequence if you once get out of the common law doctrines applicable to matters of this kind, and are forced to rely upon the true construction of the Railways Clauses Consolidation Act

Now, if we look at such decisions as there are on this point, they almost all of them are based upon the theory to which I have alluded, the theory being that, as regards mines, the railway company have nothing to do with them until the time comes when the owner wants to work them so as to endanger the railway. It may never come at all. They may be minerals which cannot be worked at a profit, or so situated that it is not worth working them, and in such a case the railway company get the right of support for ever for nothing. But if, on the other hand, the time does come for the mine owner to work these mines, he is at liberty to say to the railway company, "If you do not buy me out in accordance with these sections, which of course you have a right to do, I shall work my mines regardless of your rights; that is to say, regardless of the rights which, but for the statute, you would have had at common law." That is the position which these plaintiffs have taken up. Now that that is the view which has been taken through a great number of decisions is, I think, apparent from a study of them. I am not going through them at any length; but it is perfectly impossible to my mind for any lawyer to read the decisions upon these sections, beginning with *The Great Western Railway Co.* v. *Bennett*, 15 W. R. 647, L. R. 2 H. L. 27, and coming down to *The Midland Railway Co.* v. *Robinson*, 38 W. R. 577, 15 App. Cas. 19, both before the House of Lords, without seeing that the reasoning I have applied to this case is the reasoning which has been applied uniformly and without any exception whatever, so far as I know, except the possible exception in the judgment of Lord Macnaghten in *The Midland Railway Co.* v. *Robinson*, 15 App. Cas., at p. 36. Lord Macnaghten does throw some doubt upon the question of whether the mine owner can go upon the surface and work from above downwards. The doubt thrown upon the proposition by a noble lord of his eminence requires the greatest attention; but he stands alone, and, without enumerating the long list of lords and judges who have taken the view of the sections which appears to me to be the right view upon the study of them, it appears to me it is impossible for us to give effect to the doubt expressed by Lord Macnaghten. I think Sir Horace Davey was justified in his remark that there is a difference apparent enough to the minds of those who are accustomed to think of these things with reference to legal rights. He said the plaintiffs have no right to use the defendants' property to work theirs, and that that is a very different thing from a right to work their own property to the detriment of the Great Western Railway Co. I see the difference, of course; but, asking myself whether any such difference is drawn by these legislative enactments, I say, "No, I see no trace of it."

It appears to me, therefore, without going further into the decisions, that the appeal fails, and must be dismissed with costs.

BOWEN, L.J.—I should add nothing were it not for the great importance of this question. But as it is a most important one, perhaps it is right that one should give one's opinion separately.

It seems to me that the whole case turns upon the true construction of section 79 and the two preceding sections of the Railways Clauses Consolidation Act, 1845. The point turns upon the words in section 79 which reserve to the mine owner the right, if the company is unwilling to purchase, to work the mines, which include clay, stone, and minerals which can be got by open working, in the usual manner of working such mines in the district. And we have to decide whether, under the words "the usual manner of working such mines in the district," the owners of

the clay are entitled not merely to work underground, and let down the surface, but actually to go upon the lands which the railway company has in the first instance acquired, to disturb the surface and remove it so far as is necessary to reach the clay.

We are driven, therefore, in the first place, to consider carefully the code or fasciculus of enactments contained in the three sections I have mentioned, and the following ones down to section 86. Section 77 provides, with respect to mines lying under or near the railway, that the company is not to be entitled to any mines or minerals under any land purchased by them except only such parts as are necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of the lands unless they be expressly named therein and conveyed thereby. Now it is not perhaps a very admirable way of dealing with an Act of Parliament which is intended to be read as a whole, to read one section without the light of the sections which follow; but for the purpose of making the meaning clear of what I am about to say, I will assume that the Act of Parliament paused there, and that there was no other limitation of right or creation of right contained in the sections which follow. What would be the position of the railway company if the Act of Parliament were so worded? According to the ordinary theories of law a person who grants to an individual or to a corporate body, land for the purpose of making upon the land some work like a railway, a canal, or other buildings, impliedly is taken, unless there is any provision to the contrary contained in the document which describes the rights, to grant also that necessary support which both parties must be intended to have known would be required, and without which the enjoyment of his grant by the grantee would become wholly ineffectual and futile. You must look very carefully at the document which creates the rights of the parties to see what was the true intention of the document —whether it is a grant or an Act of Parliament— what was the true intention of the parties, or the true intention rather of those who drew the document, as to the exact amount of title which is intended to be conveyed out of the grant. If that section, however, stood alone, it seems to me there would be nothing to show that the ordinary implication of law was not to follow, and that the mine owner, although his mines are excepted out of the grant, would be nevertheless bound to leave to the railway company all the necessary support without which it would be idle to sell the land to the railway company. I think, therefore, that that is what would be the result of section 77 if it stood alone. I do not think I am alone in this view, not only because Lindley, L.J., who has preceded me, has stated that to be his impression, but also because I think it is the view of Lord Selborne in *Dixon* v. *Caledonian Railway Co.*, 29 W. R. 249, 5 App. Cas. 520, which no doubt must be read by the light of the Scotch Act, but which for the purpose of the point in question covers exactly the same ground as the English Act. Lord Selborne there says that, in his opinion, if section 70 of the Scotch Act (which is similar to section 77 of the English Act) stood alone, there would be nothing in it to deprive the railway company of the ordinary right to support. I do not myself follow the contrary view expressed by Lord Westbury in *Great Western Railway Co.* v. *Bennett*, 12 R. 2 H. L., at p. 41. But section 77 does not stand alone, and it is by virtue, it seems to me, of section 79, and the words which define what is to be reserved to the mine owner, that we get language of the Legislature which does interfere with that complete enjoyment of the railway for railway purposes, that otherwise the railway company would have possessed. What we have to decide is, to what extent does section 79 go?

I pause for a moment to remark that, although the cases use the expression "surface land" as distinguished from land below the surface, what the railway company really gets under section 77 is all the land, whether on the surface or below, which is not mines. In the present case the only matter which we have to consider is the actual surface. That is the point alone raised, and we have to construe the Act with reference to that. There is no such distinction drawn in section 77, or as it seems to me in section 79, as a distinction between lands on the actual surface and lands which are not mines, although they are below the surface.

What, then, does section 79 do in favour of the mine owner? It certainly takes away from the railway company rights of adjacent and subjacent support to some extent, from and after a particular moment. If the mine owner wants his mines, and is desirous of working them, then the occasion arises, and if the railway company upon notice are unwilling to purchase them, then he may, so far as is necessary for the enjoyment of his own mine, destroy the adjacent and subjacent support. In the case of an underground mine he may let down the surface, from and after that moment; up to that moment the railway company are not threatened, and they enjoy the benefit of the adjacent and subjacent support. It is not perfectly correct to say that under section 77 the railway company get no right to adjacent and subjacent support; they get every right to adjacent and subjacent support, it seems to me, which they want, except so far as the mine owner at any particular moment requires to utilize his mines. It is admitted, therefore, as I have said, that from and after that moment, and on the fulfilling of all the conditions precedent up to that moment, the mine owner may, if he requires it, let down the surface even if it involves letting down the railway. No injustice can be caused, because the railway company can purchase: if they do not, the mine owner is free. But the distinction raised in this particular appeal is with reference to the extent to which section 79 goes. Does it also intend to justify such acts of trespass—such acts as otherwise would be acts of trespass—upon the surface, in addition to giving the right to withdraw the support to the surface? Now this distinction, for business purposes of course, would naturally strike one as a fine one. If the mine owner may, in the enjoyment of his property, let down the railway, it seems somewhat subtle to suppose that, provided the usual manner of working the mine justifies it, he may not enter upon the surface and dig upon the surface. But, although the distinction is a subtle one, to the eye of the lawyer it is a perfectly clear one, and that it has a business value is apparent from what we have been told in the argument in the present case.

The question, therefore, really arises whether it is a distinction which we can find in the Act of Parliament. If that distinction is to be drawn, the first observation which seems to me to arise is, that you have to exclude from the protection of section 79 the rights of a mine owner whose mines consist of clay, gravel, or such minerals as are worked from the surface in cases where what he wants to work is the mineral lying immediately under the line, and which can only be got conveniently, according to the usual manner of working, by taking up the railway. You have to exclude it from section 79 because, although the usual manner of working the mines in the district would justify the taking away the surface, yet, nevertheless,

in this particular case it is said the Act of Parliament did not mean to give it.

The second observation which arises, and which seems to me arises with considerable force, is that if that distinction is to be drawn there is no provision made, as far as I can see, in the Railways Clauses Consolidation Act itself for the assessment of compensation for the purchase by the railway company, and the payment by the railway company, of that right of the mine owner. You are taking from him, if that is the true construction of the section, the natural facility of working his mineral by means of quarrying, which is usual and which is convenient. When is he paid for it, and how is he paid for it? There is nothing in section 81, I think, treating it as a mere matter of the construction of the section, to give the mine owner the means of obtaining compensation for that facility of which he is deprived. Section 81, as has been pointed out in argument, does not cover all the cases that would arise; and Sir Horace Davey and Mr. Cripps, with whose argument I was very much impressed, could only reply to the difficulty which arose in respect of that point, by turning to the Lands Clauses Consolidation Act, and saying that under that Act the mine owner would be able to obtain compensation. But still when would he obtain it? When would the railway company have to pay it? It seems to me that they would have to purchase it when they purchased the land, but if that is so, they would have to purchase it before they are threatened. They would have to purchase it before it was at all certain that the mine owner would want the clay, and they would therefore have to buy it in the dark. It would be almost impossible to assess the proper value which they ought to pay, because you never could tell the exact chances of the mine owner wishing to work his quarry, or the extent or depth to which he would work it. And if you have to pay him the price before you know whether the mine owner would require the clay, consider how you would defeat the whole object, the cardinal object of this code, as it has been expounded by judge after judge and court after court. What does Lord Cranworth say in *Bennett's case*, L. R. 2 H. L., at p. 40: "The object of the statute evidently was to get rid of all the ordinary law on the subject and to compel the owner to sell the surface, and if any mines were so near the surface that they must be taken for the purposes of the railway, to compel him to sell them, but not to compel him to sell anything more. The land was to be dealt with, just as if there were no mines to be considered; nothing but the surface. That being so, justice obviously requires that when the mine owner thinks it beneficial to him to work his mines, and proceeds to do so, he should be just in the same position as if he had never sold any part of the surface at all. If he had not compulsorily parted with the surface, he might have worked his mines sinking his shaft from the very surface down to the very bottom of the mine. The object of the statute was that, for the purpose of the railway, the company was to take (and it was a very beneficial provision for the company) that, and that only, which is necessary for the purpose of the railway; and that all the rest should be left to be dealt with, whenever the time for working the mine should arrive. It is plain to me, upon the construction of that clause of the statute, that that was the intention of the Legislature." Therefore if compensation is to be given to the mine owner at the time the land is purchased, he gets it at a moment when to give it him would defeat this cardinal object of the code which we are construing, and, as was pointed out by A. L. Smith, L.J., it would be extremely difficult to measure the compensation which ought to be given; and in practice I think I may say that it is unheard of, that compensation of the kind alluded to, should be asked for at the time of purchase of the land.

We come back, therefore, to the meaning of the words in section 79, and ask ourselves whether there is anything in the words, "usual manner of working such mines," which is reasonably intended to cover such cases as the present; and for the reasons I have given it seems to me that the words ought to cover them as a matter of business and as a matter of fair play between the company and the mine owner. It is said, indeed, that section 79 cannot be intended to take away from the railway company what they have purchased, namely, the right to the surface, and to use the surface for the purposes of their railway; but that argument goes too far. Section 79 certainly does operate from and after a particular moment to deprive the company of the full enjoyment of the surface. It is not therefore a question of the existence of any right of interfering with the enjoyment by the company of the lands which they have bought; but the question is, How far does the right of interference go? That is the view which, I think, one would form as to the interpretation of the code, keeping in mind what is the cardinal object of the code, that the railway company shall not be obliged to pay anything for the mines until the mine owner desires to work, and that the mine owner shall be at liberty, unless the railway company shall then buy, when the critical moment comes, to enjoy his property to the full; otherwise this code would really become a means of confiscation.

Now with regard to the authorities I shall say very little. In *The Great Western Railway Co.* v. *Bennett* it is obvious that Lord Chelmsford's language and Lord Cranworth's language, if read in the ordinary sense of the words, justified the judgment below. And Lord Cranworth's reasoning as to the object of the Act, I think, explains the position which the respondents assume here. We come next to *Errington* v. *The Metropolitan District Railway Co.*, 30 W. R. 663, 19 Ch. D. 559, where the late Master of the Rolls (Sir George Jessel) and the present Master of the Rolls (then Brett, L.J.) both in terms say that you may dig the surface to get at the mineral, which is properly worked by digging the surface. It is true those are expressions of opinion, and cannot be said to be strictly a decision upon the point, but they are expressions which indicate the view that those learned judges took of the objects of the Act. We come next to *The Midland Railway Co.* v. *Miles*, 35 W. R. 76, 33 Ch. D. 632, where Stirling, J., adopts the same view, basing his judgment upon the previous decisions and upon the reason of the thing. Finally we come to the case by which I feel myself very much impressed—viz., *The Midland Railway Co.* v. *Robinson*. I desire to say a word or two upon what must have been decided by that case. It was an action in which the mine owner was approaching the railway at some little distance and he served a notice to treat in respect of the land between his then workings and the railway line, which notice covered the land under the line and the land adjacent for some considerable distance. He threatened in his notice that unless the company bought, he would work those minerals which were minerals of the exact description—of the exact legal kind—to which the minerals in the present case belong. He threatened, that is to say, to work the minerals close to and under the line by open quarrying. It is said, and said with truth, that the chief point which the court were in that case considering, was the validity of the notice; but the action was one for an injunction to prevent the mine owner from working, and the mine

owner was justifying his threat by the notice, and if the notice broke down, or if the threat went beyond what is legal, the injunction would have been modified; it must have been granted in a modified form and not in a complete form. The business importance of the point may not have struck the court in the manner in which our attention has been called to it here. But the right of the mine owner to work the minerals underneath the line by open quarrying seems to me to be involved in that case. Chitty, J., gave judgment dismissing the action. When the matter came before the Court of Appeal, Cotton, L.J., seems to imply that the judgment he was giving as to the right of the mine owner to advance upon the railway included his right to quarry right through the line, because in answer to the argument that that would destroy the line, he replies, "Well, but the railway company have only got to purchase." Still it is true that the importance of the point perhaps was not brought to the attention of the court there. But when the case came to the House of Lords, it seems to me that the point was actually pressed upon the House of Lords in argument. The argument used by Mr. Rigby is that the Legislature could not have intended to give the land owner leave to break up the railway line by quarrying through it. Sir Horace Davey replied, "There is no difference in principle between stripping off the surface and picking out the minerals, and working underground within six feet of the surface, and so letting the railway down." Upon that Lord Macnaghten intimated his doubt—a doubt to which he adhered in his judgment, but a doubt in which he was not followed by the rest of the House—as to the logical necessity of allowing a man to trespass on the surface because he had a right to destroy the surface by underground working. Although, therefore, the exact point which is raised in this case may be said not to be the point which was decided by the House of Lords in their judgment, it was pointedly brought, it seems to me, to the attention of the Lords. The construction which they put upon section 79, if they held that mines and minerals there included such mines and minerals as could only be got by digging through the surface, would, of necessity and as a logical sequence, lead to the conclusion that you might quarry right through the line in order to get at the minerals under the line. And with that logical sequence in their minds, Lord Herschell and Lord Watson used language which seems to me to imply that that was a consequence which they faced, and which they thought must be faced in order to give the railway company on the one side and the mine owner on the other side the full benefit which the Act intended they should respectively enjoy. Lord Herschell was perfectly alive to the difficulty of the point. He was perfectly alive to the desirability, if you could do so, of construing the sections so as to limit the powers of interference with the railway company. But, nevertheless, having looked all round it he came to the conclusion that there was no distinction to be made between mines and minerals which could conveniently only be quarried from above, and the mines and minerals which could be obtained from underground working. I think that, although it cannot be said to have closed the door to the argument which has been addressed to us, and that it still is open to the counsel for the appellants to ask us to pronounce a contrary view to that which was expressed by Lord Herschell and Lord Watson, nevertheless their judgments follow a long chain of authority which seems to me to imply that section 79 gives the power to disturb the surface in order to get at minerals which are worked from the surface if that is the usual and ordinary way of working them in the district. The judgment of the court below, therefore, seems to me to be correct, and this appeal ought to be dismissed with the usual consequences.

A. L. SMITH, L.J.—The question is whether the mine owners, the Ruabon Brick and Terra Cotta Co., can justify what they are doing and are intending to do, under the group of sections in the Railways Clauses Consolidation Act, 1845, commencing with section 77, and more especially under section 79 of the Act. It has now been held by the highest authority that the minerals mentioned in these sections include, not only minerals won by underground workings, but also minerals won by open workings, such as by quarrying; and it is not disputed that the terra cotta clay, which is in question in this case, is a mineral within those sections. It has also been held by like authority that if when due notice is given by the mine owner to the railway company to purchase the underground minerals lying under its railway, and the company is not willing to do so, then the unpaid mine owner (if he works his minerals in a manner proper and necessary for the beneficial working thereof and according to the usual manner of working in the district) may work such minerals underground even though by so doing he lets down and destroys the surface of the railway and its works. In such case, upon action brought by the railway company against the mineral owner for letting down the surface of the railway, the mineral owner can justify under section 79 and the other sections grouped therewith; and this is not disputed. Why then, having got thus far by means of decided cases which cannot be controverted, is an unpaid mine owner who wins his minerals by quarrying in the accustomed manner to be in a worse position than an unpaid mineral owner who wins his minerals by mining? I cannot myself see why if the one can justify under the statute the other cannot. If the action against a mine owner for letting down the surface of the railway were in trespass it would be identical with the present case; but does the fact that the one cause of action is upon the case, and the other in trespass, affect the nature and the validity of the defence which the mine owner has under the statute? If pleadable with success in an action upon the case, why is it not equally pleadable in an action of trespass? If Sir Horace Davey and Mr. Cripps are correct they must establish that different rights are given to the mine owner in section 79 when applied to an owner whose minerals are worked underground, and to an owner whose minerals are worked above ground. In the one case it is conceded that the unpaid mine owner may win his minerals (working them in the accustomed manner) without let or hindrance from the railway company, whereas, in the other, it is now said he cannot. I can find no such distinction in the section. The fact is, that when once the word "owner" in section 79 is held to include both an owner whose minerals are worked from underground, and also an owner whose minerals are worked from the surface, it follows, as it seems to me, that each, if he works in the accustomed manner, has the same protection under the statute, and it makes no difference whether in the one case the surface is let down, or in the other it is trespassed upon. The substance of the defence under the statute is, that if the mine owner is unpaid for the minerals, and the company does not purchase them when the time arrives for it to do so, that is, when the mine owner desires to work his minerals, then the mine owner may proceed to win his minerals in the accustomed way irrespective of the company's works. The company must pay for the minerals whether the minerals are worked by mining or quarrying, other-

wise the mine owner may proceed in the accustomed manner to win them. This is my view of section 79 of the statute. There has been, however, upon the point now in dispute at the least a sequence of *dicta* of peculiar authority all tending in the same direction, and in antagonism to Sir Horace Davey's contention with one exception, that of Lord Macnaghten, weighty though it be. The *dicta*, without referring further to them, are those of Lord Chelmsford, Lord Cranworth, Sir George Jessel, Brett, L.J., Cotton, L.J., Stirling, J., Lord Herschell, and Lord Watson. They are all one way, all in antagonism to the point which is now argued before us, and, though I agree that, in regard to the bulk of those at any rate, they are not direct authorities upon the point, they are nevertheless the weighty opinions of those learned judges. I do not consider Lord Esher's two *dicta*, the one in *Errington* v. *The Metropolitan District Railway Co.* and the other in *Pountney* v. *Clayton*, 31 W. R. 664, 11 Q. B. D. 833, to be necessarily in conflict. There are, however, besides these *dicta*, two decisions which require consideration, for they appear to me to be very much in point. The one is the case of *The Midland Railway Co.* v. *Miles*, in which Stirling, J., decided the present point, excepting, if it be an exception, that upon the *locus in quo* in that case the rails were not actually laid down. And I say, having considered that case, I agree in the conclusion he has arrived at. There is also the case of *The Midland Railway Co.* v. *Robinson* in this court and in the House of Lords, which is very much in point also. I agree with the observations which have fallen from Bowen, L.J., as to that case.

For these reasons, whether you take the section by itself or take these *dicta*, and the two authorities I have alluded to, I am of opinion that Kekewich, J. was correct in the judgment he arrived at, and that this appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellants, *R. R. Nelson.*

Solicitors for the respondents, *Pritchard, Englefield, & Co.*, agents for *Brabner & Court*, Liverpool.

From Q. B. Div. (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) — March 15.

GRAHAM AND WIFE *v.* MAYOR, &c., OF NEWCASTLE-UPON-TYNE. (*a.*)

Highway — Surveyor — Limitation of action — Urban authority—Highway Act, 1835 (5 *&* 6 *Will.* 4, *c.* 50), *ss.* 26, 109—*Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 144, 264.

By section 109 *of the Highway Act*, 1835, *no action shall be commenced against any person for anything done in pursuance of or under the authority of the Act after three months next after the fact committed for which such action is brought. By section* 144 *of the Public Health Act*, 1875, *urban authorities* (*including, by section* 6, *corporations of boroughs*) *are made surveyors of highways within their district, and are subject to all the powers, duties, and liabilities of surveyors of highways under the law for the time being in force. By section* 264 *every action against any local authority for anything done, or intended to be done, or omitted to be done, under the provisions of the Act shall be commenced within six months after the cause of action accrued.*

In an action to recover damages for negligence on the part of the defendants as surveyors of highways,

Held, that the defendants were entitled to the protection of section 109 *of the Highway Act*, 1835, *and that the action must be commenced within three months after the cause of action accrued.*

Taylor *v.* Meltham Local Board, 47 *L. J. C. P.* 12, 26 *W. R. Dig.* 95, *and* Kay *v.* Atherton Local Board, 42 *J. P.* 792, *overruled.*

Burton *v.* Mayor, &c., of Salford, 31 *W. R.* 815, 11 *Q. B. D.* 286, *followed.*

Appeal from the judgment of the Queen's Bench Division affirming the judgment of the county court judge at Newcastle-upon-Tyne in favour of the defendants.

The action was brought in the county court to recover damages for personal injuries to the female plaintiff owing to the alleged negligence of the defendants.

It appeared that on the 22nd of January, 1892, the plaintiff and his wife were driving along a street in Newcastle-upon-Tyne, when the carriage in which they were driving was upset through coming into contact with a heap of snow which had been removed under section 26 of the Highway Act, 1835, by the defendants as surveyors of highways from other streets within their district and collected in this street, and the female plaintiff was injured. The action was brought on the 13th of July, 1892. The county court judge found that the injuries were caused by the negligence of the defendants, but held that under section 109 of the Highway Act, 1835, the action ought to have been commenced within three months of the accrual of the cause of action, and gave judgment for the defendants.

The Divisional Court (Lord Coleridge, C.J., and Cave, J.) affirmed this judgment. The plaintiff by leave appealed.

Section 26 of 5 & 6 Will. 4, c. 50:—"If any impediment or obstruction shall arise in any highways from accumulation of snow . . . the surveyor is required from time to time . . . to cause the same to be removed."

Section 109.—"No action or suit shall be commenced against any person for anything done in pursuance of or under the authority of this Act . . . after three calendar months next after the fact committed for which such action or suit shall be so brought."

Section 144 of 38 & 39 Vict. c. 55.—"Every urban authority shall within their district, exclusively of any other person, execute the office of and be surveyor of highways, and have, exercise, and be subject to all the powers, authorities, duties, and liabilities of surveyors of highways under the law for the time being in force, save so far as such powers, authorities, or duties are, or may be, inconsistent with the provisions of this Act; every urban authority shall also have, exercise, and be subject to all the powers, authorities, duties, and liabilities which, by the Highway Act, 1835, or any Act amending the same, are vested in and given to the inhabitants in vestry assembled of any parish within their district."

Section 264.—"Every action" against a local authority or any member thereof, or any officer of a local authority, or person acting in his aid, for anything done or intended to be done or omitted to be done under the provisions of this Act "shall be commenced within six months next after the accruing of the cause of action, and not afterwards."

Lowenthal, for the plaintiff.—The action was brought in time, as it was commenced within six months after the cause of action accrued. Section 144 of the Public Health Act, 1875, makes urban

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

authorities surveyors of highways within their districts, and section 264 requires an action for anything done under the provisions of the Act to be brought within six months. The defendants, therefore, acted as surveyors under the Public Health Act, 1875, and the three months' limitation prescribed by section 109 of the Highway Act, 1835, is no longer applicable. The cases of *Taylor* v. *Meltham Local Board*, 47 L. J. C. P. 12, 26 W. R. Dig. 95, and *Kay* v. *Atherton Local Board*, 42 J. P. 792, are directly in point, and if necessary the decision of Cave, J., in *Burton* v. *Mayor, &c., of Salford*, 31 W. R. 815, 11 Q. B. D. 286, ought to be overruled. The fact that the defendants were made surveyors of highways by the Newcastle-upon-Tyne Improvement Act, 1853,* does not affect the case.

He also referred to sections 6, 42, 44, and 340 of the Public Health Act, 1875.

Channell, Q.C., and *John Strachan*, for the defendants, were not called upon.

Lord ESHER, M.R.—In this case we have to say whether we agree with the decision of Grove and Denman, JJ., in *Taylor* v. *Meltham Local Board*, or with the decision of Cave, J., in *Burton* v. *Mayor, &c., of Salford*. It is true that in the latter case Cave, J., distinguished it from the former case, but I must candidly confess that the distinction seems to me to be too fine. The two cases cannot stand together, and therefore we must choose between the two. How does the matter stand? There are two statutes, the Highway Act, 1835, and the Public Health Act, 1875. The Public Health Act does not purport to touch the Highway Act. It leaves the Highway Act untouched as to every part of the management of highways. It makes corporations and local boards surveyors of highways within their own districts, but it leaves other surveyors of highways untouched. It makes a different class of persons surveyors of highways, but it leaves them to act under the Highway Act, 1835. A corporate surveyor of highways is therefore only a surveyor of highways in the ordinary sense of the term, and, that being so, such a surveyor is subject to all the liabilities and entitled to all the privileges of a surveyor of highways under the Highway Act, 1835. The limitation, therefore, as to the time for bringing actions prescribed by section 109 of the Highway Act, 1835, to three months after the cause of action accrued, is applicable. I adopt the reasoning of Cave, J., in *Burton* v. *Mayor, &c., of Salford*, and I apply it to the present case and say that the action must be brought within three months. I deliberately put the case upon this broad ground. It might be put upon the narrow ground that the removal of the snow of the defendants was an act expressly done under the powers conferred upon them by section 26 of the Highway Act, 1835, and that therefore section 109 was applicable to that particular act. But I prefer to place my decision upon the broad ground that for every act done by an urban authority as surveyors of highways their rights and liabilities are governed by the Highway Acts. I am unable, therefore, to agree with the decisions in *Taylor* v. *Meltham Local Board* and *Kay* v. *Atherton Local Board*, and those decisions must be considered as overruled.

LINDLEY, L.J.—I am of the same opinion. I decide this case apart from the Newcastle Improvement Act, 1853, though that Act brings the case exactly within the decision of Cave, J., in *Burton* v. *Mayor, &c., of Salford*. I assume for the purposes of this case that the defendants were made surveyors of highways under section 144 of the Public Health Act, 1875, and I agree with what has been said by the Master of the Rolls upon the construction of the Acts.

LOPES, L.J.—Section 144 of the Public Health Act, 1875, makes corporations and local boards surveyors of highways, and when so constituted they act as surveyors under the Highway Act, 1835. That disposes of the case. This act of the defendants in removing the snow was done under section 26 of the Highway Act, 1835. The principle of the decisions is that, to entitle the surveyor to the protection of the Act, it is sufficient if he *bonâ fide* and reasonably believes that he is acting under the Act. But this case is stronger, for here the defendants did in fact act under section 26. Therefore the period of limitation prescribed by section 109 applies. I only desire to add that I agree with the reasoning of Cave, J., in *Burton* v. *Mayor, &c., of Salford*, and I cannot agree with the decisions in *Taylor* v. *Meltham Local Board* and *Kay* v. *Atherton Local Board*.

Appeal dismissed.

Solicitors for the plaintiffs, *Dix & Warlow*, for *Keenlyside, Forster, & Forster*, Newcastle-upon-Tyne.

Solicitors for the defendants, *Hill-Motum*, Newcastle-upon Tyne.

* 16 & 17 Vict. c. clxxxii., s. 17.—"The council, and none other, shall be the surveyors of all highways within the borough, and shall have all such powers and authorities and be subject to all such liabilities as surveyors of highways are invested with and subject to by virtue of the laws for the time being in force," &c.

From Q. B. Div. (Lord Esher, M.R., and Lindley and Bowen, L.JJ.) — March 14.

FORSTER v. FARQUHAR AND OTHERS. (a.)

Practice—Costs—Discretion of court over costs—Trial with jury—"Good cause"—Ord. 65, r. 1.

The plaintiff brought an action to recover damages for breach of contract to put the drains of a house, which he agreed to take on lease from the defendants, into sound condition. Shortly after the plaintiff had gone into occupation of the house, some members of his family became ill with scarlet fever. The plaintiff, acting upon the opinion of his medical man, alleged that the scarlet fever was caused by the defective condition of the drains, and claimed, in addition to the cost of putting the drains into sound condition, £366 19s. as special damage in respect of the expenses of medical attendance, medicine, and nurses, the cost of disinfection of the house and furniture, and the cost of houses to which the plaintiff's family and household were removed, and expenses of removal. The jury found that the drains were not in sound condition, but that the scarlet fever was not caused by their defective condition, and awarded the plaintiff £12 12s., the amount expended in making good the defects therein. The judge having ordered the plaintiff to pay the costs occasioned by the claim in respect of the above items of special damage,

Held, that, though this claim was not an issue in the strict sense of the term, it was a separate head of claim involving a distinct class of evidence, and that it was not fair to the defendants to make them pay the costs of resisting it, and that, therefore, "good cause" for making the order existed.

Appeal from the judgment of Cave, J., at the trial.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

The action was brought to recover damages for breach of contract to put the drainage of a house, which the plaintiff agreed to take on lease from the defendants, into sound condition, and to remedy certain defects therein. Shortly after the plaintiff entered into occupation of the house his children and some of his servants became ill with scarlet fever, and the plaintiff, acting upon the opinion of his medical man, brought this action, alleging that the scarlet fever was caused by the defective condition of the drains. The following were the particulars of special damage alleged:—

1. Medical attendance, medicines, and nurses	£217	19	0
2. Cost of disinfection of house and furniture, and renewal of same .	109	0	0
3. Cost of houses to which plaintiff's family and household were removed and expenses of removal .	40	0	0
4. Fees and expenses of sanitary engineers	26	18	6

The action was tried before Cave, J., and a jury, when, after hearing medical evidence, the jury found that the scarlet fever was not caused by the condition of the drains, but gave a verdict for the plaintiff for £12 12s., in respect of the fees and expenses of sanitary engineers. The learned judge thereupon made an order that the costs occasioned by the claim in respect of the first three items of special damage should be paid by the plaintiff. The plaintiff appealed from this order.

Barnard Lailey, for the plaintiff.—First, the judge had no jurisdiction to make the order that the plaintiff should pay the costs occasioned by these three items of claim. They are not separate issues; they are only separate heads of damage. The judge had, therefore, no jurisdiction to treat them as separate issues, and to make the plaintiff pay the costs occasioned by them. Secondly, no "good cause" existed within ord. 65, r. 1, to give the judge jurisdiction to make a special order as to costs. There must be some misconduct, oppression, or unreasonable conduct on the part of the plaintiff to constitute "good cause": *Cooper* v. *Whittingham*, 28 W. R. 720, 15 Ch. D. 501. Here the plaintiff acted reasonably in commencing this action and making these claims, as he relied upon the opinion of his medical man.

He also referred to *Jones* v. *Curling*, 32 W. R. 651, 13 Q. B. D. 262; *Huxley* v. *West London Extension Railway Co.*, 37 W. R. 625, 14 App. Cas. 26; and *Pearman* v. *Burdett-Coutts*, 3 Times L. R. 719.

Channell, Q.C. (*Marchant Williams* with him), for the defendants.—Though this head of damage was not a separate issue in the strict sense of the term, the evidence upon it was severable from the evidence as to the rest of the claim. The costs occasioned by these claims were caused by the plaintiff alone. But for the technical rule that there is no issue as to damages the defendants would have got their costs upon these three items without any order at all. They were, to all intents and purposes, a separate issue. Therefore, it would be unfair to the defendants to make them bear the expense of litigating an unfounded claim, and "good cause" within ord. 65, r. 1, existed.

He referred to *Roberts* v. *Jones*, [1891] 2 Q. B. 194, 39 W. R. Dig. 159.

Lailey replied.

Cur. adv. vult.

March 14.—The judgment of the COURT (Lord ESHER, M.R., and LINDLEY and BOWEN, L.JJ.) was read by

BOWEN, L.J.—The old question has been once more brought before us as to what constitutes within ord. 65, r. 1, "good cause" for an order of a judge after a trial by jury interfering with the ordinary result as to costs. It has often been pointed out by this court that it is impossible to define beforehand the circumstances which may constitute "good cause," and that it is by no means desirable to attempt to limit the language which the rule has left broad and simple. Light may, however, be thrown on the meaning of the words by considering the scope and object of the rule in which they occur. Subject to certain exceptions, costs in cases tried at common law used in former days to follow the event of the action. Ord. 65, r. 1, placed all costs, both at common law and in chancery cases, subject to an exception which need not be considered, in the discretion of the judge, but added a proviso in respect of matters tried with a jury. The proviso enacts that "where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the court, shall for good cause otherwise order." The event which the costs are in general to follow is not, it will be observed, the verdict of the jury, but the event of the litigation. The jury may find a verdict for one party, and nevertheless the judgment in the end may be entered by the court for the other. In such a case the costs, if left to the ordinary course, would follow, not the verdict, but the judgment, as in the days before the Judicature Acts. When the verdict of the jury was decisive of the action, then costs would, by the general operation of the rule, follow the verdict of the jury, as also was the case in old times.

Then comes the exception engrafted on the proviso, "unless the judge shall for good cause otherwise order," the general intention being that where there is a jury trial the successful party shall receive costs and the loser pay them. Where will there be a good cause, or, in other words, a sufficient reason, for directing that it shall be otherwise? No nearer and no closer definition can be given than that there will be good cause whenever it is fair and just as between the parties that it should be so. This was, in fact, the view substantially taken in the Appeal Court in the case of *Jones* v. *Curling*. "The facts," says the present Master of the Rolls, "must show the existence of something, having regard either to the conduct of the parties or to the facts of the case, which makes it more just that an exceptional order should be made than that the case should be left to the ordinary course of taxation." "Good cause," says Bowen, L.J., "really seems to me to mean that there must exist facts which might reasonably lead the judge to think that the rule of the costs following the event would not produce justice as complete as the exceptional order which he himself could make." "I will not attempt," says Fry, L.J., "to give any definition of what 'good cause' is, but it plainly must be something which renders it reasonable that the judge should interfere with the rule that the costs should follow the event." It has become usual in cases which arise under this rule to cite to us language of the late Master of the Rolls, Sir George Jessel, in the case of *Cooper* v. *Whittingham*, as if it contained an exhaustive definition of "good cause" under ord. 65, r. 1. The case of *Cooper* v. *Whittingham* was not a decision on the meaning of the term "good cause." It was an enunciation of a principle upon which, in the opinion of the Master of the Rolls, judges should exercise their discretion under the earlier portion of the rule, which relates to actions tried before a judge without a jury. Against any attempt on the part of any court to impose by definition or otherwise a fetter

on the discretion which the law has left to a judge in any particular case this court has always protested. It would be far too narrow a view were we to hold that good cause only exists where there has been misconduct, oppression, or injustice on the part of the successful party. No such limitation is to be found in the rule; and as a matter of reason it is clear that a successful litigant need not have been guilty of injustice or oppression to make it unfair that he should cast on his opponent all the costs of the litigation. The measure of what is fair as to costs is not to be found in a mere consideration of his conduct towards the opposite side. It may have been reasonable from his point of view to do that which it would be unreasonable to make the opposite litigant pay for. Although he has won the action, he may have succeeded only upon a portion of his claim under circumstances which make it more reasonable that he should bear the expense of litigating the remainder than that it should fall on his opponent. The point is not merely whether the litigant has been oppressive in the way he waged his suit or prosecuted his defence, but whether it would be just to make the other side pay. We can get no nearer to a perfect test than the inquiry whether it would be more fair as between the parties that some exception should be made in the special instance, to the rule that the costs should follow upon success. Such was, as has been stated already, the view of this court laid down in *Jones* v. *Curling*. Such was certainly the view adopted in the House of Lords in *Huxley* v. *West London Extension Railway Co.* "I cannot entertain a doubt," says Lord Halsbury, L.C., "that everything which increases the litigation and the costs, and which places on the defendant a burden which he ought not to bear in the course of that litigation, is perfectly good cause for depriving the plaintiff of his costs." The language of Lord Watson is to the same effect. "I shall not attempt," he says, "a complete definition of what is meant by these words. They at all events embrace, in my opinion, everything for which the party is responsible, connected with the institution or conduct of the suit, and calculated to occasion unnecessary litigation and expense."

Treated from the above point of view the present case under appeal appears to us to be easy of decision. The plaintiff, as the jury found, had a grievance against the defendant in respect of a breach of contract for which £12 12s. would be sufficient compensation. Serious expense, however, was occasioned at the trial by reason of the plaintiff's having put forward a claim under a head of damage, which he failed, in the opinion of the jury, to make good. The expert witnesses called to rebut this untenable head of damage cost money and time. The plaintiff cannot be said to have been acting oppressively or vexatiously in putting forward this portion of his claim. He was acting, in fact, on the opinion—though, as it afterwards turned out, the untenable opinion—of his own medical man. But why should the extra burden of this useless expense be paid for by the defendant? It is said by the plaintiff that the various items of damage claimed do not create separate issues in the pleader's sense, nor for purposes of taxation. That is perfectly true; but it is a mere technicality of pleading and of the taxing office which has survived to us from the time when pleadings were more accurate, and when the term "issue" had a recognized meaning with respect to them. The real controversy in the present action was as to the damage suffered, and the question as to damage, though not an issue in the pleader's sense of the word, was a matter in controversy, and one which could be split up into separate heads, each involving a different class of evidence. For all purposes of justice these separate heads of controversy were different issues, though not different issues, nor even issues at all, in the sense in which pleaders use the term. Why should the defendant, whose defence has succeeded on the most expensive and most important of these heads of controversy, bear the cost of litigating it? If, by making a special order as to costs, the judge could apply distributively to these heads of controversy the maxim that he who loses pays, was it not fair and reasonable so to direct? It seems to us that it was. So far from thinking that Cave, J., had no good cause for making the order he did, what he has directed appears to us, on the contrary, to be an exact and admirable instance of the way in which, in the hands of a competent and accurate judge, the rule as to good cause can usefully be applied. For these reasons we think that the appeal ought to be dismissed, with costs.

Appeal dismissed.

Solicitors for the plaintiff, *Cave & Co.*

Solicitors for the defendants, *Walfords.*

High Court of Justice.

Chan. Div. Chitty, J. } Feb. 23; March 7, 17.

DIBB v. WALKER. (a.)

Limitations, Statute of (3 & 4 *Will.* 4, *c.* 42), *ss.* 3, 5—*Mortgage—Assignment of equity of redemption—Settlement—Payment of interest by tenant for life—Remedy on mortgagor's covenants—Judicature Act,* 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 6—Chose in action—*Assignment before the* 1*st of November,* 1875—*Retrospective operation of section.*

The payment of interest by an assignee for life of an equity of redemption is sufficient payment to keep alive the right of action on the covenants of the mortgagor, under the 5th section of the statute 3 & 4 *Will.* 4, *c.* 42.

Forsyth *v.* Bristowe, 8 *Ex.* 716, 1 *W. R. C. L. Dig.* 100, *and* Roddam *v.* Morley, 5 *W. R.* 510, 1 *De G. & J.* 1, *followed.*

Section 25, *sub-section* 6, *of the Judicature Act,* 1873, *is retrospective, and applies to assignments of* choses in action *made before that Act came into operation.*

Action.

On a transfer of mortgages in 1831 the mortgagor joined, and entered into a fresh covenant to pay the principal and interest. In 1833 he settled the equity of redemption expressly subject to the payment of the mortgage debts, and with a proviso that if he, the settlor, were required to pay them or the interest thereon the trustees of the settlement should, at his request, sell the lands and apply the proceeds in payment of the debts.

In 1870, after the death of the mortgagor, the mortgage debts and securities, including the benefit of the covenants, were transferred to persons from whom the plaintiffs derived title by assignment. Ellen Walker, the tenant for life under the settlement, joined in this transfer, and by way of further security covenanted to pay the interest during her life. It was formally admitted for the purposes of the trial that from November, 1866, to February, 1889, Ellen Walker was tenant for life in possession of the mort-

(a.) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

gaged estates and paid the interest on the mortgage debts.

The estate had recently been sold in a foreclosure suit, and, proving insufficient, the mortgagees brought this action in May, 1891, to recover the deficiency from the estate of the covenantor, the original mortgagor. Before commencing the action they gave the notice in writing required by the Judicature Act, 1873, s. 25, sub-section (6), to the defendant, who was the surviving executor and trustee of the will of the covenantor, and also a beneficiary under such will.

The defendant contended that the plaintiffs had no title to sue; and that if they had they were barred by the Statute of Limitations, 3 & 4 Will. 4, c. 42, s. 3: Shelford's Real Property Statutes, 9th ed., p. 202.

Levett, Q.C., and *Borthwick*, for the plaintiffs.—Our title is under the assignment of 1870, but the Judicature Act, 1873, s. 25 (6), which deals with the assignment of *choses in action*, is clearly retrospective. The Statute of Limitations has not run in this case, as the tenant for life has paid the interest: 3 & 4 Will. 4, c. 42, s. 5; Shelford, p. 205; *Barclay* v. *Owen*, 60 L. T. N. S. 220, 37 W. R. Dig. 111; *Roddam* v. *Morley*, 5 W. R. 510, 1 De G. & J. 1; *Chinnery* v. *Evans*, 13 W. R. 20, 11 H. L. Cas. 115, 132; *Forsyth* v. *Bristowe*, 8 Ex. 716, 1 W. R. C. L. Dig. 100; *Hollingshead* v. *Webster*, 36 W. R. 660, 37 Ch. D. 651, 660; *In re Frisby*, 37 W. R. 603, 38 W. R. 65, 43 Ch. D. 106.

Byrne, Q.C., and *Coltman*, for the defendant.—Section 25 (6) of the Judicature Act, 1873, is not retrospective, and the plaintiffs cannot sue. Again, Ellen Walker was under no liability under the covenant sued on, and payment of interest by her would not keep the debt alive. Such payment, to be effectual, must be made by someone who can be considered an agent. Her payments are to be attributed solely to her personal covenant: *Harlock* v. *Ashberry*, 30 W. R. 327, 19 Ch. D. 539; *Newbould* v. *Smith*, 34 W. R. 690, 38 W. R. Dig. 115, 33 Ch. D. 127, 14 App. Cas. 423; *Dickenson* v. *Teasdale*, 1 De G. J. & S. 52, 11 W. R. Ch. Dig. 55; *Bolding* v. *Lane*, 11 W. R. 386, 1 De G. J. & S. 122; *Coope* v. *Creswell*, 15 W. R. 242, L. R. 2 Ch. App. 112; *Fordham* v. *Wallis*, 1 W. R. 119, 10 Ha. 217.

Levett, Q.C., replied.

CHITTY, J.—The action is brought on covenants entered into in 1831. The plaintiffs are the absolute assigns of the debts covenanted to be paid and of the benefit of the covenants. The defendant is the surviving executor and trustee of the will of the covenantor.

Before commencing the action, and after the Judicature Act, 1873, came into operation, the plaintiffs gave the notice in writing required by the 6th sub-section of the 25th section of that Act. In these circumstances it is objected for the defendant that the sub-section does not apply, the point raised being that the covenants were entered into before the passing of the Act, and that the sub-section is not retrospective. In my opinion the objection must be overruled. The words "shall be deemed to have been effectual," which are found in the sub-section, are, I think, plainly retrospective, so as to apply to a debt assigned before the passing of the Act. The 25th section, as shown by the preamble, was passed for the purpose of amending and declaring the law to be "hereafter administered in England" as to the matters mentioned in the section. No just reason can be adduced for confining the operation of the sub-section to assignments made after the passing of the Act. The 3rd sub-section, as to a tenant for life without impeachment of waste, appears plainly to be retrospective. The sub-section in question deals rather with a matter of procedure than a matter of right. But even if I had thought that the objection could have been sustained, I should have given leave to amend by making the representatives of the covenantees parties either as co-plaintiffs or defendants. Before the Judicature Acts the plaintiffs could have maintained such a suit in equity as the present, making the legal personal representatives of the covenantees parties if the defendants had required them to be joined. No suggestion is made that such representatives are threatening to sue or claiming any right. The objection is purely formal.

The question of substance in the action relates to the Statutes of Limitations: the only statute relied on by the defendant's counsel is the 3 & 4 Will. 4, c. 42, and the argument turned solely on the 3rd and 5th sections of that statute. A short statement of the facts extracted from the numerous and voluminous deeds and the admissions will suffice. [His lordship stated the facts, and, after observing that under the settlement the mortgaged lands were, as between the covenantor on the one hand and the persons claiming beneficially the equity of redemption under the settlement on the other, the primary fund for payment of the debts and interest, continued:—] It is obvious that if the payment of interest by Ellen Walker was effectual to keep alive the debt as against the assets of the covenantor, the statute relied on constitutes no bar to the action. Two points were made for the defendant: the first was special, turning on Ellen Walker's covenant in the transfer of 1870; the second was general, to the effect that payment of interest by a tenant for life of the equity of redemption is not sufficient to keep alive the debt as against the assets of the covenantor.

The first point was put in this way: it was said that the payments made by Ellen Walker ought to be attributed solely to her own covenant. I am unable to accept this proposition. Her covenant was expressly entered into by way of further security, and it would be a strange thing to hold that such a covenant had the effect of impairing the mortgagee's rights, as would be the case if the argument prevailed. The answer is that, in the language of the admissions, she paid the interest on the mortgage debts; moreover, the point seems to be covered by the decision of the Court of Exchequer in *Forsyth* v. *Bristowe*, which is also an authority on the second point.

I proceed to consider the second question. The 5th section, as was observed by Lord Cranworth in *Roddam* v. *Morley*, does not specify by whom the payment is to be made. But there can be no doubt that it must be made by a party interested; payment by a mere stranger will not suffice. The question arose in that case on a specialty in which the heirs were bound, and the object of the suit was to recover payment out of the obligor's real estate. Lord Cranworth, with the assistance of the two learned common law judges who were called in, held that the effect of payment of interest by the devisee for life of the real estate was to set free the action generally, and accordingly that the action could be maintained against the remainderman of the lands devised. I followed the principle of this decision in *Hollingshead* v. *Webster*, a case of a simple contract debt not charged on the debtor's real estate, and consequently falling within the statute 3 & 4 Will. 4, c. 104, which makes the debtor's real estate assets in equity for payment of his simple contract debts as well as his specialty debts. Here the interest had been paid by the devisee for life of the real estate, who was also executrix, and the exact point decided was that the payment of interest was sufficient to keep alive the debt against all persons interested in remainder. The Statute of Limitations applicable to that case is

not the statute relied on in this action. For the defendant it is said that payment of interest by the tenant for life of the mortgaged lands is not sufficient to keep alive the debt against the general assets of the mortgagor debtor by virtue of the covenant in the mortgage deed. This gives rise to the question, what is the relation of such a tenant for life to the debt? Undoubtedly the hand of the tenant for life in possession of the mortgaged lands is the proper hand to make the payment of interest. That is peculiarly the case where, as here, the covenantor settles the mortgaged lands without reserving any interest to himself except his right to have recourse to the land in the event of his being called upon to pay. It may be admitted that such a tenant for life could not be sued in an action at law by the mortgagee. But in equity it is plain that the tenant for life could be sued by the mortgagee covenantee in a foreclosure suit, and that he is liable in such an action to be deprived of the rents and profits by the appointment of a receiver if the interest is not kept down. He is liable also to the remainderman for default in payment of the interest, and also in such a case as the present to the settlor, who has a right to have recourse to the estate, as an indemnity against the interest, of all the persons liable by virtue of the indenture, whether at law or in equity, to pay the interest. Ellen Walker was the person primarily liable to make the payment. But this point appears to be covered by the principle of the decision in *Roddam* v. *Morley* to the effect that such a payment sets free the action generally, and also by the case of *Forsyth* v. *Bristowe*. There, on an assignment of the equity of redemption by the mortgagor, the assignee covenanted to pay interest on the mortgage debt; no distinction for the purpose of the statute under consideration can be drawn between a covenant for payment of interest by an assignor of the entire estate in the equity of redemption, and a like covenant entered into by an assign taking merely a life estate in possession in the equity of redemption. This observation applies to Ellen Walker's covenant, and I think it is immaterial whether the covenant is entered into on the assignment or by a subsequent deed by way of further security to which the representative of the covenantor is party. The additional reason given by Lord Wensleydale in delivering the judgment of the court in *Forsyth* v. *Bristowe* is not a mere *dictum*, but a ground of the decision itself. He lays it down that payment of interest by the assignee of the equity of redemption (which plainly includes tenant for life of the equity of redemption) is clearly payment of interest, and that the statute—viz., the statute 3 & 4 Will. 4, c. 42, s. 5—did not expressly require that it should be made by the party liable or his agent; and that if it implied it, the assignee of the equity of redemption who covenants to pay is sufficiently an agent for the purpose. In regard to this doctrine of agency it is to be observed that payment of interest by an agent is not expressly mentioned in the 5th section of the statute under consideration; but it appears to be imported from the other part of the section, which speaks of acknowledgment made by writing by the party liable by virtue of the indenture or specialty, or his agent, and by the general tenor of the section, which treats payment of interest as an acknowledgment. In *Chinnery* v. *Evans* Lord Westbury speaks of the large import and meaning attributed to the words "person by whom the same shall be payable or his agent," which occur in the 40th section of the statute 3 & 4 Will. 4, c. 27. Many other authorities were cited at the bar, but I think it is unnecessary to consider them, and that I may rest my decision on the second point in *Forsyth* v. *Bristowe*, which has not been overruled or questioned.

I hold, then, that the payment of interest by Ellen Walker was sufficient to keep alive the debt against the defendant as the surviving devisee and executor of the covenantor.

Solicitors, *Oldman & Clabburn*, for *Albert Iveson & Son*, Gainsborough; *Gedge, Kirby, & Millett.*

Chan. Div. Kekewich, J. } Feb. 14, 28.

CATTON v. BANKS. (a.)

Partition action—Costs—Incumbered shares—Discretion of court—Partition Act, 1868 (31 & 32 *Vict.* c. 40), *s.* 10.

In partition actions, though the court has an absolute discretion as to costs, it will, as a general rule, allow only one set of costs out of the entire proceeds of sale in respect of each share of the property.

The chief clerk's certificate in a partition action found that the plaintiff was entitled to an unincumbered third share of the estate, that one of the defendants was entitled to another third share, subject to one mortgage, and that another defendant was entitled to the remaining third share, subject to two mortgages. The estate was sold and the money paid into court.

Held, that three sets of costs only—one in respect of each share of the property—were payable out of the entire proceeds.

Belcher *v.* Williams, 39 *W. R.* 266, 45 *Ch. D.* 510, *not followed.*

Further consideration.

By a marriage settlement, dated in 1834, and executed on the marriage of Richard Catton and Elizabeth his wife, certain freehold lands were conveyed to trustees upon trust for the husband and wife during their respective lives, and after the death of the survivor of them for their children upon attaining twenty-one years or marrying, in equal shares. The survivor of the husband and wife died in 1873.

There were three children of the marriage, all of whom attained twenty-one, namely, Richard T. G. Catton, Eleanor Catton, and the plaintiff, Elizabeth G. R. Catton.

Richard T. G. Catton died in 1863, having by his will devised all his property to Eliza Baxter, one of the defendants.

Eleanor Catton married James G. H. Webb, and died intestate in 1876. Her husband died in 1888, having devised all his real estate to trustees upon trust for his three children, who were infant defendants.

The action was brought for the partition or sale of the property, and the usual judgment was given.

By the chief clerk's certificate it was found that the plaintiff was absolutely entitled to one-third share of the property; that Eliza Baxter's share was subject to two mortgages, dated in 1875 and 1877 respectively; and that the remaining third share was vested in the defendant, the trustee of James G. H. Webb's will, subject to a mortgage made by Mr. and Mrs. Webb in 1875.

The property had been sold and the money was in court.

This was the further consideration of the action, and the question arose whether only one set of costs

(a.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

should be allowed in respect of each share of the property, or whether the incumbrancers should be allowed separate sets of costs out of the entire proceeds of sale. In the former case three sets of costs, in the latter case six sets of costs, would be payable out of the fund.

Ingpen, for the plaintiff.

Leeke, for the beneficiaries under James G. H. Webb's will, for the trustee of the will, and for the mortgagee of Webb's share.

Keary, for Eliza Baxter and her husband.

Gatey, for the first mortgagees of Eliza Baxter's share.

E. S. Ford, for the second mortgagees of Eliza Baxter's share.

Methold, for the trustee of the settlement.

The case of *Belcher* v. *Williams*, 39 W. R. 266, 45 Ch. D. 510, was referred to.

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KEKEWICH, J.—It is not a light thing to contravene the deliberate decision of a brother judge, especially when that decision is upwards of two years old, and concerns a point of practice of which it may be difficult to obtain consideration by the Court of Appeal. Wherefore, and notwithstanding that on a previous occasion I carefully studied the case of *Belcher* v. *Williams*, and after careful study did not adopt North, J.'s judgment therein, I have deemed it right again to consider that judgment, and also to inquire of the officers of the court to what extent it has been departed from or followed. Strangely enough the question which I will presently define does not appear to have required frequent consideration. No case of argument and decision, unless *Riddell* v. *Evans*, before myself, can be so described has been discovered, and, on the other hand, neither the registrars nor the taxing masters, who have been consulted, can find me a case in which North, J.'s judgment has been followed, though possibly, and indeed probably, orders of that character have been made. The point was raised before Chitty, J., in *Cleverton* v. *Cleverton* in January, 1891. No decision was pronounced, but the judge expressed a doubt whether that of North, J., was correct, and an order on different lines was ultimately made by consent. *Riddell* v. *Evans* came before me shortly afterwards, and after some discussion I made an order according to *Cleverton* v. *Cleverton*, but though not prepared to follow North, J.'s judgment, I did not deliver any myself. There is no record of either approval or disapproval by Stirling, J. The point has now been argued before me, and a distinct utterance of opinion is imperative.

The point is this. It is settled practice to allow the costs of what is vulgarly called a partition action—that is, an action in which property is sold for the purpose of distributing the proceeds among two or more persons entitled thereto—out of the entire proceeds of sale, and so long as the costs incurred in respect of each share are roughly of about the same amount the rule works fairly to all concerned, and each party entitled gets, in the ultimate result, a sum calculated on the basis of his paying a share of the entire costs exactly proportioned to his share in the property sold. The fairness of the rule would be somewhat disturbed by the costs incurred in respect of any one share largely exceeding those incurred in respect of the other shares; but it is not usually necessary or right to inquire into such matters, the broad view being, that all the costs properly incurred in order to realization and division are incurred on behalf of all the proprietors.

If any one proprietor has incumbered his share, and the incumbrancer, who is, of course, a necessary party, appears separately, he is entitled to his costs out of either the entirety or the particular share affected by his charge, and the question is, which ought to bear those costs. It may affect the incumbrancer—that is, it will do so if the incumbered share is insufficient to pay his principal, interest, and costs—but if that share be sufficient for this purpose the point is immaterial to him, and becomes material to his mortgagor. And that is how it arises in this particular case. The property is divisible into three shares—one being unincumbered, one having a single incumbrance on it, and the other two incumbrances. If the incumbrancers' costs are to be paid out of the entire fund there will be six sets of costs, but on the other footing there would be three only. According to *Belcher* v. *Williams* the first result would prevail, but I am asked by the owner of the unincumbered share, and also by the owner of the share on which there is one incumbrance only, to adopt the second.

Let me in the outset express my entire concurrence with North, J.'s opinion that this is a matter of discretion. It is desirable to have guiding rules, and it is desirable that those rules should be followed generally and by all judges, but it is impossible to say that they shall be without exception, or that any judge shall not be at liberty in any particular case to act according to his discretion under the circumstances before him. That would, I conceive, be directly contrary to the Judicature Acts and the practice of the court.

Also, I completely agree with North, J., in thinking that the point is not settled by the recognised rule in administration actions, that only one set of costs shall be given in respect of each share. The practice in administration actions affords a useful analogy, which should, I think, be applied unless there is some cogent reason to the contrary, but I do not think it can be regarded as having established a rule for this class of cases In selling land and distributing the proceeds among the parties entitled the court is certainly engaged in administrative business, and in some particulars the proceedings approach nearly to those of an action for the execution of the trusts of a settlement or will, or the administration of an estate. Yet I think it would be unsatisfactory to treat the proceedings as more than analogous, and it is proverbially unsafe to press an analogy to the extreme limit. Partnership actions are also of an administrative character, and it is now settled that in an ordinary case the costs of all parties are paid out of the entire estate, but they frequently disclose reasons for the exercise of discretion in departing from this rule, and the question respecting the costs of an incumbered share is not likely to arise. I am not aware of any case in which it has ever arisen. And there is no other branch of equitable jurisdiction which affords me assistance by analogy or otherwise.

North, J., places in the forefront of his judgment the question—What is a share? and he concludes that the shares ought to be taken to be as they are ascertained at the time when the chief clerk's certificate is made, finding who are the persons interested in the property. With this I am unable to agree. I concur with him in seeing no reason why, simply because fifty years ago the property happened to go in moieties, all the costs in connection with the shares afterwards coming into existence should be measured by the original devolution; but it does not seem to me to follow that the chief clerk's certificate is a necessary or proper guide. When first I took the matter into consideration it seemed necessary to determine the question thus put by North, J., and

also seemed to be one of considerable difficulty. On reflection, I think that it need not be determined now, and possibly it may never be necessary to lay down any definite rule, or to say to what extent an assignment will operate to create a new share, so as to give the owner thereof a separate set of costs out of the entire fund. This, however, is to my mind safe and sound: a mortgage merely creates a new interest in the share comprised in it, and does not create a new share. Property held by several in common is not held in more shares after the execution of a mortgage by one of the tenants in common than it was before. If there were an actual partition of the property the mortgagor and the mortgagee would get only one severed portion, and they take only one share of the proceeds of sale. A man advancing money on the security of an undivided share of real estate must be taken to be aware that the entirety is liable to be sold at the suit of one or more of his co-proprietors, because a sale is recognized as a proper and convenient method of division among the parties entitled; and that, therefore, the mortgaged share may be compelled to bear its proportion of the costs occasioned by a sale of the whole. But what justice is there in allowing him to insist that his co-proprietors shall be burdened with extra costs only because the share in which he is interested has been mortgaged? It is right for him to take into account, in calculating the money which he is prepared to advance, the probability of the gross value of his share being reduced by its proportion of the general costs, and he can also take into account the costs which the share itself will have to bear, just as much as if he were contemplating a sale of that share alone.

On principle, therefore, and by analogy to the practice in administration actions, so far as that analogy is applicable, I am of opinion that, as a general rule, and without pretending to limit judicial discretion, only one set of costs should be allowed out of the entire proceeds of sale in respect of each share of the property which those proceeds represent. There certainly is no authority except *Belcher* v. *Williams* to prevent the adoption of that rule, and, notwithstanding North, J.'s judgment, which I have studied with deep attention and respect, I venture to think that that rule ought to be adopted. I therefore hold that in this case there must be three sets of costs only. The practice in administration actions has been to give a mortgagee, and, where there is more than one, the first mortgagee, the full benefit of the one set of costs allowed in respect of a mortgaged share, and that practice ought, I conceive, to be followed in partition actions. That was the course pursued in *Cleverton* v. *Cleverton* and in *Riddell* v. *Evans*, and it will be pursued here.

Solicitors, *Chamberlayne & Short*, for *Hyde & Hobbs*, Portsmouth; *H. Hope Shakespear; Wedlake, Letts, & Wedlake; Hamlin, Grammer, & Hamlin*, for *Dowling, Urry, & Hamer*, Bolton; *C. E. Bird; E. Huelin.*

Q. B. Div. (Lord Coleridge, C.J., and Bruce, J.) — Jan. 31; Feb. 17.

REG. v. HOPKINS (METROPOLITAN POLICE MAGISTRATE). (a.)

Metropolis—Police Acts—Magistrate—Jurisdiction—Penalty—Imprisonment in default of payment of—Street musician—2 & 3 Vict. c. 47, s. 77—27 & 28 Vict. c. 55, s. 1.

By 2 & 3 Vict. c. 47, s. 57, a street musician who played on a musical instrument in a thoroughfare near any house, after being required by the householder for reasonable cause to depart, was made liable to a penalty of forty shillings. By section 77 of the same Act a magistrate is empowered, in case of the non-payment of a pecuniary penalty under the Act, to commit the offender to prison for not more than one month.

By 27 & 28 Vict. c. 55, s. 1: "Section 57 of 2 & 3 Vict. c. 47 is hereby repealed, and in lieu thereof the following provision shall take effect"; the section then proceeds to re-enact the offence under the repealed section, and provides that "the offender shall be liable to a penalty of not more than forty shillings, or, in the discretion of the magistrate before whom he shall be convicted, may be imprisoned for any time not more than three days."

A. was charged with an offence under the last-mentioned section before a metropolitan police magistrate. He was convicted and fined forty shillings, and, in default of payment of the fine, was committed to prison for one month. Upon a rule nisi *for a* certiorari *to quash the conviction,*

Held, discharging the rule, that section 77 of 2 & 3 Vict. c. 47 was not, by the provisions of section 1 of 27 & 28 Vict. c. 55, rendered inapplicable to the enforcement by imprisonment of a penalty under that section, and that the conviction was good.

Rule *nisi* for a *certiorari* to quash a conviction by Mr. Hopkins, a metropolitan police magistrate.

The defendant, a member of the Salvation Army, was convicted of an offence under section 1 of 27 & 28 Vict. c. 55, and was fined forty shillings. The fine was not paid, and he was committed to prison for one month under the provisions of section 77 of 2 & 3 Vict. c. 47.

A rule *nisi* was then obtained to quash the conviction, on the ground that that section was impliedly repealed by section 1 of 27 & 28 Vict. c. 55.

Section 1 of 27 & 28 Vict. c. 55 enacts that "section 57 of the said Act, 2 & 3 Vict. c. 47, is hereby repealed, and in lieu thereof the following provision shall take effect as part of the said Act—namely," in effect, that any householder (personally or by his servant), &c., or police constable may require any street musician or street singer to depart from the neighbourhood of the house of such householder on account of illness or other sufficient cause, and "every person who shall sound or play upon any musical instrument, or shall sing in any thoroughfare or public place near any such house after being so required to depart, shall be liable to a penalty of not more than 40s., or, in the discretion of the magistrate before whom he shall be convicted, may be imprisoned for any time not more than three days," &c.

Section 57 of the Police Act, 1839 (2 & 3 Vict. c. 47), provided that it should be lawful for any householder within the Metropolitan District, personally or by his servant or any police constable, to require any street musician to depart from the neighbour-

(a.) Reported by JOHN P. MELLOR, Esq., Barrister-at-Law.

hood of the house of any such householder on account of the illness of any inmate of such house, or for other reasonable cause, and that every person who should sound or play upon any musical instrument in any thoroughfare near such house after being so required to depart should be liable to a penalty of 40s.

Section 77 provides "that in every case of the adjudication of a pecuniary penalty or amends under this Act, and non-payment thereof, it shall be lawful for the magistrate to commit the offender to any gaol or house of correction within his jurisdiction for a term not more than one calendar month when the sum to be paid shall not exceed £5, this imprisonment to cease on payment of the sum due," &c.

Bankes, for the magistrate, showed cause.—The words of section 1 of 27 & 28 Vict. c. 55 in repealing section 57 of 2 & 3 Vict. c. 47 are "and in lieu thereof the following provision shall take effect." It is clear, therefore, that section 1 of the later statute is to be read into the earlier one as part of it. Then section 77, unless expressly or impliedly repealed, applies, and gives a magistrate jurisdiction to commit a defendant to prison for a month for non-payment of a pecuniary penalty under section 1, notwithstanding that the alternative initial penalty under that section is imprisonment for three days only. Section 77 is nowhere expressly repealed, and there is no sufficient ground for holding that it is repealed by implication by section 1 of 27 & 28 Vict. c. 55. That Act, as appears from the preamble, was intended to be more severe than the earlier one, which it declares was insufficient for the protection of householders. It therefore, without in any way interfering with the existing power of imprisoning for non-payment of a fine where the magistrate thought a fine was the proper initial penalty, enabled him to deal with those cases where a fine was found to be an insufficient punishment, but while taking away the defendant's option, limited the initial imprisonment to three days. And there is no real inconsistency in the procedure if section 77 is put in force, for any less term than a month can be imposed, a defendant can determine the imprisonment by paying the fine, and under the Summary Jurisdiction Act, 1879, the magistrate can give time for payment or allow it to be paid by instalments. If, therefore, section 77 is impliedly repealed by 27 & 28 Vict. c. 55, that Act, instead of being more severe than 2 & 3 Vict. c. 47, would in reality be much less so.

Witt, Q.C., and *Bodilly*, in support of the rule.—The meaning of section 1 of 27 & 28 Vict. c. 55 is that the defendant may be fined 40s., to be recovered according to the forms of law, or imprisonment for three days. In any event there is no power of imprisonment for non-payment of the fine unless there is no distress; if the return is *nulla bona* then the defendant may be imprisoned for the period appointed by the statute upon which the conviction is founded. To construe the section according to the contention of the magistrate is to enable him, when he knows he has a defendant who is unable to pay a fine, by imposing one, to condemn him to imprisonment for a month, when the Act says if imprisonment is imposed as the alternative, it shall be limited to three days.

Cur. adv. vult.

Feb. 17.—BRUCE, J.—In this case the defendant has been fined 40s., and in default has been committed to prison for one month. The question before us is whether the order of the magistrate is good on the face of it. The answer to that question depends upon whether the magistrate has power to commit the defendant to prison for a month in default of payment of the fine of 40s. [The learned judge read the section of the Acts above set out, and continued:—]

It has been contended before us with great force that it is an unreasonable thing that the non-payment of a fine should be treated as an offence punishable by imprisonment for so long a period as a month when the offence for which the fine was imposed could not be punished by imprisonment for a longer period than three days. I think that we should be astute to endeavour to find, if possible, some reasonable meaning of the words of the Legislature which will enable us to escape from such a construction; but that, if the Legislature has clearly expressed its intention, we have no alternative but to give effect to its enactments. But the 27 & 28 Vict. c. 55 expressly enacts that the words of the new enactment are to be read into the 2 & 3 Vict. c. 47 in lieu of the repealed section. According to the ordinary canons of construction the new clause inflicting the penalty of 40s. should be read as part of the Act 2 & 3 Vict. c. 47, and in that case the penalty would, of course, be capable of being enforced by imprisonment as provided by section 77 of the last-mentioned Act.

But it is said that it would be too unreasonable to adopt this construction, that we ought to treat the 77th section as inapplicable to the altered state of things; in other words, we must arrive at the conclusion that the Legislature never could have intended that a man should be liable to be sent to prison for non-payment of a penalty for a longer term than that for which he was liable, he could have been sent to prison by way of punishment for the offence for which the penalty was imposed.

But it seems to me that the Legislature has expressed, and in words which admit of no doubt, exactly the opposite intention. For reasons best known to those who framed the statute of 2 & 3 Vict. c. 47, the Legislature has considered it right in cases other than that now under consideration that the payment of a penalty should be enforced by a longer term of imprisonment than could have been awarded in respect of the offence for which the penalty is imposed. Section 58 of 2 & 3 Vict. c. 47 seems to me to place this beyond doubt. A person who is found drunk and disorderly in the public streets is rendered by the section liable to a penalty of not more than 40s., or he may be committed, if the magistrate shall think fit instead of inflicting on him any pecuniary penalty, to the house of correction for any time not more than seven days. It seems to me to be clear that the penalty imposed by section 58 may be enforced by imprisonment for a month under section 77, although the imprisonment awarded in respect of the offence in respect of which the penalty is enforced could not exceed seven days. That being so, I do not think we ought to set aside the ordinary rules of construction upon the assumption that the Legislature never could have intended to adopt a principle which it has, as it seems to me, expressly adopted in the very Act which is now under consideration. If section 77 applies to the enforcement of the penalty imposed by section 58 of 2 & 3 Vict. c. 47, why should it not apply to the pecuniary penalty imposed by 27 & 28 Vict. c. 55, s. 1, which is to be read as part of 2 & 3 Vict. c. 47 and in lieu of section 57.

But it seems to me that there is very little substance in the objection that is made. Even if section 77 of 2 & 3 Vict. c. 47 is to be regarded as inapplicable, then as there is no express provision for the enforcement of the penalty it can be enforced only under section 19 of 11 & 12 Vict. c. 43, s. 19.

But even in this case imprisonment for a term not exceeding one month is the ultimate remedy for enforcing the penalty. It is quite true that under the

section last mentioned imprisonment only can be resorted to where there is no sufficient distress, but the anomaly remains that a defendant who has neither money nor goods may be sent to prison for one month for the non-payment of a fine of 40s. So that the objection to the conviction is of a technical character, and it is an objection to the form of the conviction only. Had the commitment been in the form of a commitment for want of distress it would have been undoubtedly legal. It may be said that there are cases in which it may be of great importance to a defendant to have a distress levied rather than be sent to prison, but no hardship in that respect arises in the present case.

Under the Summary Jurisdiction Act of 1879 the magistrate has very extensive powers as to giving time for payment, and he may extend the time or allow the penalty to be paid by instalments. It is clear from the affidavit of the magistrate in the present case that he was willing to extend every reasonable indulgence. He asked the defendant if he wished for time to pay, and the defendant said: "I shall not pay. It is my conscience. I had rather go to prison than pay." So I do not see any hardship in the matter. If, according to the statute, it is necessary to issue a distress before committing the party to prison, then the commitment might be wrong; but I do not think that there would be any hardship in the result.

Lord COLERIDGE, C.J.—I agree with great reluctance, but yet yielding completely to the reasoning in the judgment of my learned brother. At the end of the argument my own opinion was strongly the other way, from the difficulty I felt that a man might have to go to prison for a longer time for non-payment of a fine than for the offence itself; and I am not free of the feeling that there is an anomaly in the present state of things. But the analogy pointed out by my brother Bruce as to the person drunk and disorderly appears to me perfectly complete and unanswerable. We can only construe Acts of Parliament according to their true meaning, and if there be an anomaly we must not strain the words of the Act to avoid it, but we must leave it to the Legislature to remove it.

Rule discharged.

Solicitors for the applicant, *Ranger & Burton.*

Solicitor for the respondent, *Solicitor to the Treasury.*

Court of Appeal.

From Chan. Div. (Lindley, Bowen, and Kay, L.JJ.) — April 20, 24.

WILLIS *v.* EARL HOWE. (*a.*)

Limitations, Statute of (3 *&* 4 *Will.* 4, *c.* 27), *s.* 26—*Concealed fraud — Continuous adverse possession — Practice — Pleadings — Striking out—Frivolous and vexatious action—R. S. C.,* 1883, *ord.* 25, *r.* 4.

The plaintiff, by his statement of claim in an action of ejectment brought in 1892, *alleged that he was the heir-at-law of W. J., who died intestate in* 1798, *and that, on the death of W. J., his real estate was wrongfully taken possession of by the mother of G. C., in the name of G. C., as the heir-at-law—as the mother falsely alleged—of W. J.; that G. C. died an infant in* 1805, *whereupon G. C.'s mother continued to hold possession in the name of a supposititious child, R. C., on the false pretence that such child was a brother of G. C., and as such was heir-at-law of W. J.; that both R. C., and afterwards the defendant, who claimed as a volunteer under R. C., remained in possession knowing the above facts, and fraudulently concealed the same from the true heir of W. J.; that the plaintiff and his predecessors had been deprived of the estate by the said concealed fraud, which had not, and could not with reasonable diligence have, been discovered until* 1879; *and that the plaintiff, at the time of such discovery, was an infant, and only attained twenty-one in* 1887. *The defendant moved to have the statement of claim struck out and the action dismissed as frivolous or vexatious; and, in support of his application, adduced evidence to show that the allegation that R. C. was a supposititious child had been publicly made in* 1853, *and had been the foundation of other actions of ejectment against the defendant and his predecessors by other claimants, and that such actions had all been dismissed.*

Held (*affirming* Kekewich, J.), (1) *that the allegations in the statement of claim as to the entry in* 1798 *on behalf of G. C. did not show a case of concealed fraud within section* 26 *of* 3 *&* 4 *Will.* 4, *c.* 27, *but only a wrongful entry under a false claim as heir-at-law;* (2) *that the statute began to run as against the plaintiff and his predecessors in* 1798, *and that, as possession adverse to the plaintiff and his predecessors had been held ever since, the operation of the statute was not suspended by what was alleged to have been done in* 1805; (3) *that the plaintiff or his predecessors knew, or might with reasonable diligence have known, the alleged concealed fraud more than twelve years before action brought; and, accordingly, that the action should be dismissed as frivolous or vexatious.*

Lawrance *v.* Lord Norreys, 38 *W. R.* 753, 15 *App. Cas.* 210, *followed.*

Trustees, Executors, and Agency Co. *v.* Short, 37 *W. R.* 433, 13 *App. Cas.* 793, *distinguished.*

The action was an ejectment action, and the plaintiff, Benjamin Willis, claimed to be entitled to certain real estates as the present heir-at-law of William Jennens, who died in 1798. The plaintiff attained the age of twenty-one years in 1887, and the writ in this action was issued in August, 1892. By his statement of claim the plaintiff alleged (paragraph 5) that on the death of William Jennens in 1798 Lady Curzon (Baroness Howe) "wrongfully took possession" of the real estates of William Jennens "in the name and on behalf of her infant son, George Curzon, as the heir-at-law (as she falsely alleged) of William Jennens, and, upon the death of the said George Curzon during infancy in 1805, continued to hold possession of the real estates in the name and on behalf of a supposititious child called Richard W. P. Curzon, then an infant, on the false pretence and representation that he was a younger brother of the said George Curzon, and as such was heir-at-law of said William Jennens, whereas in truth and in fact the so-called Richard Curzon was the illegitimate child of one Anne Oakes, a spinster." It was alleged in other paragraphs of the claim that the said Richard Curzon remained in possession of the estates during his life, although well aware of the above-stated facts, and fraudulently concealed such facts from the then true heir-at-law of William Jennens; that this Richard Curzon was created Earl Howe in 1821, and on his death devised the estates to his son, George Augustus Curzon, the second Earl Howe; that the second Earl Howe devised the estates to his brother, the present defendant, who succeeded as third Earl Howe. The claim further alleged that both the second Earl Howe and the defendant also, knew and

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

fraudulently concealed from the lawful descendants of the first true heir-at-law of William Jennens the facts stated in paragraph 5 of the claim. It was further alleged (paragraph 11) that the facts stated in paragraph 5 "were concealed and kept secret fraudulently by the contrivance of the defendant and his said brother and father respectively, with the intention of depriving the plaintiff and his predecessors in right of the estates, and to further effect the intention aforesaid the defendant and his said brother and father respectively, at various times prior to the year 1859, and subsequently from the last-mentioned date down to the year 1879, did alter the inscription on the family monument in Acton Church, Acton, in the county of Suffolk, by additions to such inscription and erasures therefrom so as to conceal the said fraud." The claim further alleged that the plaintiff had been deprived of the estates by the said concealed fraud, which was not discovered, and could not with reasonable diligence have been discovered, by the plaintiff or his predecessors in right prior to 1879; that the plaintiff at the time of such discovery was an infant, and that since he attained twenty-one he had caused inquiries to be made with the object of obtaining further proof of the said concealed fraud, and that he had only recently been able to obtain such further proof.

The defendant, without delivering any statement of defence, moved to have the statement of claim struck out and the action dismissed as frivolous and vexatious; and in support of the defendant's application, an affidavit was filed by the solicitor of the Howe family which showed in effect that the allegation in the plaintiff's statement of claim that Richard Curzon, first Earl Howe, was not the brother of George Curzon, but an illegitimate child of Anne Oakes, had been often publicly made in newspapers and books many years ago, and had been the foundation of more than one action against the Howe family by other claimants of the estates in question, but that such actions had always been dismissed (see *Willis* v. *Earl Howe*, 29 W. R. 70).

Kekewich, J., on the hearing of the defendant's application, made an order that the statement of claim be struck out and the action dismissed as frivolous or vexatious.

The plaintiff appealed.

Winch, Q.C., J. Stuart Colquhoun, and *J. C. Calvert*, for the appellant.—The operation of the Statute of Limitations is excluded in cases of a concealed fraud: 3 & 4 Will. 4, c. 27, s. 26. The plaintiff here alleges concealed fraud on the part of the defendant and his predecessors, and gives in his pleading particulars of such fraud—viz., that Richard Curzon, knowing that he was the illegitimate child of Anne Oakes, fraudulently took the name of Curzon to conceal his identity, and took possession of the estates under colour of a false title. Acts of concealed fraud are also alleged against the second Earl Howe and the present defendant. This is only an interlocutory application, and if the statement of claim is defective in some respects the plaintiff should have an opportunity of amending; but the judge below has dismissed the action. *Vane* v. *Vane*, 21 W. R. 252, L. R. 8 Ch. App. 383, is an authority in favour of the plaintiff's claim.

Warmington, Q.C., and *Ingle Joyce*, for the defendant.—From the facts, as stated by the plaintiff himself, the right of entry of the plaintiff's ancestor first accrued in 1798, when a wrongful entry was made on behalf of George Curzon. There is no allegation of any concealed fraud in respect of George Curzon's entry. The statute began to run as against the plaintiff and his ancestors in 1798, and its operation could not be suspended by any concealed fraud—if any such there were—afterwards. Therefore, even if Richard were not the brother of George, and had committed the alleged concealed fraud, still the plaintiff's claim would be demurrable. The evidence filed on behalf of the defendant shows that the allegations of concealed fraud on which the plaintiff relies were made and discussed in public prints years ago, and were actually the foundation of similar ejectment actions against the defendant's predecessor by other claimants, but such actions always failed.

They cited *Petre* v. *Petre*, 1 W. R. 139, 1 Drew., at p. 397, and *Lawrance* v. *Lord Norreys*, 38 W. R. 753, 15 App. Cas. 210.

Colquhoun, in reply.—If, as the claim alleges, Richard was not really the brother of George, the entry of Richard forms a new departure; and the fact that the statute had begun to run as against the plaintiff's ancestor on the entry of George is immaterial; the operation of the statute would be suspended by reason of the concealed fraud of Richard, through whom the defendant claims. George was only in possession for eight years, and had not acquired a statutory title as against the plaintiff's ancestor.

Cur. adv. vult.

April 24.—LINDLEY, L.J.—The action is one of ejectment, and it is brought nearly 100 years after the title of the plaintiff's ancestor accrued, the plaintiff's case being that there had been a "concealed fraud" within the meaning of section 26 of the Statute of Limitations (3 & 4 Will. 4, c. 27). It must be borne in mind that the property has been held adversely to the plaintiff and his predecessors in title ever since 1798. The meaning of section 26 has been very much discussed in various cases, such as *Petre* v. *Petre*; *Rains* v. *Buxton*, 28 W. R. 954, 14 Ch. D. 537; *Lawrance* v. *Lord Norreys*; and *Vane* v. *Vane*. These cases show that, in order to obtain the benefit of section 26, the plaintiff in such an action must make out three things:—(1) That there had been a concealed fraud, (2) that he or his predecessor in title had been deprived of the estate by that fraud; and (3) that the fraud had not and could not with reasonable diligence have been known or discovered but within the statutory period (now twelve years) before the action was brought. Lord Herschell, in *Lawrance* v. *Lord Norreys*, said (15 App. Cas., at p. 213): "Where an action is thus brought, on a title which accrued more than seventy years ago, to dispossess those who, or whose predecessors, have been in possession during that length of time, it is obvious that the allegations by which it is sought to prevent the statute being a bar need to be closely scrutinized. I will first call attention to what a plaintiff must prove in order to oust the ordinary operation of the statute. . . . It is not enough to prove a concealed fraud; the person bringing the suit must show that he, or some person through whom he claims, has been by such fraud deprived of the land which he seeks to recover, and that the fraud could not with reasonable diligence have been known or discovered more than the statutory period before the action was brought." And Lord Watson said (at p. 220): "It is not any and every fraud that will elide the provisions of the statute and keep alive a right of action for recovery of lands. In the first place, it must be a fraud which has deprived the plaintiff of his land; and, in the second place, it must be a concealed fraud in this sense: that it was not only unknown to the plaintiff and to those through whom he derives right, but could not with reasonable diligence have been discovered by him or them before the commence-

ment of the twelve years immediately preceding the institution of the suit."

Applying those principles of law to the present case, it seems to me that the plaintiff has not brought himself within section 26. What was it that, according to his statement of claim, had deprived the plaintiff's predecessor of the estates? It was what was done in 1798, when he was wrongfully turned out—when the Baroness Howe wrongfully took possession on behalf of her son George. There was no fraud in that, and no concealment. It may have been a wrongful act in respect of which an action could have been brought. From that time the statutory period of limitation began to run, and there has been continuous adverse possession ever since. The case is not like the *Trustees, Executors, and Agency Co.* v. *Short*, 37 W. R. 433, 13 App. Cas. 793, where the lands had been left vacant. The act which deprived the plaintiff's predecessor of possession was not a fraud at all, and still less a concealed fraud. The only thing alleged here, with reference to what occurred in 1798, was a wrongful trespass. This is a short answer to the plaintiff's case. But, looking out of the plaintiff's pleading to the affidavit which had been filed by the defendant's solicitor, it is obvious that the action is a most hopeless one. The story about the substitution of the child had been going about ever since 1853, and the plaintiff's predecessors in title might have discovered the alleged fraud (if it existed) long ago without any difficulty. It is a most frivolous and vexatious action, had recourse to for the purpose of extortion, and it ought to be dismissed with costs. Bowen, L.J., concurs in this judgment.

KAY, L.J.—The plaintiff claims a large estate of which he alleges his predecessors in title were deprived in the latter end of last century. He attempts to avoid the effect of the long adverse possession of more than ninety years by alleging that the case comes under section 26 of the 3 & 4 Will. 4, c. 27. He tries to make out that he was so deprived by a concealed fraud. To bring a case within that section these circumstances must concur: (1) There must have been a fraud; (2) That fraud must have deprived the plaintiff or his predecessors in title of the estate; (3) Such fraud must have been concealed. The concealment, further, must have been such that it could not with reasonable diligence have been discovered sooner than it was in fact discovered, and of course must have been within twelve years before the commencement of the action.

Everyone must see the reasonableness of what is stated by the Lord Chancellor in *Lawrance* v. *Norreys*, to the effect that in case of a claim after a very long adverse possession the statement in the claimant's pleading must be closely scrutinized.

In this case the first wrongful act which deprived the plaintiff's predecessors in title of the estate is alleged to be the entry upon that estate by Lady Sophia Curzon (afterwards Baroness Howe) on behalf of her infant son George, whom "she falsely alleged" to be the heir of the deceased owner, Wm. Simmens. It is not stated that she knew the allegation to be untrue. But assuming such knowledge to be implied by the use of the word "falsely," the allegation would not amount to more than this, that a person took possession as heir knowing that he was not heir. Is a false assumption of title by a person in taking possession a concealed fraud within the meaning of the section? If so, it must follow that every entry upon land under a claim of title which the person entering knows he could not support would be a concealed fraud within section 26. I do not think this is the meaning of the section. No case has gone so far. Kindersley, V.C., in *Petre* v. *Petre*, 1 W. R. 139, 362, 1 Drewry, at p. 397, says: "What is meant by concealed fraud? It does not mean the case of a person entering wrongfully into possession; it means a case of designed fraud by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment enables himself to enter and hold." That is not an exhaustive definition, and perhaps none could easily be given of the meaning of "concealed fraud." It is not merely an "unknown fraud," but the word "concealed" seems to indicate that there are facts known to the person who enters, and designedly concealed by him from the real owner, which facts, if known, would enable the real owner to recover. The deprivation of which the section speaks in such a case is by the fraudulent entry; but that which makes a wrongful entry fraudulent is not only the knowledge, but the concealment of those facts. If they had been disclosed, and the person who disclosed them had nevertheless entered, the entry would have been wrongful, but would it have been fraudulent? The section seems to point to some contrivances by which the real owner has not merely been deprived, but defrauded, in the sense of being induced to believe that he was not owner, and that the person who so entered was owner and entitled to enter.

The case on which the pleader really relies is not the first entry on behalf of the son George, but the continuance of possession by Lady Sophia Curzon after the death of George while an infant, on behalf of her alleged second son, Richard. It is stated that Richard was not really the son of Lady Sophia Curzon, being the illegitimate child of one Anne Oakes, but that she passed him off as such, and continued the possession on his behalf, and that when he came twenty-one, he, knowing all the facts, took possession, and that such possession has since been continued by persons claiming as volunteers under him. This is much more like a case of concealed fraud. The personation by Richard of the position of brother of George, and the concealment of the fact that he was not such brother, and the taking possession by him in that character, might bring the case within the section: see *Vane* v. *Vane*. But this, according to the allegation, was not the fraud that deprived the plaintiff's ancestor of possession. He had been deprived some years before by the entry of George, and his right first accrued under section 2 of the statute when an entry was made in the name and on behalf of George. Unless that entry brought the case within section 26, the subsequent fraud by which the possession was continued by the supposititious brother of George would not suspend the operation of the statute, which began to run when entry was made on behalf of George. It was suggested in reply that as the alleged brother was not really the brother of George his taking possession formed a new departure, and that the statute would begin to run from that entry, and that the previous possession of George was not material. The effect of that would be that, if a series of occupiers not claiming under one another kept out the real owner for 100 years, time would only run against him from the moment when the last of such occupiers entered into possession. I am of opinion that this is not the law. A continuous adverse possession for the statutory period, though by a succession of persons not claiming under one another, does, in my opinion, bar the true owner. I desired to consider the case (which I had in my mind during this part of the argument, but which was not referred to by counsel)—viz., *The Trustees, Executors, and Agency Co.* v. *Short*. In that case there had been an adverse possession of land for some time short of the statutory period, which was then abandoned and the land left vacant, and after the statutory period had

elapsed, but within twenty years before the plaintiff's action, the defendant or his successor in title took possession. The law is thus stated in the language of Lord Macnaghten in delivering the judgment of the Privy Council (13 App. Cas., at p. 798): "If a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner on the abandonment is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make an entry upon himself, nor is there any principle of law which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself. No new departure is necessary. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud on the title of the rightful owner, or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant."

These observations were made in a case in which—as I have already noticed—the defendant or his predecessor had not been in possession for the statutory period. If his defence could prevail, it would be enough for a man who entered the day before the action brought to say that the true owner had left the possession vacant for more than twelve years. But it was not meant that if the possession had not been vacant, but some one or other had been in adverse possession during the twelve years, such possession would not bar the true owner unless all such occupants could show a title derived from one another.

An affidavit has been filed on behalf of the defendant, as the practice allows, to show that this action is frivolous and vexatious. According to that affidavit the foundation of the plaintiff's case—viz., that Richard was not the brother of George, but was the illegitimate son of Anne Oakes—has been publicly alleged again and again for many years. It has been the ground of more than one action by claimants of this estate which have failed: it has been published in newspapers and in a book which has been produced. Therefore, there has been no new discovery of this fact. The plaintiff and his predecessors in title knew, or with reasonable diligence might have known, all that he now alleges.

I am of opinion that, on the plaintiff's statement in his pleadings, time began to run against his predecessor in title on the entry of Lady Sophia Curzon on behalf of her son George, and that nothing which is alleged alters the fact that the right of the plaintiff's predecessor first accrued at that time. Even if that were not so, I think it is plain that the plaintiff or his predecessors knew, or might with reasonable diligence have known, all that is here alleged as to the concealed fraud that is put forward as the ground of his claim; and I think that this action is frivolous and vexatious; and therefore the appeal must be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant, *N. Moody.*

Solicitors for the respondent, *Trower, Freeling, & Parker.*

From Q. B. Div. (Lindley and Bowen, L.JJ.) — Feb. 28.

MACALPINE & CO. *v.* CALDER & CO. (*a.*)

Practice—Arbitration—Reference of action for trial—Order for inspection of premises—Jurisdiction of referee—R. S. C., 1883, *ord.* 36, *r.* 50—*Arbitration Act,* 1889 (52 & 53 *Vict. c.* 49), *ss.* 14, 15.

A referee or arbitrator to whom an action has been referred for trial under section 14 *of the Arbitration Act,* 1889, *has jurisdiction under ord.* 36, *r.* 50, *to make an order for inspection of premises the subject-matter of the action.*

Hayward *v.* Mutual Reserve Association, 39 *W. R.* 624. [1891] 2 *Q. B.* 236, *approved.*

The court or a judge has also jurisdiction to make an order for inspection, but, as a general rule, the most convenient course is to apply to the referee or arbitrator in the first instance.

Appeal from an order of the Queen's Bench Division (Day and Collins, JJ.) reversing an order of the judge at chambers.

In an action to recover the price of work and labour done and materials supplied to the defendants' premises, after the statement of defence had been delivered, upon a summons for directions, an order was made by consent that the action should be tried before an official referee unless the parties agreed upon a special referee. The parties subsequently agreed upon Mr. Bucknill, Q.C., as special referee, and an order was drawn up on the 3rd of January, 1893, in the form No. 24 in appendix K. to the Rules of the Supreme Court, 1883, referring "all matters in dispute in the action to the award of" Mr. Bucknill.

On the next day the plaintiffs took out a summons for an order for leave to inspect the defendants' premises. The judge made the order, but the Divisional Court discharged it on the ground that, as the order of reference was not made under the Arbitration Act, 1889, the judge had no jurisdiction to make the order. The plaintiffs appealed.

W. O. Hodges, for the plaintiffs.—This is a reference under section 14 of the Arbitration Act, 1889, and not a reference at common law. The matters in the action alone were referred for trial, and not "all matters in difference," as in *Darlington Wagon Co.* v. *Harding,* 39 W. R. 167, [1891] 1 Q. B. 245. There was, therefore, jurisdiction in the judge to make the order. The powers conferred upon arbitrators by the first schedule to the Arbitration Act, 1889, only apply to references by consent out of court: section 2. Even if the referee had power under ord. 36, r. 50,* to order inspection, still the judge had concurrent jurisdiction, and as he has exercised his discretion in the matter, the court ought not to have interfered with it.

He also referred to *Dauvillier* v. *Myers,* 29 W. R. 535, 17 Ch. D. 346; *Rowcliffe* v. *Leigh,* 25 W. R. 56, 4 Ch. D. 661; *Edwards* v. *Edwards,* 7 W. R. 92.

Hammond Chambers, for the defendants.—This is not a reference under the Arbitration Act, 1889. It is not a reference "for trial" under section 14; forms 33 and 33*a* are applicable to that section. It is a common law reference to arbitration. There is, therefore, no cause or matter in the court, and the judge had no jurisdiction to make this order: *Pearce* v. *Williams,* 31 W. R. 496, 23 Ch. D. 353. But if it is a reference under section 14, the arbitrator has jurisdic-

* See ord. 36, r. 55c.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

tion under ord. 36, r. 50, to make an order for inspection: *Hayward* v. *Mutual Reserve Association*, 39 W. R. 624, [1891] 2 Q. B. 236; *Barnett* v. *Aldridge Colliery Co.*, 4 Times L. R. 16.

Hodges replied.

LINDLEY, L.J.—It seems to me that this appeal ought not to be allowed. In my opinion this order of reference was intended to be made and drawn up under section 14 of the Arbitration Act, 1889. Assuming that that is so, the question arises what jurisdiction the court or a judge has over any question arising in the course of the reference. To ascertain that, we must see what is the position of a referee or arbitrator under such an order of reference. His position is defined by section 15. Putting the two sections together, the position of the referee under this order is that he is an officer of the court, and the court or a judge has jurisdiction over him. Unless, therefore, some language is to be found in the Act depriving the court of that jurisdiction, it is going too far to say that the court has no jurisdiction over its own officer. I cannot find any such language in the Act. Therefore the learned judge at chambers had jurisdiction to make the order. But upon looking at ord. 36, r. 50, it is clear that the referee has ample power to make the order for inspection asked for here. There is, therefore, what I may call concurrent jurisdiction. That being so, the most convenient course to adopt as a general rule is to make the application in the first instance to the referee or arbitrator. That course was stated to be the convenient course in *Barnett* v. *Aldridge Colliery Co.* I cannot understand why the plaintiff was in such a hurry to go to chambers and get an order to inspect the premises. He took out the summons the day after the order of reference. If he had waited and applied to the referee, the latter would have decided whether it was necessary. There was no urgency in the matter, and the plaintiff ought not to have adopted the course he did. Still, inasmuch as the matter was within the jurisdiction of the judge at chambers, if the judge had in his discretion considered it a proper case in which to make the order we should not interfere. But the judge was not considering anything of the sort. His mind was directed solely to the question of jurisdiction, and he made the order upon that footing alone. I cannot say that the judge had no jurisdiction, but for the reasons I have given I think that the order of the Divisional Court must be affirmed.

BOWEN, L.J.—I entirely agree. I only desire to add that I agree with the view taken by Wills, J., in *Hayward* v. *Mutual Reserve Association*, which is in entire conformity with the judgment just delivered by Lindley, L.J. If it ever becomes necessary to deal with the decision in *Danvillier* v. *Myers*, I should require time to consider whether it was right, because the late Master of the Rolls seems to have thought that a judge at the trial had no power to make an order for production of documents, a course which has been frequently adopted by judges at trials, at any rate in the common law division.

Appeal dismissed.

Solicitors for the plaintiffs, *Irvine, Hodges, & Borrowman.*

Solicitor for the defendants, *P. Thornton.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Kay, L.JJ.) — Nov. 30.

In re AN ARBITRATION BETWEEN KEIGHLEY, MAXSTED, & CO. AND BRYAN, DURANT, & CO. (*a.*)

Arbitration — Remitting award — Discovery of new evidence—Jurisdiction to remit—Absence of request by arbitrator to remit—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 10.

The court has power, under section 10 *of the Arbitration Act*, 1889, *to remit an award to an arbitrator upon the ground that new evidence has been discovered since the award was made, though the arbitrator does not join in asking the court to remit the award.*

Burnard *v.* Wainwright, 1 *L. M. & P.* 455, *approved.*

Appeal from an order of the Queen's Bench Division remitting an award.

By a contract for the purchase and sale of a cargo of wheat it was stipulated that all disputes arising out of the contract should be referred to two arbitrators, who had power to call in a third, the award of any two to be final; but in case either party should be dissatisfied with the award, an appeal was given to the committee of appeal of the London Corn Trade Association, subject to the rules of the association. According to these rules the committee of appeal consisted of twenty-five members of the association, five of these being elected by ballot in each case to hear the appeal, and they must confirm the award unless four of them decided to vary or reverse it; and the award of the appeal committee, whether varying or confirming the original award, was to be signed by the chairman, and was to be final and conclusive of the matter in dispute. The rules also provided that in case of the death, illness, refusal to act, or incapacity of any of the five members, the appeal committee should elect by ballot a new member in his or their place or places.

Disputes having arisen under the contract, they were referred to arbitration, and an award having been made in favour of Messrs. Keighley, Maxsted, & Co., the appeal committee confirmed this award. Messrs. Bryan, Durant, & Co., moved to have the award remitted to the appeal committee under section 10 of the Arbitration Act, 1889, upon the ground that subsequent to the making of the award new evidence, namely, certain letters, had been discovered material to the question at issue. It appeared from an affidavit made by the appellants that one of the committee stated that if these letters had been before them their decision would have been materially affected. The Divisional Court (Mathew and Bruce, JJ.), reversing the decision of the judge at chambers, remitted the award. Messrs. Keighley, Maxsted, & Co. appealed.

Cohen, Q.C., and *T. G. Carver*, for the appellants.—There is no jurisdiction to remit this award. Section 10 of the Arbitration Act, 1889, is similar to section 8 of the Common Law Procedure Act, 1854, and the court has only power to remit an award where it could formerly have set it aside. An award cannot be remitted on the ground of a mistake of law or fact: *Hodgkinson* v. *Fernie*, 6 W. R. 181, 3 C. B. N. S. 189; unless the arbitrator himself admits the mistake and asks the court to remit the award to him: *Mills* v. *Bowyer's Society* 3 K. & J. 66; *Dinn* v. *Blake*, L. R. 10 C. P. 388, 23 W. R. Dig. 10. So also in the case of the discovery of new evidence the court will not remit the award unless the arbitrator states in an

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

affidavit that the evidence would have affected his decision. In *Burnard* v. *Wainwright*, 1 L. M. & P. 455, the arbitrator asked to have the award remitted; or if that is not so, it is the only case against the appellant's contention and ought not to be followed. [*In re Huntley*, 1 W. R. 305, 1 E. & B. 787, and *Morris* v. *Morris*, 4 W. R. 549, 6 E. & B. 383, were also referred to.] Secondly, there were no arbitrators or umpire here within the meaning of section 10 of the Arbitration Act, 1889. An arbitrator or umpire is a person who has to determine the matter finally. There was an appeal in this case from the arbitrators to the appeal committee, who are not arbitrators or umpires, and the award cannot be remitted to them. Further, one of the five members of the committee has died since the award, and it is impossible to remit it to the same tribunal that heard the matter. Lastly, these letters are not evidence admissible in a court of law, and on that ground the court will in its discretion refuse to remit the award.

Finlay, Q.C., and *Pollard*, for the respondents, were not called upon.

Lord ESHER, M.R.—The parties to this arbitration entered into a contract for the purchase and sale of a cargo of wheat. Disputes arose in relation to that contract, and by one of its terms those disputes were referred to certain arbitrators, subject to the right of either party, if dissatisfied with the award, to have the matters in dispute tried by the committee of appeal of the London Corn Trade Association, which was, in reality, a hearing by an umpire. The arbitrators made an award, and one of the parties being dissatisfied with it, desired the decision of the umpire. The appeal committee act according to their well-known rules, and appoint five members of their body to hear the matter. According to the rules, if one of the five dies, the committee appoint another in his place. The matters in dispute accordingly went before the committee, who gave their decision. That was the decision of the umpire. One of the members has since died, and I presume that another will be appointed in his place if this award is sent back. The decision is final, and not subject to appeal to a court of law. One of the parties, however, has asked the court to remit the award under section 10 of the Arbitration Act, 1889. In the first place I cannot doubt that this was an arbitration, and that the arbitrators and appeal committee were in reality arbitrators and an umpire. The case therefore comes within the Act. Now the Arbitration Act, 1889, has in great measure followed the Common Law Procedure Act, 1854. If any part is enacted in the same terms as the earlier Act, then, according to well-known rules of construction, decisions placing a construction upon the words of the earlier Act will be followed when construing similar words in the later Act.

The history of the power to refer back an award is this. Formerly, submissions to arbitration sometimes contained a power to refer back the award, and sometimes they did not. In the former case the court could have referred back the award; in the latter case it could not. But the court could only refer back the award upon certain grounds. The effect of section 8 of the Common Law Procedure Act, 1854, according to the decisions, was that all submissions, whether by consent or not, must be treated as if they contained a clause giving the court power to refer back the award. That is still the law under section 10 of the Arbitration Act, 1889, which is similar in terms to section 8 of the earlier Act. Therefore we must treat this case in the same way as if it was a submission in the old days containing a clause giving the court power to refer back the award to the arbitrator. The decisions upon the Common Law Procedure Act showed that the Act did not alter the old law that the award of the arbitrators was final and conclusive, both as to law and fact, and that the court could not upon the application of the parties send back the award merely upon the ground of a mistake of law or fact. But where one of the parties applied to the court to send the award back, and the arbitrator himself admitted the mistake and asked the assistance of the court in sending it back, the court had power to send it back. That was the law under the Common Law Procedure Act, 1854, and *Dinn* v. *Blake* adopts that law. That rule only applies where there has been a mistake of law or fact, and *Dinn* v. *Blake* is no authority beyond that. In the present case it is not alleged that the arbitrators made any mistake upon the case as it was before them. It is, however, said that they had not the whole case before them, new evidence having been discovered since the award was made. We have only to decide the question to-day upon the ground of the discovery of new evidence. We are not required to say whether an award might not be sent back upon other grounds, as, for instance, where one of the parties kept back certain material evidence. We are only called upon to determine whether, upon the discovery of new evidence since the award, the court can send the award back where the arbitrator has not asked the court to send it back to him. That question seems to me to have been determined in *Burnard* v. *Wainwright*. In the submission in that case (decided in 1850) there was a power to remit the award for reconsideration, and the law, as I have said, now is that all submissions are to be taken as containing such a power. Wightman, J., there decided that the court might remit the award upon the ground of the discovery of new evidence, though the arbitrator had not asked that it should be remitted. We must adopt that law now. It is then said that the evidence must be such as would be admissible in a court of law. But the parties have agreed to submit their disputes to arbitrators who are not bound by the legal rules of evidence. The court must say whether something has been discovered since the award which an arbitrator might think material and which might affect his decision. We cannot say whether or not it will alter his decision. That is a matter for him. If something is discovered which relates to the matter in dispute, even though it is not strictly evidence in a court of law, the court may, though it is not bound to, remit the award. Here something has been discovered since the award which relates to the matter in dispute, and which may alter the decision of the appeal committee, and the award will accordingly be remitted to them.

LOPES, L.J.—I am of the same opinion. The question arises under section 10 of the Arbitration Act, 1889. The words are very general and comprehensive, but I am not prepared to say that they are more so than section 8 of the Common Law Procedure Act, 1854. Now the first case that we must consider is *Burnard* v. *Wainwright*, decided in 1850. In that case there was a clause in the submission empowering the court to refer the award back, and there seems to have been a statement by the arbitrator that his decision would have been affected by the new evidence, though Wightman, J., placed no reliance upon that fact in his judgment. In the present case also it is stated that one of the committee said that the decision would have been affected by the new evidence. In the former case, as in this, there was no affidavit by the arbitrator asking the assistance of the court; and so that case bears very strongly upon the decision in this case. Then came

the case of *Mills* v. *Bowyer's Society*, where Wood, V.C., said: "It does not appear that there is anything in that statute (the Common Law Procedure Act, 1854) that would authorize the court to send back an award for the reconsideration of the arbitrators upon any other grounds than those which have hitherto prevailed to invalidate an award. . . . This 8th section is nothing more or less, as it appears to me, looking back to the history of what took place before the passing of the Act, than the introduction of a statutory enactment enabling the court to do that which experience has shown it was convenient it should have the power of doing, and which had frequently before been specially provided in orders of reference by the court and in submissions by consent between the parties—namely, that there should be a special power in the court to remit the matters in question, or any of them, to the consideration of arbitrators rather than set the whole award aside." The learned Vice-Chancellor makes it clear that a submission since the Common Law Procedure Act, 1854, without a clause giving the court power to refer back the award, has the same effect as a submission with that clause formerly had.

Then we come to *Dinn* v. *Blake*, where it was decided that an award will not be sent back to an arbitrator on the ground that he has made a mistake except where the arbitrator himself admits the mistake. Archibald, J., states the law clearly: "The general principle is that an award is final; and, assuming that it is good on the face of it, there can be no appeal from it. The only exceptions are where there is corruption on the part of the arbitrator, or excess of jurisdiction, or where the arbitrator himself admits that there is a mistake, and, as it were, craves the assistance of the court in setting it right." If the present case was one of mistake of law or fact made by the arbitrators, as the arbitrators do not ask that the award should be sent back, that decision shows that the court would not send it back. But the present case is governed by the decision in *Burnard* v. *Wainwright*, which shows that the court can remit the award upon the ground of the discovery of fresh evidence without being asked to do so by the arbitrator. Therefore it seems to me that the court has power to remit this award.

It is said that this new matter is not such evidence as would be admissible in a court of law, and that therefore the court ought not to remit the award. I cannot agree. A lay arbitrator is not governed by the strict rules of evidence, and it is sufficient if he might be influenced by it, though it is not strict legal evidence. I am not prepared to say that this evidence is not legal evidence; I express no opinion upon that.

The conclusion at which I have arrived is that the court has jurisdiction to remit this award, and that the new evidence is such as will justify the court in the exercise of its discretion in remitting it.

KAY, L.J.—This case raises a question of great importance as to the finality of awards. I am clearly of opinion that neither section 8 of the Common Law Procedure Act, 1854, nor section 10 of the Arbitration Act, 1889, intended to give an appeal from the decision of an arbitrator upon the ground that he came to a wrong decision. What, then, is the effect of the sections? I find it very difficult to lay down the precise limits of the applicability of those sections, and accordingly we cannot do better than be guided by previous decisions. The court has always been very reluctant to remit an award. The decisions have laid down rules upon which the court acts in determining whether an award is to be remitted, and enable us to say that this case comes within those rules. I say so upon this ground: in *Dinn* v. *Blake* Archibald, J., laid down the rules upon which the court will remit an award, and those rules are strictly limited. But *Burnard* v. *Wainwright* added yet one more exception to the rule against remitting awards, namely, where new evidence is discovered since the award which might, and probably would influence the arbitrator's decision, the discovery of that evidence would be a ground upon which the court might remit the award, more especially where the arbitrator himself said that it would have influenced his decision if it had been before him. In *Burnard* v. *Wainwright* a statement appears in the report that the arbitrator said that he would have been influenced by the evidence, and in the present case we have something like it, one of the arbitrators stating that he would have been influenced by it. Therefore the present case is very like *Burnard* v. *Wainwright*. In that case, decided in 1850, the submission contained a clause giving the court power to remit the award. The court did not say that that clause gave it an absolute discretion to remit; it only said that the court might remit if fresh evidence were discovered since the making of the award. The present case comes within the decision in *Burnard* v. *Wainwright*, and we do not in any way extend the power of the court to remit an award. I am not prepared to go one step beyond those cases. The limit to be placed upon section 10 of the Arbitration Act, 1889, must be looked for in those decisions. The case of *Mills* v. *Bowyer's Society* shows that one object of section 8 of the Common Law Procedure Act, 1854, was to do away with the necessity of inserting in submissions a clause giving the court power to remit an award. We cannot hold that the court ought now to remit an award when it would not have done so before the Act when the submission contained a clause giving power to remit.

It was then said that the new evidence here is of such a character that it would not be admissible in a court of justice, and that therefore the court would be going too far if it said that it would remit the award upon the discovery of such evidence. To my mind no hard-and-fast rule can be laid down. If the admission of the evidence would cause grave injustice, the court would, in all probability, not remit the award. But I am not satisfied that this evidence would not be admissible in a court of justice. I do not mean to say that if the court thought that the evidence was not such as would be admissible in a court of justice, but was such as an arbitrator might well receive, the court might not remit the award. The court would, perhaps, in such a case, be slow or cautious in remitting it. It was then said that, as one of the five arbitrators has died since the award, the court cannot remit the award to the five arbitrators. But part of the agreement of reference is that, if one of the arbitrators dies before the award is made, the vacancy so caused may be filled up. If this award is remitted, then there has been no final award, and so the vacancy may be filled up. Therefore no difficulty can arise. The appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Simpson & Cullingford.*

Solicitors for the respondents, *Freshfields & Williams.*

High Court of Justice.

Chan. Div. Chitty, J. March 15.

In re J. BROWN'S ESTATE.
BROWN *v.* BROWN. (*a.*)

Mortgage — Principal and surety — Joint and several covenant by mortgagor and surety — Payment on demand—Present debt—Collateral sum — Statute of Limitations (3 & 4 *Will.* 4, *c.* 42), *s.* 3.

Where there is a present debt and a promise to pay on demand, the demand is not considered to be a condition precedent to the bringing of an action.

Secus, *where there is a promise to pay a collateral sum on request.*

Where a mortgage contained joint and several covenants by J. B. and the mortgagor to pay the mortgage debt and interest "on demand," and that they would, "in the meantime from the date" of the deed pay interest half-yearly until payment of the principal, and a proviso for redemption if the mortgagor should "on demand" pay the debt and interest,

Held, on the construction of the covenants, that there was intended to be a demand precedent to the bringing of any action thereon, and that no right of action accrued against J. B. until demand made.

Summons.

These were two summonses which were heard together, the application in each case being that the applicants might, notwithstanding that the time limited for their making claims as creditors upon the estate of John Brown in the above action had expired, make and establish their claims as such creditors.

By an indenture of mortgage, dated in September, 1867, and made between Alfred Brown, now deceased, the mortgagor, of the first part, John Brown, his father, of the second part, and the mortgagees of the third part, after reciting that Alfred Brown had requested the mortgagees to lend him £3,000, which they had agreed to do upon having the same, with interest, secured in manner thereinafter expressed, it was witnessed that in consideration of the loan Alfred Brown mortgaged to them certain hereditaments and premises, subject to a proviso for redemption thereof if Alfred Brown should on demand pay to the mortgagees £3,000, with interest for the same from the date thereof, and Alfred Brown and John Brown did thereby jointly covenant for themselves, their heirs, executors, and administrators, and each of them did thereby separately for himself, his heirs, executors, and administrators, covenant with the mortgagees that they or one of them, their or one of their heirs, executors, administrators, or assigns, would on demand pay unto the mortgagees £3,000, and also would in the meantime, from the date thereof, pay interest on the same by equal half-yearly payments in each year, and a proportionate part of such interest from the date of the last half-yearly payment up to the payment of the principal money thereby secured.

By another indenture of mortgage made in October, 1867, the parties to which were Joseph Granger Brown, the mortgagor, of the first part, the above-named John Brown of the second part, and mortgagees of the third part, the sum of £6,000 lent by them to the mortgagor, with interest, was secured in similar manner.

John Brown died in November, 1872. In April, 1880, this action was begun for administration of his estate, and in May, 1880, the usual judgment was given. In pursuance thereof advertisements were issued for creditors to come in and prove their debts, and the time fixed for bringing in claims expired in 1880 without any claims having been sent in.

The last payment of interest by Alfred Brown on account of the £3,000 was on the 1st of January, 1886, but the proceeds of a distraint for interest under a power in the mortgage were in January, 1887, and some rent due from a tenant of part of the property was in December, 1887, paid to the mortgagees.

The interest on the £6,000 was paid in full by Joseph Granger Brown down to December, 1884. His last payment on account of interest thereof was in March, 1888.

In July, 1889, the property mortgaged in October, 1867, was sold under the power of sale, but the amount realized was considerably short of the sum then due on the mortgage.

No claim was made against the estate of John Brown in respect of the liability under the covenant contained in the £3,000 mortgage until July, 1889, or in respect of the liability under the covenant contained in the £6,000 mortgage until October, 1889.

The mortgagees now claimed to be let in as creditors of the estate in respect of the amounts due on their respective mortgages which the mortgagors were unable to pay.

Farwell, Q.C., and *G. N. Marcy*, for the applicants on the first summons.—The Statute of Limitations (3 & 4 Will. 4, c. 42), s. 3, did not commence to run till demand was made, there being no debt until demand made, which was a condition precedent under the mortgage covenants. The moneys secured did not therefore become payable until 1889, when demand was first made. The case is analogous to that of a bond payable on demand, where there is no breach until demand made of the condition in the bond: *Carter* v. *Ring*, 3 Camp. 459; *Sicklemore* v. *Thistleton*, 6 M. & S. 9; *Brighty* v. *Norton*, 11 W. R. 167, 32 L. J. Q. B. 38, 3 B. & S. 305; *Toms* v. *Wilson*, 11 W. R. 117, 4 B. & S. 442; *Nicholl* v. *Bromley*, 2 B. & Bing. 464; and unlike that of a negotiable instrument, which depends upon the law merchant, and is different: *Brighty* v. *Norton*, 32 L. J. (Q. B.), at p. 40, *per* Blackburn, J.

Vernon R. Smith, for the applicants on the second summons.

G. Henderson, for the respondents.—The statute commenced to run from the respective dates of execution of the mortgages. No demand was necessary. Words used in the defeasance of a bond are distinguishable, and the analogy of the law of negotiable instruments shows that the moneys were payable as soon as the mortgages were executed: *Norton* v. *Ellam*, 2 M. & W. 461; *Jackson* v. *Ogg*, 7 W. R. 730, Johns. 397; *In re George*, 38 W. R. 617, 44 Ch. D. 627.

Farwell, in reply, cited Saunders' argument in *Birks* v. *Trippet*, 1 Williams' Saunders, 42. [CHITTY, J., referred to *Collins* v. *Benning*, 12 Mod. 444, and *Rumball* v. *Ball*, 10 Mod. 38.]

CHITTY, J.—The claims of the two applicants are founded upon covenants. The covenants are the same, and my judgment in the one case will apply to the other.

The covenant is by the testator John Brown; it is a separate covenant; and the question for decision is one on the construction of the covenant. It is a covenant (I am speaking of one covenant only now) in a mortgage deed, the testator's son being the

(*a.*) Reported by J. F. WALEY, Esq., Barrister at-Law.

borrower and mortgagor. The recital is that Alfred Brown has requested the mortgagee to lend and advance to him the sum of £3,000, which he has agreed to do upon having the same, with interest, secured. Then the operative part shows payment to Alfred, the son, and then the proviso for redemption is if Alfred, his heirs, executors, administrators, or assigns, shall, on demand, pay to the mortgagee the £3,000, with interest on the same from the date hereof at the rate of five per cent. per annum, then these presents shall be void. The covenent is joint and several. Alfred and John jointly and severally covenant with the mortgagee that they, or one of them, will on demand pay to the mortgagee the sum of £3,000, and also will in the meantime, from the date hereof, pay interest on the same or such part thereof as shall from time to time remain unpaid at the rate of five per cent. per annum, by half-yearly payments at the dates hereinafter specified.

Now for those interested in the testator's estate it is said that the meaning of the words "on demand" is the same as that which has been attributed to them in promissory notes and the like. The law is quite settled that, with regard to a promissory note payable on demand, no demand is necessary before bringing an action; and indeed the Statute of Limitations begins to run from the making of the note.

It was suggested by Mr. Farwell in his argument that the class of cases to which I am now alluding were all referable to the law merchant, and a passage from Blackburn, J.'s judgment, as reported in 32 L. J. in the case of *Brighty* v. *Norton*, was relied on for that purpose. But in the report of the same case in 3 B. & S. the passage is omitted. I am not satisfied that the distinction attempted to be made between the law merchant and the general law with regard to the meaning of the words "pay on demand" can be supported. Lord Wensleydale, in the well-known case of *Norton* v. *Ellam*, does not draw that distinction. He says, "I entertain no doubt at all on this point"—that is, about the Statute of Limitations running from the date of the note—"it is the same as in the case of money lent, payable on request with interest, where no request is necessary before bringing the action." That is a general proposition, and not one based upon the law merchant; and without going through the whole of the cases to which I have referred in the course of the argument, it is plain that a distinction has been taken and maintained in law, the result of which is that where there is a present debt and a promise to pay on demand, the demand is not considered to be a condition precedent to the bringing of the action.

But it is otherwise on a promise to pay a collateral sum on request, for then the request ought to be made before action brought. I think the distinction which I have mentioned is sufficiently pointed out in Saunders' argument in *Birks* v. *Trippet*, which was accepted by the whole of the court, the judges having been apparently somewhat impatient at the learned counsel labouring his argument to the extent he did.

It is a question, then, of the construction of the instrument; and it is not immaterial to observe that the testator here was a surety. Nor is it immaterial to observe that the proviso conferring the right of redemption on the son is framed in a similar manner to the covenant, and there is in the proviso for redemption as well as in the covenant a distinction with regard to interest which would be no distinction if the argument for the respondent could be maintained, the distinction being a distinction between "on demand" as to principal and interest "from the date hereof." In other words, the proviso for redemption would have to be read, according to the respondent's argument, in this way:—This being a mortgage transaction and the sum of £3,000 lent on the security of the land, the words "pay on demand" must be transmuted to "shall pay on the date hereof." The interest is to run "from the date hereof" according to the express words of the proviso. I can see no grounds for putting a different construction in this respect on the proviso and on the covenant, and I therefore come to the conclusion that the meaning of the covenant is, and the meaning of the parties sufficiently manifested by the language they have used is, that there shall be a demand precedent to the bringing of any action on the covenant. The father as surety was to have some time, that is a reasonable time, which it is not necessary for me to attempt to define. But he was to have a reasonable time after demand to find the money which he has to pay. The covenant itself as to interest is a separate covenant, the words being "will in the meantime." What force can be attributed to the words "in the meantime," if the words "on demand" mean at the date of this deed?

That being my opinion upon the construction of the instrument, and it being admittedly a question of construction, it is hardly necessary to refer to the authorities. I may, however, mention *Carter* v. *Ring*, where the action was brought on the bond, the defeasance of the bond being to pay one-half of the amount of the penal sum on demand, with lawful interest; and Lord Ellenborough held (at *Nisi Prius*) that the plaintiff in such case as that was bound to prove a demand before he could succeed. I am unable to follow the distinction that was attempted to be made with regard to this case, founded on the suggestion that the words "on demand" come in the defeasance of the bond. I can see no difference between the words occurring in the defeasance of a bond or in a covenant in which there is no defeasance.

With regard to the other cases, there is *Sicklemore* v. *Thistleton*; but upon that it appears to me there could have been little doubt as to the meaning of the parties that the demand did mean a demand, as was there held, the only difference in the case being that there were two covenants. It is not necessary to cite any further authority, and I am of opinion that the right of action did not accrue against the testator till demand made, and it is admitted that the demand was made for the first time in 1889. That being so, I think both the applicants are entitled to be admitted now to come in and prove. The estate under administration has not been fully administered. Of course they could not, and do not, disturb anything that has been already done in the way of payment to other creditors and the like. There is no *laches*. There is no such conduct on their part as would justify the court, according to the ordinary rule, in precluding them, although they come late.

Applications allowed.

Solicitors for the applicants, *Prior, Church, & Adams; Patersons, Snow, Bloxam, & Kinder*, for *F. T. Veley*, Chelmsford.

Solicitor for the respondents, *J. Plaskitt*, for *F. Smoothy*, Braintree.

Chan. Div.
Stirling, J. } Jan. 13.

COLLINS v. BARKER. (a.)

Partnership — Articles — Bankruptcy of some of the partners—Provision for retention of bankrupt partner's share — Validity—Receiver and manager — Right of trustee in bankruptcy to appointment of.

It was provided by articles of partnership entered into in August, 1891, *that if any partner should become bankrupt, he should be deemed to have ceased to be a partner at the date of such bankruptcy; and that, upon any partner ceasing to be a partner from any cause, before the expiration of the partnership term (which was for fourteen years), the partnership should thereupon determine as to such partner, and his share in the capital of the partnership should remain as a loan, bearing interest, to the continuing partners for the residue of the term of fourteen years, or so long as the business should be carried on, and the repayment of the loan and interest should be secured by the joint and several bond, or the bond or covenant, of the continuing partners.*

The partnership consisted of four persons, one of whom had provided the whole of the capital. This partner and two of the other three, became bankrupt in June, 1892, *and their trustees in bankruptcy brought an action against the defendant, the remaining solvent partner, for a declaration that the above provisions of the partnership articles were void as against the plaintiffs and the creditors of the bankrupts. On an application by the plaintiffs for the appointment of a receiver and manager of the partnership business, the defendant claimed the right, as solvent partner, to be appointed receiver and manager.*

Held, that, in the absence of any explanation as to the reason for the insertion of the above provisions in the partnership articles, the inference was that they were inserted in contemplation of bankruptcy, and that under the circumstances the plaintiffs were entitled to the protection of a receiver and manager, but that the defendant was entitled to be appointed receiver and manager; that he must give security, pass his accounts, furnish the plaintiffs with proper accounts, and give them reasonable access to the books; and that he must pay the balances in his hands when they reached an agreed amount, either into court, or to a joint banking account of himself and the plaintiffs.

Motion.

This was a motion by the plaintiffs, who were the trustees in bankruptcy of George Barker, Hilton Cassanet Barker, and William Barker, asking for the appointment of a receiver and manager of the business of distillers and wine and spirit merchants, lately carried on by the defendant G. E. Barker in partnership with the bankrupts. The articles of partnership were dated the 14th of August, 1891, and provided for a term of fourteen years from the 1st of January, 1891.

Clause 21 of the articles provided that if any partner or partners should retire or become bankrupt, he or they should be deemed to have ceased to be a partner or partners at the date of such retirement or bankruptcy.

Clause 22 provided as follows:—Upon the death of any partner, or upon any partner or partners ceasing to be a partner or partners from any cause whatsoever before the expiration of the partnership, such partnership shall thereupon determine as to such partner or partners and the share of such deceased or outgoing partner or partners shall, as from his or their death, or ceasing to be a partner or partners as aforesaid, vest in, and belong to, and be purchased by, the remaining partners or partner, and if more than one in shares proportionate to their then shares in the profits of the business, and the deceased or outgoing partner or partners or his or their representatives (as the case may be) shall be entitled to interest on his or their share or shares in the capital of the partnership up to the time of the death or ceasing of the partnership of such partner or partners, and to any profits which shall have become payable but shall not have been actually paid to him or them, and also if he or they shall die or cease to be a partner or partners on the day for taking the annual general account to his or their share or shares of profits as ascertained on taking such account, and if he or they die or cease to be a partner or partners on any other day to an allowance in lieu of profits at a rate equal to the net profits during the year preceding the last day for taking the annual general account on his or their shares in the said capital up to the day of his or their death or ceasing to be a partner or partners to be calculated if he or they shall die or cease to be a partner or partners before the 31st day of December, 1891, from the commencement of the partnership, but if he or they shall die or cease to be a partner or partners after that day then from the last day for taking the annual general account (but subject to the deduction of any drawings on account of current profits which shall have been made by him or them respectively) and the representatives of such deceased or outgoing partner or partners shall be bound by such last annual account and shall be excluded from examining the partnership books, and his or their share or respective shares in the capital of the partnership shall remain as a loan to the surviving or continuing partners or partner during the residue of the said term of fourteen years or during such shorter period as such surviving or continuing partners or partner shall carry on the said business either alone or in partnership with any other persons or person in accordance with the provisions of these presents, bearing interest at the rate of £5 per cent. per annum payable on the usual quarter days, and the repayment of the said loan at the end of the said period, together with the interest thereon as aforesaid, shall be secured to the outgoing partner or partners or his or their representatives as the case may be at the expense and by the joint and several bond or the bond or covenant of the surviving or continuing partners or partner."

The whole of the capital in the business had been provided by Geo. Barker, the father of the other three partners. The defendant, the youngest of the three sons, had for some years previously to the present term of partnership been manager of the business under the former partnership articles, and continued to act as such during the present partnership, having become a partner in 1891. Geo. Barker and his two elder sons, at the time of their bankruptcy, June, 1892, were engaged in a very large business as bankers and financial agents, and in other businesses. The plaintiffs in the action claimed a declaration that the articles of partnership under which the defendant claimed to retain as a loan the share of the bankrupts in the capital of the partnership for the residue of the term of fourteen years from the 1st of January, 1891, were void as against the plaintiffs, and the creditors of the bankrupts. They also asked for an account, and that the partnership business might be wound up and the assets realized under the direction of the court.

Hastings, Q.C., and *Eve*, for the motion, contended that the articles of partnership amounted to a fraud on the bankruptcy laws: *Higinbotham* v. *Holme*, 19

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

Ves. 88; *Ex parte Mackay*, 21 W. R. 664, L. R. 8 Ch. App. 643; *Whitmore* v. *Mason*, 10 W. R. 168, 2 J. & H. 204; and *Wilson* v. *Greenwood*, 1 Swans. 471. [STIRLING, J., referred to Lindley on Partnership, 5th ed., pp. 433, 647.] If the clause in question were held to be valid, the continuing partner would be able to keep the creditors of the bankrupts out of their property for a number of years.

Buckley, Q.C., and *Vernon Smith*, for the defendant, did not object to the appointment of a receiver, and accepted the principle as laid down by James, L.J., in *Ex parte Jay, In re Harrison*, 28 W. R. 449, 14 Ch. D. 19; but that was not the present case. *Wilson* v. *Greenwood* was the nearest to the present one, and was not an authority, because the point was not necessary for decision. If there was a *bonâ fide* contract, and the bankruptcy of any partner resulted, the trustee in bankruptcy was bound to regard the rest as debtors, and must take his debt by instalments with interest. It was not taking away the bankrupt's property, but selling it on particular terms: Lindley on Partnership, p. 670. In the event of the bankruptcy of a partner no right passed to the trustee in bankruptcy to continue in partnership with the solvent partners: *Ex parte Stoveld*, 1 Gl. & J. 303; *Freeland* v. *Stansfeld*, 2 W. R. 575, 2 Sm. & Giff. 479. No case was made out or suggested against the defendant personally, so as to say that he was not entitled to be appointed receiver.

Hastings, Q.C., in reply.—[STIRLING, J.—I am satisfied on the point of law that it is a proper case for a receiver; I only want to hear you as to the terms on which a receiver should be appointed.] I ask for the appointment of one of my clients as receiver, and the defendant may continue as manager.

STIRLING, J., stated the facts, and continued:—If the clause in question (22) is valid, the creditors of the bankrupts will be kept out of their share of the partnership property for about thirteen years, and will have no security for it except the bond or covenant of the defendant, who did not bring one shilling into the business. It appears to me that the case of *Wilson* v. *Greenwood* does apply to this case. In that case articles of partnership provided that on dissolution by death, notice, or misconduct of a partner the remaining partners should have the option of taking his share at a valuation, payable by yearly instalments in the course of seven years, and that on the bankruptcy or insolvency of a partner the partnership should be immediately void as to him. By a deed four years subsequent the partners declared (after a recital that such was their intention in the articles) that in the event of bankruptcy or insolvency the same arrangement should be practised as on dissolution by death, notice, or misconduct. One of the partners having become bankrupt a few months after the execution of the latter deed his assignees were not bound by it. Lord Eldon's opinion seems to have been that, even if the provision had been in the original deed, it would not have been good. He came to the conclusion that the deed was not made *bonâ fide*, but with a view of protecting the remaining partners in the event of bankruptcy.

How, in the present case, the clause got in the articles is not quite clear. Mr. George Barker and the defendant both say in their evidence that they knew nothing about it. The defendant says he thought it was a provision for the death of his father, so that he should not have to pay out his capital in that event. In the absence of any explanation I draw the inference of fact that the clause was inserted in contemplation of bankruptcy. In my opinion it has been sufficiently made out that there is a case to be tried, and having regard to the large interests of the plaintiffs, they must be protected. I must treat the case for the present purpose as if the clause had been struck out by the bankruptcy, and no express provision for winding up the affairs of the partnership had been made. In an ordinary case a solvent partner would be entitled to wind up the affairs of the partnership, and the usual course where disputes as to the management of the partnership affairs arise between the trustee of a bankrupt partner and the solvent partners, and there is no reason for distrusting the latter, is, as stated in Lindley on Partnership, 5th ed., p. 670, that the court will appoint one of them receiver of the partnership property, directing him to give security, to pass his accounts, and to furnish the trustee with proper accounts, and to allow him at all reasonable times to inspect the partnership books.

The defendant claims the benefit of his *primâ facie* right to be appointed receiver, in accordance with the practice of the court. The plaintiffs do not object to his being manager, but wish that someone should be appointed receiver jointly with him, and that is the question which I have to determine. I feel strongly that the plaintiffs' risk is so great that they ought to be protected; but the defendant is a partner, and a solvent one, in the sense that he has not been adjudicated bankrupt, though it may be doubtful whether his pecuniary resources are great; and no reason has been shown why he should not be appointed receiver and manager, in accordance with the practice of the court. He must give security and pass his accounts; he must furnish the plaintiffs with proper accounts, and allow them all reasonable access to the books; and, further, when the balances in his hands reach a certain amount, to be agreed upon by the parties, he must pay the amount into court or to a joint account at a bank of the plaintiffs and himself. His remuneration must be settled by the chief clerk at chambers. I do not think it desirable to appoint the defendant manager and someone else receiver, as that course sometimes leads to difficulties.

Solicitors for the motion, *A. J. Benjamin.*

Solicitors for the defendant, *Whittington, Son, & Barker.*

Chan. Div. } Romer, J. } Nov. 18.

In re GURNEY.
MASON *v.* MERCER. (*a.*)

Trustee—Breach of trust—Trustee Act, 1888 (51 & 52 *Vict. c.* 59)—*Conversion—Statute of Limitations.*

M. was trustee under a will of certain funds which he was empowered to invest in real securities in England or Wales. He and his co-trustee, in March, 1878, *advanced* £10,000, *part of the funds, upon mortgage of hop and fruit gardens in Kent, and the money was paid to the credit of the account of the mortgagor, which was overdrawn to more than that amount, at a bank in which M. was a partner. The investment turned out valueless, and this action was brought on the 20th of August*, 1890, *by a beneficiary under the will, alleging that M. had been guilty of fraudulent breach of trust.*

Held, that section 8 *of the Trustee Act*, 1888, *applied and barred the action, which could not be treated as an action to recover the proceeds of trust property "received by the trustee and converted to his use" within the meaning of sub-section* 1 *of section* 8 *of the Act, and so be excepted from the operation of the Statute of Limitations.*

(*a.*) Reported by J. W. GREIG, Esq., Barrister-at-Law.

Chan. Div. Stirling, J. } Jan. 13.

COLLINS v. BARKER. (a.)

Partnership — Articles — Bankruptcy of some of the partners—Provision for retention of bankrupt partner's share — Validity—Receiver and manager — Right of trustee in bankruptcy to appointment of.

It was provided by articles of partnership entered into in August, 1891, *that if any partner should become bankrupt, he should be deemed to have ceased to be a partner at the date of such bankruptcy; and that, upon any partner ceasing to be a partner from any cause, before the expiration of the partnership term (which was for fourteen years), the partnership should thereupon determine as to such partner, and his share in the capital of the partnership should remain as a loan, bearing interest, to the continuing partners for the residue of the term of fourteen years, or so long as the business should be carried on, and the repayment of the loan and interest should be secured by the joint and several bond, or the bond or covenant, of the continuing partners.*

The partnership consisted of four persons, one of whom had provided the whole of the capital. This partner and two of the other three, became bankrupt in June, 1892, *and their trustees in bankruptcy brought an action against the defendant, the remaining solvent partner, for a declaration that the above provisions of the partnership articles were void as against the plaintiffs and the creditors of the bankrupts. On an application by the plaintiffs for the appointment of a receiver and manager of the partnership business, the defendant claimed the right, as solvent partner, to be appointed receiver and manager.*

Held, that, in the absence of any explanation as to the reason for the insertion of the above provisions in the partnership articles, the inference was that they were inserted in contemplation of bankruptcy, and that under the circumstances the plaintiffs were entitled to the protection of a receiver and manager, but that the defendant was entitled to be appointed receiver and manager; that he must give security, pass his accounts, furnish the plaintiffs with proper accounts, and give them reasonable access to the books; and that he must pay the balances in his hands when they reached an agreed amount, either into court, or to a joint banking account of himself and the plaintiffs.

Motion.

This was a motion by the plaintiffs, who were the trustees in bankruptcy of George Barker, Hilton Cassanet Barker, and William Barker, asking for the appointment of a receiver and manager of the business of distillers and wine and spirit merchants, lately carried on by the defendant G. E. Barker in partnership with the bankrupts. The articles of partnership were dated the 14th of August, 1891, and provided for a term of fourteen years from the 1st of January, 1891.

Clause 21 of the articles provided that if any partner or partners should retire or become bankrupt, he or they should be deemed to have ceased to be a partner or partners at the date of such retirement or bankruptcy.

Clause 22 provided as follows:—Upon the death of any partner, or upon any partner or partners ceasing to be a partner or partners from any cause whatsoever before the expiration of the partnership, such partnership shall thereupon determine as to such partner or partners and the share of such deceased or outgoing partner or partners shall, as from his or their death, or ceasing to be a partner or partners as aforesaid, vest in, and belong to, and be purchased by, the remaining partners or partner, and if more than one in shares proportionate to their then shares in the profits of the business, and the deceased or outgoing partner or partners or his or their representatives (as the case may be) shall be entitled to interest on his or their share or shares in the capital of the partnership up to the time of the death or ceasing of the partnership of such partner or partners, and to any profits which shall have become payable but shall not have been actually paid to him or them, and also if he or they shall die or cease to be a partner or partners on the day for taking the annual general account to his or their share or shares of profits as ascertained on taking such account, and if he or they die or cease to be a partner or partners on any other day to an allowance in lieu of profits at a rate equal to the net profits during the year preceding the last day for taking the annual general account on his or their shares in the said capital up to the day of his or their death or ceasing to be a partner or partners to be calculated if he or they shall die or cease to be a partner or partners before the 31st day of December, 1891, from the commencement of the partnership, but if he or they shall die or cease to be a partner or partners after that day then from the last day for taking the annual general account (but subject to the deduction of any drawings on account of current profits which shall have been made by him or them respectively) and the representatives of such deceased or outgoing partner or partners shall be bound by such last annual account and shall be excluded from examining the partnership books, and his or their share or respective shares in the capital of the partnership shall remain as a loan to the surviving or continuing partners or partner during the residue of the said term of fourteen years or during such shorter period as such surviving or continuing partners or partner shall carry on the said business either alone or in partnership with any other persons or person in accordance with the provisions of these presents, bearing interest at the rate of £5 per cent. per annum payable on the usual quarter days, and the repayment of the said loan at the end of the said period, together with the interest thereon as aforesaid, shall be secured to the outgoing partner or partners or his or their representatives as the case may be at the expense and by the joint and several bond or the bond or covenant of the surviving or continuing partners or partner."

The whole of the capital in the business had been provided by Geo. Barker, the father of the other three partners. The defendant, the youngest of the three sons, had for some years previously to the present term of partnership been manager of the business under the former partnership articles, and continued to act as such during the present partnership, having become a partner in 1891. Geo. Barker and his two elder sons, at the time of their bankruptcy, June, 1892, were engaged in a very large business as bankers and financial agents, and in other businesses. The plaintiffs in the action claimed a declaration that the articles of partnership under which the defendant claimed to retain as a loan the share of the bankrupts in the capital of the partnership for the residue of the term of fourteen years from the 1st of January, 1891, were void as against the plaintiffs, and the creditors of the bankrupts. They also asked for an account, and that the partnership business might be wound up and the assets realized under the direction of the court.

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Ves. 88; *Ex parte Mackay*, 21 W. R. 664, L. R. 8 Ch. App. 643; *Whitmore* v. *Mason*, 10 W. R. 168, 2 J. & H. 204; and *Wilson* v. *Greenwood*, 1 Swans. 471. [STIRLING, J., referred to Lindley on Partnership, 5th ed., pp. 433, 647.] If the clause in question were held to be valid, the continuing partner would be able to keep the creditors of the bankrupts out of their property for a number of years.

Buckley, Q.C., and *Vernon Smith*, for the defendant, did not object to the appointment of a receiver, and accepted the principle as laid down by James, L.J., in *Ex parte Jay, In re Harrison*, 28 W. R. 449, 14 Ch. D. 19; but that was not the present case. *Wilson* v. *Greenwood* was the nearest to the present one, and was not an authority, because the point was not necessary for decision. If there was a *bonâ fide* contract, and the bankruptcy of any partner resulted, the trustee in bankruptcy was bound to regard the rest as debtors, and must take his debt by instalments with interest. It was not taking away the bankrupt's property, but selling it on particular terms: Lindley on Partnership, p. 670. In the event of the bankruptcy of a partner no right passed to the trustee in bankruptcy to continue in partnership with the solvent partners: *Ex parte Stoveld*, 1 Gl. & J. 303; *Freeland* v. *Stansfeld*, 2 W. R. 575, 2 Sm. & Giff. 479. No case was made out or suggested against the defendant personally, so as to say that he was not entitled to be appointed receiver.

Hastings, Q.C., in reply.—[STIRLING, J.—I am satisfied on the point of law that it is a proper case for a receiver; I only want to hear you as to the terms on which a receiver should be appointed.] I ask for the appointment of one of my clients as receiver, and the defendant may continue as manager.

STIRLING, J., stated the facts, and continued:—If the clause in question (22) is valid, the creditors of the bankrupts will be kept out of their share of the partnership property for about thirteen years, and will have no security for it except the bond or covenant of the defendant, who did not bring one shilling into the business. It appears to me that the case of *Wilson* v. *Greenwood* does apply to this case. In that case articles of partnership provided that on dissolution by death, notice, or misconduct of a partner the remaining partners should have the option of taking his share at a valuation, payable by yearly instalments in the course of seven years, and that on the bankruptcy or insolvency of a partner the partnership should be immediately void as to him. By a deed four years subsequent the partners declared (after a recital that such was their intention in the articles) that in the event of bankruptcy or insolvency the same arrangement should be practised as on dissolution by death, notice, or misconduct. One of the partners having become bankrupt a few months after the execution of the latter deed his assignees were not bound by it. Lord Eldon's opinion seems to have been that, even if the provision had been in the original deed, it would not have been good. He came to the conclusion that the deed was not made *bonâ fide*, but with a view of protecting the remaining partners in the event of bankruptcy.

How, in the present case, the clause got in the articles is not quite clear. Mr. George Barker and the defendant both say in their evidence that they knew nothing about it. The defendant says he thought it was a provision for the death of his father, so that he should not have to pay out his capital in that event. In the absence of any explanation I draw the inference of fact that the clause was inserted in contemplation of bankruptcy. In my opinion it has been sufficiently made out that there is a case to be tried, and having regard to the large interests of the plaintiffs, they must be protected. I must treat the case for the present purpose as if the clause had been struck out by the bankruptcy, and no express provision for winding up the affairs of the partnership had been made. In an ordinary case a solvent partner would be entitled to wind up the affairs of the partnership, and the usual course where disputes as to the management of the partnership affairs arise between the trustee of a bankrupt partner and the solvent partners, and there is no reason for distrusting the latter, is, as stated in Lindley on Partnership, 5th ed., p. 670, that the court will appoint one of them receiver of the partnership property, directing him to give security, to pass his accounts, and to furnish the trustee with proper accounts, and to allow him at all reasonable times to inspect the partnership books.

The defendant claims the benefit of his *primâ facie* right to be appointed receiver, in accordance with the practice of the court. The plaintiffs do not object to his being manager, but wish that someone should be appointed receiver jointly with him, and that is the question which I have to determine. I feel strongly that the plaintiffs' risk is so great that they ought to be protected; but the defendant is a partner, and a solvent one, in the sense that he has not been adjudicated bankrupt, though it may be doubtful whether his pecuniary resources are great; and no reason has been shown why he should not be appointed receiver and manager, in accordance with the practice of the court. He must give security and pass his accounts; he must furnish the plaintiffs with proper accounts, and allow them all reasonable access to the books; and, further, when the balances in his hands reach a certain amount, to be agreed upon by the parties, he must pay the amount into court or to a joint account at a bank of the plaintiffs and himself. His remuneration must be settled by the chief clerk at chambers. I do not think it desirable to appoint the defendant manager and someone else receiver, as that course sometimes leads to difficulties.

Solicitors for the motion, *A. J. Benjamin.*

Solicitors for the defendant, *Whittington, Son, & Barker.*

Chan. Div. } Romer, J. } Nov. 18.

In re GURNEY.
MASON *v.* MERCER. (*a.*)

Trustee—Breach of trust—Trustee Act, 1888 (51 & 52 *Vict. c.* 59)—*Conversion—Statute of Limitations.*

M. was trustee under a will of certain funds which he was empowered to invest in real securities in England or Wales. He and his co-trustee, in March, 1878, *advanced* £10,000, *part of the funds, upon mortgage of hop and fruit gardens in Kent, and the money was paid to the credit of the account of the mortgagor, which was overdrawn to more than that amount, at a bank in which M. was a partner. The investment turned out valueless, and this action was brought on the* 20*th of August*, 1890, *by a beneficiary under the will, alleging that M. had been guilty of fraudulent breach of trust.*

Held, that section 8 *of the Trustee Act*, 1888, *applied and barred the action, which could not be treated as an action to recover the proceeds of trust property "received by the trustee and converted to his use" within the meaning of sub-section* 1 *of section* 8 *of the Act, and so be excepted from the operation of the Statute of Limitations.*

(*a.*) Reported by J. W. GREIG, Esq., Barrister-at-Law.

Trial of action.

John Gurney by his will, dated May 27, 1864, appointed the defendants, Henry Mason and Richard Mercer, executors, and gave them all his residuary personal estate upon trust for sale and conversion, and directed them to invest the clear surplus thereof (after payment of debts, funeral and testamentary expenses, and legacies) in the parliamentary stocks and public funds of Great Britain or on Government or real securities in England or Wales. The testator also directed the sale of his residuary real estate, and that out of the proceeds of sale of the residue of his real and personal estate two sums of £3,750 should be set apart, and that two-elevenths of his ultimate residue should be held in trust to pay the income to Mary Ann Mason and Ellen Roberts for their respective lives.

The testator died on the 4th of December, 1865, and the executors, having proved the will, appropriated certain investments comprising New £3 per Cent. Annuities Victorian Government Bonds and Great India Peninsular Railway Stock as representing the two sums of £3,750 and the two-elevenths ultimate residue. In 1878 the executors sold the bonds and railway stock and part of the annuities, and invested the proceeds, amounting to £10,000, on mortgage of certain freehold lands and buildings, including farm buildings, and hop and fruit gardens in Kent belonging to one E. J. Goodwin. No independent valuer was employed by the trustees, but a valuation was made, as it was alleged, on behalf of the mortgagor, who valued the property at £12,750. The mortgage deed was dated the 7th of March, 1878. The defendant Mercer was, at the date of the advance, a partner in a firm known as the Kentish Bank, and Goodwin, the mortgagor, was a customer of the bank, and indebted to them in a sum exceeding £14,000 secured by an equitable charge by deposit of deeds relating to the property mortgaged to the defendants, and the sum of £10,000 so advanced by them was credited to Goodwin in his banking account, and to that extent reduced his debit balance to the bank.

This action was brought on the 20th of August, 1890, by Mary Ann Mason against the executors and trustees claiming a declaration that the investment of the £10,000 on this mortgage was an improper investment and a breach of trust, and that such breach of trust was fraudulent on the defendant Mercer's part, and claiming a declaration also that the defendants were liable to make good to the trust estate the loss occasioned thereby, on the footing of the defendant Mercer being primarily liable. The defendants by their statements of defence claimed the benefit of the provisions of the Trustee Act, 1888, and of all such statutory enactments for the limitations of actions and suits as might be applicable to the case. The defendant Mason died before the case came on for hearing, and the action was revived against his legal personal representative.

Chadwyck-Healey, Q.C., and *Lemon*, for the plaintiff.—The mortgage of the £10,000 was on property of a speculative character, and the money actually went into the pocket of the defendant Mercer, as a partner in the Kentish Bank, in payment of E. J. Goodwin's overdrawn account, and section 8 of the Trustee Act, 1888, is not applicable, and the remedy is not now barred, for this property was received by the trustee and converted to his use. [ROMER, J.—If the money had been handed to the mortgagor and then paid to the bank the plaintiff would have been out of court.] Mercer had the deeds of the property, he wanted to reduce the account and he shut his eyes to the fact that he was advancing money in contravention of his duty, and it is money for which he cannot show a discharge—all he shows is a mortgage of less value. There is, of course, no fraud in the popular sense, but there was practically a conversion within the section: for Mercer's bank actually received the trust money, and thus the case is saved from the operation of the Statutes of Limitation. The transaction resolves itself into this: trust property in trustee's hands, he then sells, invests in an improper security and has never discharged himself, the money never got home.

Neville, Q.C., and *Ingle Joyce*, for the defendant Mercer.—The contention on the other side is baseless, as the words "converted to his use" must mean money which the trustee could be called on to refund; if the beneficiaries in this case have a mortgage for £10,000, and a right against the trustee of having the whole sum repaid to them, this would be absurd.

Horton Smith, Q.C., and *Ingpen*, for the defendant Mason's legal personal representatives.—Mason never received any part of the trust money, and is clearly protected by the section in question.

The section, so far as material, is as follows:—8. (1) "In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee or previously received by the trustee, and converted to his use, the following provisions shall apply:—(*a*) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him. (*b*) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statutes of limitations apply, the trustee or person claiming through him shall be entitled to the benefit of, and be entitled to plead the lapse of, time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so, nevertheless, that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession."

ROMER, J.—The short question I have to decide is this. The trustees having trust money in their possession invest it on mortgage. It appears that the mortgagor had previously mortgaged that property to a bank, or, at any rate, that the bank had a charge upon the property for a debt due by the mortgagor to them. One of the trustees is a partner in that bank. The money advanced on mortgage by the trustees is by the direction of the mortgagor paid to the bank in discharge of the balance due by the mortgagor to the bank. The case made by the beneficiary against the trustees is that an insufficient security was taken for the trust money. The security taken was within the authority of the trustees. The only complaint is that the property was not of sufficiently high value. It is admitted that the trustee, who was also a partner in the bank, in this matter was not guilty of fraud or fraudulent conduct. The only act complained of is that of negligence on the part of the trustees in not seeing that the security was ample. Under those circumstances, the transaction having taken place in 1878, to this claim by the beneficiary,

section 8 of the Trustee Act of 1888 is pleaded, and I have to determine whether that section applies.

Now it applies to every action or other proceeding against a trustee or any person claiming through him except in certain specified exceptions. The section, therefore, does apply to this section, unless the plaintiff shows that her claim is one of the excepted claims. I turn to the exceptions to see whether this particular claim by the plaintiff is or is not excepted. It appears to me it is not excepted. It is not a claim founded upon any fraud or fraudulent breach of trust. It is not to recover trust property or the proceeds of trust property still retained by the trustee, nor is it in my judgment to recover trust property or the proceeds of property previously received by the trustee and converted to his use. In my judgment it would be a perversion of the language used in that section if I were to hold that such a transaction as this, being an honest transaction, was to be treated as a conversion by the trustee, who happened to be a partner in the bank, of the money lent on mortgage to his own use. In my judgment it is not a conversion to his use. The argument of the plaintiff in this case would amount to this, that if trustees advance money on a transfer of a mortgage, and it happened that one of the transferors was also one of the trustees, the transaction being a simple transfer of mortgage, in that case you ought to treat the trustee who happened to be one of the transferors as having received the trust money and converted it to his own use. In my judgment that is not what is meant by this section. I think, within the meaning of this section, it is not possible to say that such a transaction as I have to deal with in this case was a case of conversion by a trustee to his own use. I, therefore, hold that the section applies; and it follows that in the defendant Mason's case also the action must be dismissed, and dismissed with costs.

Solicitors for the plaintiff, *Campbell, Reeves, & Hooper.*

Solicitors for the defendant Mercer, *Hollams, Son, Coward, & Hawksley.*

Solicitor for the defendant Mason, *H. W. Davie.*

Q. B. Div.
(Lord Coleridge, C.J., and Cave, J.) — Feb. 9.

SUMMERS *v.* HOLBORN DISTRICT BOARD OF WORKS. (*a.*)

Metropolis—Street traffic—Exposure of goods for sale in street—Costermongers—Inconsistent enactments—Implied repeal—57 Geo. 3, c. xxix., s. 65—Metropolitan Streets Acts, 1867 (30 *&* 31 *Vict. c.* 134), *s.* 6, *and* 1868 (31 *&* 32 *Vict. c.* 5), *s.* 1—*Metropolis Police Act,* 1839 (2 *&* 3 *Vict. c.* 47), *s.* 74.

The provisions contained in the Metropolitan Streets Acts, 1867 (*section* 6) *and* 1868 (*section* 1), *as to the deposit of goods in streets and for the regulation of the business of costermongers and itinerant traders, are inconsistent with the powers given to metropolitan local authorities by section* 65 *of* 57 *Geo.* 3, *c. xxix.* (*Michael Angelo Taylor's Act*) *to order the removal of goods, barrows, &c., from carriageways and footways; that section is therefore impliedly repealed so far as it affects costermongers, and a conviction of a costermonger for an offence under it cannot be sustained.*

Case stated by a metropolitan police magistrate.

The facts were shortly as follows:—The appellant was one of a number of costermongers who had for many years carried on their business in a street within the district of the respondents. He was required by the respondents' officers to remove his barrow and goods from the street, and upon his refusal to do so he was summoned before the magistrate under section 65 of 57 Geo. 3, c. xxxix., and convicted. The magistrate imposed a nominal fine, and stated this case for the opinion of the court. The question to be decided was whether the section under which the appellant was convicted was still in force, or whether it had been impliedly repealed by later legislation dealing with the same subject. The following are the enactments referred to in the arguments and judgments.

57 Geo. 3, c. xxix. (commonly known as Michael Angelo Taylor's Act), s. 65, which provides (*inter alia*) that if any person shall place, or cause to be placed, in or upon any of the carriage or footways, in any streets or public places, in any district within the jurisdiction of the Act, any stall, board, wares, merchandize, or goods of any kind, or any coach, wheelbarrow, handbarrow, &c., (except licensed hackney coaches and except for the necessary time of loading or unloading, taking up or setting down fares, &c.) and shall not immediately remove all or any of such matters or things being thereunto required by any person appointed by the commissioners, trustees or other persons having control of the pavements in the district, then the person offending and the owner of such matters or things, and the employer of the person so offending, may be summoned before justices and convicted in a penalty; and power is given to the persons appointed by the commissioners, &c., without any warrant or other authority than the Act to seize any such stall, board, goods, barrows, &c., and deal therewith in the manner specified in the section.

The Metropolitan Streets Act, 1867, which deals with substantially the same district as that dealt with by Michael Angelo Taylor's Act, and provides, section 6, "No goods or other articles shall be allowed to rest on any footway or other part of a street within the general limits of this Act, or be otherwise allowed to cause obstruction or inconvenience to the passage of the public, for a longer time than may be absolutely necessary for loading or unloading such goods or other articles. Any person doing any act in contravention of this section shall be liable for each offence to a penalty not exceeding forty shillings.

"For the purposes of this Act, the surface of any space over which the public have the right of way that intervenes in any street within the general limits of this Act between the footway and the carriageway shall, notwithstanding any claim of any person by prescription or otherwise to the deposit or exposure for sale of any goods or other articles on such surface, be deemed to be part of the footway."

Section 27: "All powers conferred by this Act shall be deemed to be in addition to and not in derogation of any other powers conferred by any other Act of Parliament, and any such other powers may be exercised as if this Act had not passed."

Section 28: "This Act, so far as is consistent with the tenor thereof, shall be construed as one with the Acts relating to the Metropolitan police and to the City police."

The Metropolitan Streets Act, 1867, Amendment Act, 1868, which provides—

Section 1: "The sixth section of the Metropolitan Streets Act, 1867, prohibiting the deposit of goods in the streets, shall not apply to costermongers, street hawkers, or itinerant traders, so long as they carry on their business in accordance with the regulations from

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

time to time made by the commissioner of police, with the approval of the Secretary of State; and so much of the said sixth section as refers to the surface of any space that intervenes in any street between the footway and the carriageway is hereby repealed."

The Metropolis Police Act, 1839 (2 & 3 Vict. c. 47), s. 74: "Nothing herein contained shall be construed to prevent any person from being indicted for any indictable offence made punishable on summary conviction by this Act, or to prevent any person from being liable under any other Act or Acts to any other or higher penalty or punishment than is provided for such offence by this Act, so nevertheless that no person be punished twice for the same offence."

Frederick Low, for the appellant.—The conviction was wrong. The provisions of section 65 of Michael Angelo Taylor's Act are inconsistent with later legislation and are no longer in force. When that Act was passed (1817) the Metropolitan police were not in existence, and the duty of regulating street traffic was cast upon the local boards. Afterwards that duty was given to the police, and the Metropolitan Streets Act, 1867, s. 6, gives ample powers to deal with obstructions to traffic by itinerant vendors. It cannot have been intended that these powers should exist side by side with the powers given to the local authorities by Michael Angelo Taylor's Act; that Act, therefore, so far as it deals with the same subject matter as the Metropolitan Streets Act, 1867, must be taken to have been repealed. This is made clearer still by the Act of the following year (Metropolitan Streets Act, 1867, Amendment Act, 1868) section 1 of which relieves costermongers, &c., from the penalties of section 6 of the Act of 1867, provided that they comply with the police regulations. If the penalties imposed by Michael Angelo Taylor's Act for the same offences had still been in force, relief would have been given against them also by section 1 of the Act of 1868. That section was meant to prevent interference with the trade of costermongers so long as they conform to the police regulations. The police regulations exist (see Archibald, Police Guide, p. 86) and have been conformed to by the appellant. In *Fortescue* v. *The Vestry of St. Matthew, Bethnal Green*, [1891] 2 Q. B. 170, 39 W. R. Dig. 125, the Court of Appeal, overruling *The Vestry of St. Mary, Islington* v. *Goodman*, 23 Q. B. D. 154, held that section 72 of Michael Angelo Taylor's Act which deals with the removal of projections from the fronts of houses had been impliedly repealed by section 119 of the Metropolis Management Act, 1855, which deals with the same subject matter. *Brackley* v. *The Vestry of St. Mary, Battersea*, 38 W. R. 28, 23 Q. B. D. 486, a decision on section 65 of Michael Angelo Taylor's Act, is no authority against my contention, as the later legislation upon the subject was not brought to the notice of the court.

Peile (*Courthorpe Munroe* with him), for the respondents.—The conviction was right. There is no inconsistency between section 65 of Michael Angelo Taylor's Act and the later Acts which have been referred to. There is no reason why the police and the vestry or other local authority should not have concurrent powers for the regulation of street traffic and the removal of obstructions. Moreover, powers existing under other Acts are expressly saved by section 27 of the Act of 1867, and there is a similar saving of offences and penalties under other Acts contained in section 74 of the Metropolis Police Act, 1839, an Act with which the Act of 1867 (see section 28) is to be construed as one. That section shows that the Legislature contemplated the possibility (in the absence of enactment to the contrary) of a person being punished under the Police Acts and also under some previous Act for the same offence. *Brackley* v. *The Vestry of St. Mary, Battersea*, is an express decision that the power of seizure contained in section 65 of Michael Angelo Taylor's Act can still be put in force.

Lord COLERIDGE, C.J.—I am of opinion that the magistrate was wrong, and that the appellant ought not to have been convicted under this section. The question is whether the provisions of the Metropolitan Streets Acts, 1867 and 1868, are or are not substantially inconsistent with the provisions of section 65 of Michael Angelo Taylor's Act. I am of opinion that they are substantially inconsistent with, and that therefore, according to well-established rules, they amount to a repeal of, the earlier enactment. Section 65 of Michael Angelo Taylor's Act provided very stringent regulations respecting the trade of costermongers and others within limits which are nearly coextensive with the district to which the Metropolitan Police Acts apply. At the date of that Act the Metropolitan police did not exist, and the authority having control over the pavements in the district was the body entrusted with the exercise of these powers which are of a very strong character. Barrows and goods may be seized, and summary proceedings may be taken, both against the costermongers and against other persons. We are not concerned to say whether the liability of other persons to these proceedings remains; we are dealing only with the liability of the costermongers. Then, many years after the beginning of the present reign, the Metropolitan Streets Act, 1867, was passed, with the provisions contained in section 6 for the restraint, if not for the total abolition of the business of costermongers. Under that section proceedings may be taken against some of the same persons as may be proceeded against under Michael Angelo Taylor's Act, and it might be a question whether the two enactments could co-exist; but section 6 of the Act of 1867, was itself altered by the Act of the following year. [His lordship read section 1 of the Metropolitan Streets Act, 1867, Amendment Act, 1868.] These sections seem to me to be plain, and if they stood alone I think there could be no question that they impliedly repeal these provisions of Michael Angelo Taylor's Act; they deal with the same subject-matter, and create a different offence and a different procedure with respect to it, and therefore upon the clearest principles they must be held to have repealed the earlier enactment. If they did not, nothing could be more unfair or entrapping than this later section; it directs the costermongers to carry on their business in accordance with the requirements of the police. It is not suggested that these costermongers have not done so, but it is said that, in spite of their having done so, the local authority may interfere and confiscate their goods. Therefore, if these two sections stood alone, I should say that the matter was too plain for argument. But it is said that they do not stand alone, but that in the Act of 1867 there is a section which keeps alive the provisions of Michael Angelo Taylor's Act. [His lordship read section 27 of the Metropolitan Streets Act, 1867.] To that contention I think there are two answers. The first is that the word "powers" in that section must mean powers conferred by another Act upon the same persons as had powers conferred upon them by that Act—that is, the police; and if that be not a sufficient answer, then I say, secondly, that section 6 of the Act of 1867, as qualified by the Act of the following year, is a distinct provision that a costermonger may carry on his business according to certain regulations, and I cannot persuade myself that that express enactment is not to prevail against

the general enactment contained in section 27. Again, it was argued that section 74 of the Metropolitan Police Act, 1839, preserves these provisions of Michael Angelo Taylor's Act. That is an Act which deals with the police and their powers and duties from beginning to end. [His lordship read section 74.] My answer to that argument must be the same as my answer with respect to section 27 of the Act of 1867. The section must in reasonable fairness be taken to refer to penalties for offences in which the police are the prosecutors; and if that view is not correct, then I think that the governing statute is the latest one, and that so far as any provisions of earlier Acts are inconsistent with the clear provisions contained in the later Acts they must be taken to be impliedly repealed. Therefore I think that the conviction was wrong, and must be quashed.

CAVE, J.—I am of the same opinion. The general rule is that, if there are two Acts of Parliament which contain inconsistent enactments, the former enactment is impliedly repealed by the later one. The repeal is of course implied and not express from the necessity of the case. We have to see, therefore, whether these later enactments are inconsistent with Michael Angelo Taylor's Act. It is not, so far as I am aware, expressly referred to in them.

The appellant in this case has committed an offence against section 65 of Michael Angelo Taylor's Act, and proceedings have been taken against him under that section. What he has done would also be an offence under section 6 of the Metropolitan Streets Act, 1867. Now these two enactments, so far as they apply to the same offence, provide different punishments and different procedure: they therefore could not, according to general rules, stand together: see *Fortescue* v. *Vestry of St. Matthew, Bethnal Green.* But we must look at the whole of the legislation, and see whether the earlier enactment was intended to stand together with the later. Section 74 of the Metropolitan Police Act, 1839, is intended to be read into the Act of 1867, and I think that that shows the intention of the Legislature to have been that these provisions of Michael Angelo Taylor's Act should stand side by side with the Act of 1867.

I do not feel pressed in the same way by section 27 of the Act of 1867, because I am clearly of opinion that the word "power" in that section does not apply to the duty cast upon the authorities who are intrusted with the care of streets to take proceedings against offenders against the provisions upon that subject. Instances occur in the Act of powers exercisable by the police to which section 27 can refer; there are powers for the regulation of stage carriages and advertisements and other matters, and I think that these are the powers intended to be referred to in the section, and not powers to proceed against offenders. If I wanted any corroboration of that view I find it in section 74 of the Act of 1839, and I think that it is not necessary to construe section 27 out of its proper meaning, because section 74 of the earlier Act was in existence and provided for the saving of penalties and proceedings under other Acts.

If the legislation stood there I could not have got over the provisions of section 74 of the Act of 1839; but then there is section 1 of the Act of 1868. Now if the Legislature had intended that costermongers who complied with the regulations issued by the police should not be liable to the comparatively mild penalties of the Act of 1867, but should still be liable to the severer penalties of Michael Angelo Taylor's Act, we should have been obliged to give effect to that extraordinary provision. But the Act does not say that. [His lordship read section 1 of the Metropolitan Streets Act, 1867, Amendment Act, 1868.] I think that that provision is so inconsistent with the provisions of Michael Angelo Taylor's Act that it is impossible that they should stand together. It would be monstrous, to my mind, that they should, and I cannot bring myself to think that the Legislature gave the costermongers this boon with one hand and took it away with the other. It would be most misleading to them that the Legislature should, by the enactment contained in section 1 of the Act of 1868, tempt them to invest their money in barrows and goods in order to avail themselves of the permission given to them by that section to carry on their business in accordance with the police regulations if they are at any moment liable to have their property swept away by the local authority. This result would be so monstrous that I have no hesitation in saying that the later legislation is inconsistent with Michael Angelo Taylor's Act, and that this conviction under that Act was wrong.

Appeal allowed.

Solicitor for the appellant, *Arthur Newton.*

Solicitor for the respondents, *Matthew H. Hale.*

Q. B. Div.
(Lawrance and Collins, JJ.) Feb. 8, 10.

PHARMACEUTICAL SOCIETY v. PIPER & CO. (*a*.)

Pharmacy Acts—Sale of poison—Compound or medicine containing "poison"—"Patent medicine"—Pharmacy Act, 1868 (31 & 32 *Vict. c.* 121), *ss.* 1, 2, 15, 16.

By the Pharmacy Act, 1868, *section* 2, *certain articles specified in Part* 2 *of Schedule A to the Act, which include opium and all preparations of opium and chloroform, are deemed to be poisons within the meaning of the Act; and by sections* 1 *and* 15 *it is made unlawful for persons to keep open shop for the retailing, dispensing, or compounding poisons unless they are chemists or druggists, and duly registered under the Act, under a penalty of* £5 *for each offence. By section* 16 *nothing in the Act is to interfere with the dealing in "patent medicine."*

The appellants, who were not qualified persons within the meaning of the Act, sold over the counter a half-ounce bottle of chlorodyne, a proprietary medicine, which contained, amongst other ingredients, one grain of morphine, the active principle of opium, the evidence being that less than that quantity had been known to be fatal to an adult, but that, if taken according to the directions, the dose would not be so to an adult, but might be to an infant.

In an action against the appellants to recover a penalty under section 15 *for a breach of the provisions of the Act,*

Held, that, inasmuch as the article sold by them contained one of the scheduled poisons, it was a poison within the meaning of the Act, and it was immaterial that it did not consist, or was not compounded, of the scheduled poisons alone.

Held, also, that it was not a "patent" medicine within the exemption in section 16, *which applied exclusively to medicines protected by the letters patent, and, therefore, that the appellants were liable to the penalty.*

Appeal from a decision of his Honour Judge Francis Bacon at the Bloomsbury County Court.

The plaintiff sued the defendants, who were grocers carrying on business in Warwick-street, Pimlico, as follows:—"To penalty incurred on the 16th of October, 1892, in keeping open shop for

(*a*.) Reported by JOHN P. MELLOR, Esq., Barrister-at-Law.

retailing chlorodyne which contained poisons, to wit, opium, or a preparation of opium and chloroform, or one of the said poisons, contrary to the provisions of the Pharmacy Act, 1868 (31 & 32 Vict. c. 121)," and the amount of the penalty claimed was £5.

The following are the material provisions of the Pharmacy Act:—

By section 1 it is enacted that it shall be "unlawful for any person to sell or keep open shop for retailing, dispensing, or compounding poisons," &c., "unless such person shall be a pharmaceutical chemist or a chemist and druggist within the meaning of this Act, and be registered under this Act," and conform to the regulations as provided by the Act.

By section 2 it is provided that the several articles named or described in Schedule A should be deemed to be poisons within the meaning of the Act.

Schedule A is divided into two parts, and in Part II. are included "opium, and all preparations of opium or of poppies" and "chloroform."

Section 15 provides, *inter alia*, that "any person who shall sell or keep an open shop for the retailing, dispensing, or compounding poisons," &c., "not being a duly registered pharmaceutical chemist or chemist and druggist," &c., shall for every such offence be liable to pay a penalty or sum of five pounds, and the same may be sued for, recovered, and dealt with in the manner provided by the Pharmacy Act for the recovery of penalties under that Act," &c.

Section 16 enacts, *inter alia*, that "nothing hereinbefore contained shall extend to or interfere with . . . the making or dealing in patent medicines, nor with the business of wholesale dealers supplying poisons in the ordinary course of wholesale dealing," &c.

Section 17 contains regulations to be observed on the sale of poisons, and provides that it shall be unlawful to sell any poison, by wholesale or retail, unless the box, bottle, vessel, wrapper, or cover in which such poison is contained be distinctly labelled with the name of the article and the word poison and with the name and address of the seller of the poison; "and it shall be unlawful to sell any poison of those which are in the first part of the Schedule A to this Act, or may hereafter be added thereto under section 2 of this Act, to any person unknown to the seller, unless introduced by some person known to the seller; and on every sale of any such article the seller shall, before delivery, make or cause to be made an entry in a book to be kept for that purpose stating, in the form set forth in Schedule F to this Act, the date of the sale, the name and address of the purchaser, the name and quantity of the article sold and the purpose for which it is stated by the purchaser to be required, to which entry the signature of the purchaser and of the person (if any) who introduced him shall be affixed." The section provides for a penalty for breach of the section, but further provides that "the provisions of this section, which are solely applicable to poisons in the first part of the Schedule A to this Act, or which require that the label shall contain the name and address of the seller," shall not apply to certain articles or sales as therein mentioned, "provided such medicines be labelled in the manner aforesaid, with the name and address of the seller, and the ingredients thereof be entered," &c.

It was proved in evidence at the trial that the defendants had sold a bottle of Dr. Collis Browne's preparation of chlorodyne, a proprietary medicine, over the counter on the date above mentioned. It was proved to contain ½ fluid oz. of chlorodyne, which gave, upon analysis, one grain of morphine, the active principle of opium, but the dose to be taken by an adult person in accordance with the directions would contain only from one-fortieth to three-fortieths of a grain. It was stated in evidence by medical experts that one-hundredth part of a grain of morphine had been known to be fatal to an infant, and eight-tenths of one grain to an adult. The chlorodyne was also found to contain a small amount of prussic acid, with treacle, peppermint and capsicum, with other unascertained ingredients. The medical evidence was further to the effect that no chemical in the mixture would correct the effect of the poison. The bottle in question was stated to have been labelled "poison." Evidence was also given on behalf of the defendants by a number of witnesses, to the effect that stamp or proprietary medicines had for a number of years been sold as "patent" medicines, that in fourteen years preceding the Act of 1868 only fifty medicines had been patented, and of these only thirty were complete patents, of which only four contained poison, and further that none of them had any sale. On the other hand, there were upwards of 1,000 stamp or proprietary medicines, sold by some 30,000 licensed persons, of whom 10,000 only were chemists.

The learned county court judge held that the article sold by the defendants was a poison, and that it was not a patent medicine within the exemption in section 16, and gave judgment for the plaintiffs for the penalty. The defendants appealed.

H. D. Bonsey, for the appellant.—The county court judge was wrong upon both the grounds of his decision. First, the article in question is not a poison within the meaning of the Act. It is a useful medicine which has had a large sale for forty years, and although the Pharmacy Act was passed in 1868 the plaintiffs have never before attacked the sale of these medicines by unqualified persons. The object of that Act was to prevent the sale of poisons unmixed or in such mixture as to be simply an evasion of the Act. But if it had been intended to include all mixtures containing some poison, the language of the Act, instead of simply naming the articles, would naturally have been framed to forbid the sale of articles, "one of the ingredients of which is" one of the poisons named. If the decision of the county court is right an immense number of articles now commonly sold by tradesmen will become the monopoly of chemists: such, for instance, as contain a slight proportion of arsenic or cantharides. Could it be said, moreover, that a combination of two poisons producing an innocent entirety would be a poison? The contention of the appellants, therefore, is that an article, to be a "poison" within the meaning of the Act, must be substantially the same poison as one of those named in the schedule. Secondly, the article sold by the defendant is a patent medicine within the exemption in section 16. The earlier Acts dealing with the subject, from 1783 to 1812, spoke of patent medicines as then sold under the authority of letters patent royal or the Great Seal. They also spoke of "nostrums or proprietary medicines." But the evidence shows that by degrees the number of those sold under letters patent almost disappeared and were supplanted almost entirely by the proprietary medicines, which increased to such an extent that by the time the Pharmacy Act was passed the term "patent" had acquired a wider significance and popular meaning, and was universally understood to include proprietary or stamp medicines. For this reason it was not considered necessary to expressly name the latter in the section exempting "patent medicines." Further, the disproportion in point of number being so great, the Act would, if there had been an intention to limit the term, have exempted only medicines "sold under letters patent." Again, there was no

reason for confining the sale of proprietary medicines to chemists; as a protection it would be wholly illusory. Chemists would know no more about the composition of such articles than other persons, or whether they contained poison, and would be unable to comply with the requirements of section 17 as to the entry of the necessary particulars in a book of the "article" sold, which in that case means "poison," or take the other precautions prescribed by that section.

Poland, Q.C., and *T. R. Grey*, for the respondents.—The decision below was right on both points. On the first point, the restriction in section 16 confining the sale of medicines containing poisons by unqualified persons to "patent" medicines clearly shows that it was intended to restrain the sale of all other such medicines. But according to the argument on the other side this proviso would be unnecessary. Further, when the Legislature intends to exempt proprietary medicines from the operation of an Act it does so in express terms, as in the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63). It is not contended that one drop of poison in 1,000 gallons of water would be a poison. [LAWRANCE, J., referred to *Berry v. Henderson*, L. R. 5 Q. B. 296, 18 W. R. Dig. 74.]

Bonsey, in reply.—With reference to the last part of the argument on the other side the evidence here does not show that the article was a "poison," but only that it was a compound of poison.

LAWRANCE, J.—Speaking for myself, I have entertained considerable doubt during the course of the argument; but those doubts are now removed, and I am of opinion that the appeal must be dismissed.

On the first question, which is whether a person who is not a chemist can sell medicines containing poison, I have come to the conclusion that he cannot. It is important to notice that in the preamble to the statute in question it is declared that it is "expedient for the safety of the public that persons keeping open shop for the retailing, dispensing, and compounding of poisons, and persons known as chemists and druggists, should possess a competent practical knowledge of their business"; and the sections of the statute proceed to make provisions to that end, and the provisions of the 15th section have been called to our attention as being most material in this case. [The learned judge read the section, and continued:—]

The question here is whether the appellant was such a person retailing a poison, not being a chemist, and therefore liable to the penalties sued for and recovered in the county court. That depends upon whether the chlorodyne, which forms the basis of the action, is a poison, and, if so, whether it is or is not within the exemption in section 16 applicable to patent medicines; for it is argued by the appellant that, whether it is or is not a poison, he is nevertheless entitled to sell it as being a "patent medicine" within section 16. Now, as to that contention it is material to note that in the schedule to the Act of 52 Geo. 3, c. 150 there are several hundred patent medicines, and the Act apparently contemplated three different sets of persons as being entitled to sell them: First, there were those claiming the right to make secret prescriptions; secondly, those who sold medicines protected by letters patent; and, thirdly, those who sold proprietary medicines. Those three are entirely distinct, but Mr. Bonsey says that the term "patent medicines" includes all these different things. I was at first much impressed with the force of his argument, but on looking at the Act of 1868 I think there is a distinction clearly taken between them, and that the term "patent medicine" is applicable only to such as are protected by letters patent or under the Great Seal, and, therefore, that all not so protected are not within the exemption in section 16.

Now with respect to the question as to whether this chlorodyne sold by the appellant is a poison, we are referred to the provisions of section 17 and to the regulations therein contained for the sale of poisons.

Mr. Bonsey says that "article" there means "poison," and that it applies simply to poisons mentioned in the schedule, and not to such as merely contain them as ingredients. I was impressed with the way in which he put this contention also, but on the whole I am of opinion that the application of the Act is not so restricted. I think that it is conclusive that if an article contains poison it must be labelled "poison," and the regulations applying to the sale of poisons must be complied with. That may, I think, be done, as regards the form given in Schedule F, by filling in the number of bottles sold.

It might seem absurd, no doubt, that an article containing an infinitesimal quantity of poison should be obliged to be labelled "poison," but, at any rate, no harm would be done, and the public would be protected against mischiefs arising from the ignorance or incompetence of unskilled compounders.

With regard to patent medicines, the public and those selling them have this protection, that they can always refer to the specifications and ascertain the ingredients. The conclusion, therefore, which I have come to upon the whole case is that if an article which is not a medicine protected by letters patent contains poison it cannot be sold by an unqualified person without rendering him liable to the penalties provided by the Act, and I am of opinion, therefore, that the learned county court judge was right in his judgment, which must be affirmed.

COLLINS, J.—I am of the same opinion. It is unnecessary for me to go through the sections of the Act, but there are two points for our consideration. The first, whether this preparation of chlorodyne is a "poison" within the Act, and secondly, if so, is it within the exemption in section 16? We have been greatly assisted by the able argument of Mr. Bonsey, and I am not at all sure that I am right in the conclusions at which I have arrived. Now I think the article in question does come within the designation "poison." It is found to contain more than one poison—viz., opium and chloroform, both of which are contained in Schedule 2. It is also found that there was in the bottle sufficient to kill an adult person if the whole quantity were taken at once. Therefore I think we may take it that it was in fact a poison. Whether I am right or not, I am also of opinion that it was a compound into which poison enters, and that it therefore comes within the Act. But while I am of that opinion in regard to this specific thing, I do not think it necessary to lay down any general rule as to such as contain infinitesimal quantities; that case can be dealt with when it arises.

Now is this a "poison" within the meaning of the Act? The schedule includes in Part 2 both opium with its compounds and chloroform absolutely. It is said that the Act does not apply to articles into which these enter, but which are incapable of being described as "poison" or as preparations of "poison. I do not think that is correct. I think it applies to something more, or in other words that there may be a "poison" within it, which does not consist exclusively of poison or of a preparation of poison. I think section 17 shows us what was intended, because after mentioning special preparations by chemists, it goes on to say in the proviso that the provisions shall not apply to "any medicine supplied

by a legally qualified apothecary to his patient, nor apply to any article when forming part of the ingredients of any medicine dispensed by a person registered under this Act." Now that provision seems to me to show that but for the exemption, a medicine containing one of the poisons named would come within the Act, and which did not intend to exclude all other ingredients but poison in the article sold. My brother Lawrance referred to a case of *Berry* v. *Henderson*, which I think is in point. The thing sold in that case was prussic acid, and the court came to the conclusion that the fact that the article contained only two things, prussic acid and water, did not prevent prussic acid from being an "ingredient," and further that, having regard to its uses, it was within the exception, and it was necessary then to find first, whether it was properly described as a "poison" before the court could decide whether it was within the exemption. Now it seems to me that from the judgment of Lush, J., that he held that the Act did hit a compound; and, therefore, that the case is a distinct authority. When you have arrived at that, the question of more or less seems to me not to apply until you have a state of things to which would be applied the maxim *de minimis non curat lex*. Before I pass to the next point I wish to refer to one formidable argument advanced by Mr. Bonsey. He says, quite properly, that the word "article" in the latter part of section 17 applies to poison only, and to poison in the schedule. Then he says if he is wrong in his main argument it is impossible to apply that provision, because it would be impossible for the seller to put down the quantity of the "article" sold by a chemist, and to conform to the regulations in section 17. But I feel no difficulty in saying that a chemist may satisfy the section by putting down the number of bottles sold.

Then I come to the second point, is this a patent medicine within the exemption in section 16? Mr. Bonsey contends that on the evidence here all medicine which are dealt with as stamp medicines or as proprietary medicines are understood to be patent medicines and within the exemption, and broadly that was what the term in the section intended. Now, having regard to the object of this Act and of the Act of George III., we ought not to put upon the term "patent" in this Act an interpretation which would extend it beyond what is covered by "letters patent." What is the Act? It deals with the sale of poisons and amends the Pharmacy Act of 1862. Broadly, therefore, it deals with poisonous drugs which might be called harmful. It says in the preamble that it is dealing with the safety of the public by regulating the dispensing of drugs, by providing that this shall only be done by qualified persons, but there is an exception in favour of patent medicines. Now I do not think that the case for sweeping all proprietary medicines into that exception is made out. Can anything be more dangerous, that a proprietary, but not patent, medicine, and which may be compounded of poison, may be sold to any extent by unskilled persons? The very mischief aimed at by the Act would thus be allowed free scope. In the case of medicines sold under letters patent, any one who wants to know the composition of the medicine is able to do so. But when we look at the definitions in the Stamp Act, 52 Geo. 3, c. 150, we see how that would be in the case of proprietary medicines. That Act deals not only with patent medicines, but gives very strong grounds for knowing what comes within the proper description of "proprietary" medicines. In the schedule to that Act which specifies the articles upon which stamp duties are imposed, the following things are included, viz., all medicines, &c., "made, prepared, uttered, vended, or exposed for sale by any person or persons whatsoever, wherein the person making, preparing, uttering, vending, or exposing to sale the same hath or claims to have any occult secret or art for the making or preparing the same, or hath or claims to have any exclusive right or title to the making or preparing the same, or which have at any time heretofore been, now are, or shall hereafter be prepared, uttered, vended, or exposed to sale under the authority of any letters patent under the Great Seal," or which are "held out or recommended to the public by the makers, vendors, or proprietors thereof as nostrums or proprietary medicines, or as specifics," &c.

Practically, therefore, it seems to me that anyone with very slight claims to possess a secret prescription or preparation, and who chooses to send out a notice with it calling it a nostrum, may at once deal with and dispense as much poison as he likes, and if the appellant is right here, be exempted from the operation of the Pharmacy Act, leaving behind no trace whatever of the way in which it is sold. I do not think, therefore, that Mr. Bousey has either principle or wording in his favour. He says it will destroy the sale of proprietary medicines. Now I am not so much pressed with that, for if it is worth while for chemists to ascertain by analysis what are the ingredients of proprietary medicines, then it is not difficult for them to comply with section 17, thereby securing all the ends aimed at. At any rate, whatever inconvenience is involved is not so great as would be the danger to the public if the contention of the appellant were allowed to prevail. We think, however, having in view the importance of the case, that they should have leave to appeal.

Appeal dismissed.

Solicitors for the appellants, *Neve & Beck.*

Solicitors for the respondents, *Flux, Sons, & Co.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) — March 10.

MURRAY v. FREER. (a.)

Licensing law—Lapsed licence—Discretion of justices to refuse transfer—Licensing Act, 1828 (9 *Geo.* 4, *c.* 61), *s.* 14—*Wine and Beerhouse Act*, 1869 (32 *&* 33 *Vict. c.* 27), *ss.* 8, 19—*Wine and Beerhouse Act Amendment Act*, 1870 (33 *&* 34 *Vict. c.* 29), *s.* 7.

At the general annual licensing meeting in August, 1891, *the justices refused to renew the licence of the tenant of a beerhouse on account of his having been convicted for permitting drunkenness on the premises. The beerhouse had been continuously licensed for the sale of beer to be consumed on the premises from a date prior to the 1st of May*, 1869. *In consequence of the refusal to renew, the licence expired on the 10th of October*, 1891. *On the 5th of October*, 1891, *the tenant gave up possession of the house to the respondent, who applied, on the 17th of November*, 1891, *to the justices in special sessions for a transfer of the licence.*

Held (*reversing the decision of* Pollock, B., *and* Vaughan Williams, J.), *that at the date of the application by the respondent the licence was not in force within the meaning of section* 19 *of the Wine and Beerhouse*

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Act, 1869, and that the justices' power of refusing the transfer was, therefore, not limited to the four grounds mentioned in section 8 of that Act.

Appeal from the decision of a divisional court (Pollock, B., and Vaughan Williams, J.) on a case stated by quarter sessions.

The Pheasant Inn, No. 155, Chester-street, Manchester, was continuously licensed for the sale of beer to be consumed on and off the premises from a date prior to the 1st of May, 1869, until the 10th of October, 1891, when the certificate of justices granted in respect of the said house pursuant to sections 5 and 6 of the Wine and Beerhouse Act, 1869, which had been in force from the 10th of October, 1890, expired. The said certificate and the excise licence were granted to one Faulkner, who was a tenant of the said house and had been previously licensed in respect thereof. On the 30th of December, 1890, Faulkner was convicted of permitting drunkenness in the house. At the general annual licensing sessions for the city of Manchester held on the 27th of August, 1891, objection was made to the renewal of the licence by the district superintendent of police. The justices adjourned the consideration of the case to the 10th of September, on which day Faulkner applied to the justices for a renewal of the licence. This application was refused.

Faulkner did not appeal from this refusal, but on the 5th of October, 1891, he gave up possession of the house to the respondent Freer. On the 9th of October, 1891, the respondent gave notice under section 14 of the Licensing Act, 1828, of his intention to apply to the special sessions for a transfer of the licence, and on the 17th of November, 1891, he applied for the transfer. It was contended on his behalf that the justices could only refuse the transfer upon one of the four grounds set forth in section 8 of the Wine and Beerhouse Act, 1869, and it was admitted by the justices that if their discretion was so limited the respondent was entitled to the transfer. The justices, however, were of opinion that there was then no licence in force in respect of the house, inasmuch as it had expired on the 10th of October, 1891, and that, the renewal of the licence having been refused, and there having been no appeal against the renewal, the licence had not been granted by way of renewal from time to time so as to entitle the respondent to the benefit of section 19 of the Wine and Beerhouse Act, 1869, and section 7 of the Wine and Beerhouse Act Amendment Act, 1870, and that they were therefore not limited in dealing with the application to the said four grounds of refusal, but were at liberty to exercise their discretion and take into consideration the nature of the neighbourhood and its requirements and the history of the house.

The justices accordingly refused the application.

The respondent appealed to the quarter sessions, who granted the transfer of the licence, subject to a case for the opinion of the court. The case was argued before the Divisional Court on the 27th and 28th of April, 1892, and judgment was given on the 19th of January, 1893. The Divisional Court upheld the decision of the quarter sessions, and allowed the transfer of the licence to the respondent, being of opinion that at the date of the respondent's application for the transfer on the 17th of November, 1891, the licence was in force within the meaning of section 19 of the Wine and Beerhouse Act, 1869, and that the justices' power of refusing the transfer was limited to the four grounds mentioned in section 8 of that Act.

The justices appealed.

Section 19 of the Wine and Beerhouse Act, 1869, is as follows:—Where, on the 1st of May, 1869, a licence under any of the said recited Acts is in force with regard to any house or shop for the sale by retail therein of beer, cider, or wine to be consumed on the premises, it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer, cider, or wine to be consumed on the premises in respect of such house or shop, except upon one or more of the grounds upon which an application for a certificate under this Act in respect of a licence for the sale of beer, cider, or wine, not to be consumed on the premises, may be refused in accordance with this Act.

By section 7 of the Wine and Beerhouse Act Amendment Act, 1870, the 19th section of the principal Act shall extend to licences granted by way of renewal from time to time of licences in force on the 1st of May, 1869, whether such licences continue to be held by the same person or have been or may be transferred to any other person or persons.

By section 3 of 34 & 35 Vict. c. 88 (repealed by the Licensing Act, 1872), it was declared that, if the licence which had been in existence on the 1st of May, 1869, or any certificate since granted in respect of the house, had, by forfeiture, lapse of time, or otherwise, ceased to be in force, then, in the case of an application for a certificate for such a house, the justices might refuse the application on any ground upon which they might refuse an application if made for a certificate with respect to a house with respect to which a licence was not in force on the 1st of May, 1869.

Sir C. Russell, A.G., and *Joseph Walton, Q.C.* (*Avory* with them), for the appellants.—The decision of the Divisional Court was wrong. This case does not come within section 19 of the Wine and Beerhouse Act, 1869. That section only applies where the licence is in force and has been granted by way of renewal from time to time. This licence expired on the 10th of October, and cannot be said to have been in force on the 17th of November, when the respondent made his application. The fallacy underlying the judgments of the Divisional Court is the attempt to draw a distinction between a licence which has been forfeited and one which has lapsed for want of renewal. No such distinction can be made: see section 3 of 34 & 35 Vict. c. 88, which is declaratory of the meaning of section 19 of the Act of 1869.

They cited *Hargreaves* v. *Dawson*, 24 L. T. N. S. 428, 19 W. R. C. L. Dig. 11; *Reg.* v. *Curzon*, 21 W. R. 887, L. R. 8 Q. B. 400; *Reg.* v. *Justices of the West Riding*, 36 W. R. 855, 21 Q. B. D. 258.

Finlay, Q.C., *Poland, Q.C.*, and *J. M. Yates*, for the respondent.—At the time the respondent applied for a transfer of this licence it was still "in force" within the meaning of section 19, the application having been made before the next ensuing general annual licensing meeting, and therefore the justices, in exercising their discretion, were limited to the four grounds of refusal set out in section 8. In *Hargreaves* v. *Dawson* the licence had lapsed for more than a year, and in *Reg.* v. *Curzon* for more than three years, before the application. The applicant in these cases was really asking for a new licence, not for a transfer.

Reg. v. *Justices of Middlesex*, 19 W. R. 960, L. R. 6 Q. B. 781; *Simpkin* v. *Justices of Birmingham*, 20 W. R. 702, L. R. 7 Q. B. 482; and *Reg.* v. *Rowell*, L. R. 7 Q. B. 490, 20 W. R. C. L. Dig. 3, were also referred to.

Lord ESHER, M.R.—In this case the court has to construe two sections of two different Acts of Parliament. The first is section 14 of 9 Geo. 4, c. 61. That section applies to this case so far as to allow the

respondent to be a proper applicant for the transfer of the licence. But section 14 does not do more than say who may be a proper applicant; it does not in any way deal with the application, and all that was decided in the case of *Reg.* v. *Justices of Middlesex*, which was cited by Mr. Finlay in the course of the argument, was that a person in the position of this respondent was a proper person to apply under section 14. An application having been made to the justices the question then arises, how is it to be dealt with? Now in certain cases a very large discretion is given to the justices in dealing with these applications, but there is one section which limits their jurisdiction, and that section is section 19 of the Wine and Beerhouse Act, 1869, which is the second section we have to deal with in this case. If a case comes within section 19 of that Act the justices are limited in the exercise of their discretion to the four grounds of refusal mentioned in section 8 of the same Act. It is necessary therefore to ascertain what is the proper construction of section 19, and whether this case comes within it. [His lordship read the section.] The grammar of that section is not very accurate unless the words "is in force" are construed to mean "was in force, and is at the time of the application." And even if the section stood alone I should be inclined to construe it in that way, but there is section 7 of the Amendment Act, 1870, which reads it in the same way as I have done, and the meaning of the section was also considered in the cases of *Hargreaves* v. *Dawson* and *Reg.* v. *Curzon*, and we find that the words "is in force" are to be taken to mean "was in force on May 1, 1869, and has continued to be and is in force on the day when the application is made." If that is the true reading of the section, it is not disputed that this licence had ceased to exist at the date of the application by the respondent. In my opinion those two cases to which I have referred govern this case, and the court will not overrule them The case does not come within section 19, and therefore the discretion of the justices is not limited, and the appeal must be allowed.

LINDLEY, L.J.—I am of the same opinion. The question which we have to determine turns on the construction to be put upon the words, "Where on May 1, 1869, a licence is in force," in section 19 of the Wine and Beerhouse Act, 1869. As that Act came into force at a later date than May 1, 1869, the construction to be put upon the words is at first sight a little doubtful, but the explanatory Act of 1870, and also the case of *Reg.* v. *Curzon*, makes it clear that the words are to be construed to mean, where a licence was in force on May 1, 1869, has been kept alive since that date, and is in force at the time when the application is made. Having arrived at that conclusion there is an end to this case, for this licence was not in force at the date when the application was made. The cases which were referred to in support of the respondent's contention are a different class of case from the present, and relate to applications under section 14 of 9 Geo. 4, c. 61. They do not apply to this case. The respondent had, no doubt, a *locus standi* under that section to make an application, but that section does not determine what discretion the justices are to exercise when adjudicating upon the application.

LOPES, L.J.—I agree, and have very little to add. This case does not come within section 19, because that section only applies when the licence is in force when the application is made. With regard to section 14 of 9 Geo. 4, c. 61, that section only deals with the persons by whom applications for a renewal of a licence may be made, and does not affect the question of what discretion the justices may exercise when dealing with the application.

Appeal allowed.

Solicitor for the appellants, *Solicitor to the Treasury.*

Solicitors for the respondent, *Crowders & Vizard*, for *Hockin, Raby, & Beckton*, Manchester.

App. Bankruptcy.
(Lord Esher, M.R., and Lopes, and Kay, L.JJ.) — Oct. 28; Dec. 3.

In re BINSTEAD.
Ex parte DALE. (*a.*)

Bankruptcy—Bankruptcy notice—"Final judgment"—Decree for dissolution of marriage—Order for payment of costs—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (e) (g).

A decree nisi *in a suit for dissolution of marriage on the ground of adultery contained an order that the co-respondent should pay the petitioner's costs. The decree was made absolute and the costs taxed, and an order was made that the co-respondent should pay the amount within a specified time. He did not comply with the order, upon which the petitioner issued a bankruptcy notice against him, with which he again did not comply. A bankruptcy petition was then presented against him.*

Held (affirming an order dismissing the petition), that the order of the Divorce Court for payment of the costs was not a "final judgment" within sub-section 1 (g) *of section* 4 *of the Bankruptcy Act*, 1883, *and that a bankruptcy notice could not, therefore, be issued in respect of it against the co-respondent; and that there was, therefore, no act of bankruptcy.*

Appeal by a creditor, E. J. Dale, from the dismissal by Mr. Registrar Hope of a bankruptcy petition, dated the 29th of August, 1892, presented by the appellant against A. M. Binstead.

The creditor's claim was for the sum of £204 19s. 8d., the taxed costs in a divorce suit, under the following circumstances:—

The appellant Dale instituted a suit for divorce against his wife, in which Binstead was co-respondent. The trial on the 26th of April, 1888, resulted in a verdict for the petitioner, and a decree *nisi* was pronounced for the dissolution of the marriage, on the ground of the wife's adultery with Binstead, unless sufficient cause should be shown to the court why the decree should not be made absolute within six months from the making thereof.

The petitioner's costs incurred, and to be incurred, in the suit were ordered to be paid by the co-respondent Binstead, and the decree having been made absolute on the 13th of November, 1888, the costs were eventually taxed at £204 19s. 8d., and an order made on the 30th of June for payment of the amount by Binstead within a specified time.

The costs were not paid, and Dale issued a bankruptcy notice on the 26th of July, 1892, against Binstead, who did not comply with the notice within the time limited. His non-compliance was alleged by the creditor to be an act of bankruptcy, upon which the petition was presented. The registrar, however, held that the order to pay costs was not a "final judgment" in an action, and, consequently, that there had been no act of bankruptcy, and dismissed the petition.

Section 4 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), provides as follows:—

(*a.*) Reported by JOHN P. MELLOR, Esq., Barrister-at-Law.

"A debtor commits an act of bankruptcy in each of the following cases:—

"(e) If execution issued against him has been levied by seizure and sale of his goods under process in an action in any court, or in any civil proceeding in the High Court.

"(g) If a creditor has obtained a final judgment against him for any amount, and, execution thereon not having been stayed, has served on him in England, or by leave of the court elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or to compound for it to the satisfaction of the creditors or the court, and he does not within seven days after the service of the notice in case the service is effected in England, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set-off, or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which his judgment was obtained."

Herbert Reed, Q.C., and *J. E. Bankes*, for the appellant.—The registrar was mistaken in his view that there was not here a final judgment within the meaning of the section. In *Ex parte Moore*, 33 W. R. 438, 14 Q. B. D. 627, Lord Selborne says, at p. 632: "To constitute an order a final judgment nothing more is necessary than a proper *litis contestatio* and a final adjudication between the parties to it on the merits." And the Master of the Rolls held in that case that there was a "final judgment" when everything which had to be done by the court itself was finished. This point is really concluded by that case. There was an order for the payment of costs and for the payment of the taxed amount, and nothing more remained to be done by the court: *In re Riddell, Ex parte Earl of Strathmore*, 36 W. R. 532, 20 Q. B. D. 512. [LOPES, L.J., referred to *Salaman* v. *Warner*, 39 W. R. 547, [1891] 1 Q. B. 734.] Further, it is not necessary that there should have been final judgment in an "action" in the strict sense. [KAY, L.J.—In the Judicature Act, 1873, by section 100 "action" is defined to be a "civil proceeding commenced by writ or in such other manner as may be prescribed by rules of court."] That includes a proceeding in the Divorce Court, and by that section "judgment" includes "decree." [KAY, L.J., referred to *In re Alexander*, 40 W. R. 202, [1892] 1 Q. B. 216. LOPES, L.J., referred to *In re Fawsitt*, 34 W. R. 26, 30 Ch. D. 231.]

E. Clayton, for the respondent Binstead.—I rely on the definition by the Master of the Rolls in *In re Riddell, Ex parte Earl of Strathmore*, at p. 516, by which he says final judgment under sub-section 1 (g) means "a judgment obtained in an action by which the question whether there was a pre-existing right of the plaintiff against the defendant is finally determined." Here there was (1) no pre-existing right, and (2) the proceeding was not an action. It is a case of damage, not in satisfaction of some pre-existing right before proceedings either by contract or tort, but under a special statutory provision, and is not a "final judgment," but a "final order": *Ex parte Chinery*, 32 W. R. 469, 12 Q. B. D. 342. Moreover, section 100 of the Judicature Act, 1873, only makes a decree a judgment for the purposes of that Act. In section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, the legislature differentiates between an action and a civil proceeding. The right to enforce an order by execution does not constitute it a "judgment"; garnishee proceedings are not actions for the purposes of the Bankruptcy Act (*Ex parte Chinery*), but they would come within the definition in the Judicature Act. It was held in *Ex parte Schmitz* that an order for the payment of costs was not a final judgment within sub-section 1 (g). Section 4 is in the nature of a penal enactment, and must be construed strictly.

He referred also to *Ex parte Whinney*, 13 Q. B. D. 476, 32 W. R. Dig. 11; *Ex parte Moore; In re Henderson*, 36 W. R. 567, 20 Q. B. D. 509; *In re Crump*, 8 Morrell, 174.

Bankes, in reply.—The definition of "action" in the Judicature Act, 1873, is not the conclusive test, and in section 4, sub-section 1 (g), the term is used in a wider sense. There is nothing in *Ex parte Chinery* to show that it must be a judgment within the definition in the Judicature Act, 1873.

Cur. adv. vult.

December 3.—Lord ESHER, M.R.—By a decree *nisi* in a suit in the Divorce Division it was decreed that the marriage of Dale and his wife should be dissolved, on the ground of her adultery with Binstead, the co-respondent, unless cause should be shown within six months why that decree should not be made absolute. The co-respondent, Binstead, was also condemned to pay the costs of the petitioner in the suit. Those costs, when the decree was afterwards made absolute, were taxed at £204 19s. 8d. The petitioner served a bankruptcy notice on the correspondent, treating the order for payment of the costs as a final judgment within the meaning of the Bankruptcy Act, 1883. The costs not being paid, the petitioner presented a bankruptcy petition against the co-respondent, alleging that the failure to comply with the bankruptcy notice was an act of bankruptcy. The registrar held that the order for payment of the costs was not a "final judgment" within the meaning of sub-section 1 (g) of section 4 of the Bankruptcy Act, 1883, and that the bankruptcy notice was therefore invalid, and that consequently no act of bankruptcy had been committed. He dismissed the bankruptcy petition, and we are asked to say that he was wrong.

The case depends upon the construction of the sub-section. Under it a man may be compelled to commit an act of bankruptcy in respect of which he may be made bankrupt, and he may thereby be forced to pay the particular debt, and all the other creditors will also be brought into the bankruptcy. Bankruptcy is therefore not merely an execution of a particular decree, but it has the great effect, as a general rule, of compelling all the bankrupt's creditors to accept payment of a part only instead of the whole of their debts. Sub-section 1 (g) of section 4 operates, therefore, not only against the debtor himself, but also against other persons. The question for us is whether an order for the payment of costs, forming part of a decree of the Divorce Court, is a "final judgment" within sub-section 1 (g). It has been held that that sub-section must be construed strictly. In *Ex parte Chinery*, in this court, Cotton, L.J., said, 12 Q. B. D., at p. 345, "Now, in legal language, and in Acts of Parliament, as well as with regard to the rights of the parties, there is a well-known distinction between a 'judgment' and an 'order.' No doubt the orders under the Judicature Act provide that every order may be enforced in the same manner as a judgment, but still judgments and orders are kept entirely distinct. It is not said that the word 'judgment' shall in other Acts of Parliament include an 'order.' I think we ought to give to the words 'final judgment' in this sub-sec-

tion their strict and proper meaning, *i.e.*, a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established." Now that shows that the words "final judgment" must be construed strictly. So construing them, can they apply to an order of the Divorce Court in the decree in a divorce suit for the payment of costs? The words of the sub-section are as follows:—[The Master of the Rolls read the sub-section, and continued:—] These words seem, therefore, to me to show that, construing them strictly, as we must do, they can only mean a judgment in an action in which the defendant might have a counter-claim, set-off, or cross demand which could be set up in the action in which the judgment was obtained. Is it possible to say that a suit in the Divorce Court is such a proceeding? I think not, and that goes a long way to show that the order of the Divorce Court is not a final judgment within sub-section 1 (*g*), which view is confirmed by a reference to Form No. 6, of a bankruptcy notice given in the appendix to the Bankruptcy Rules of 1886. It was suggested that sub-section 1 (*e*) of section 4 shows that such an order cannot be within sub-section 1 (*g*). I question whether you can support sub-section 1 (*g*) by reference to sub-section 1 (*e*). I think it is probable that the Divorce Court must enforce its own order by its own procedure, and not by execution. But it is not necessary to decide that now. It follows from what I have said, therefore, that the registrar's decision was right, and must be affirmed.

LOPES, L.J.—I am also clearly of opinion that the decree of the Divorce Court was not a "final judgment" within the meaning of section 4, sub-section 1 (*g*). That view was most appropriately and clearly expressed by Cotton, L.J., in *Ex parte Chinery*, the words which have been already quoted by the Master of the Rolls, and by other portions of his judgment on page 345. The other members of the court (Bowen and Fry, L.JJ.) also gave judgment to the same effect, and I think their judgments go a very long way to establish that a decree of the Divorce Court is not a final judgment within the sub-section. Sub-section 1 (*e*) is, in my opinion, important. It contains the words "process in an action in any court or in any civil proceeding in the High Court."

Now these words are comprehensive, and seem to show that the narrower words in the sub-section 1 (*g*) were used by the Legislature advisedly. I am inclined to the opinion that sub-section 1 (*e*) might have been made use of in this case for the purpose of obtaining an act of bankruptcy; but I do not wish to express any definite opinion on that point.

KAY, L.J., delivered the following written judgment:—The appellant seeks to make Binstead a bankrupt. The alleged act of bankruptcy is the non-compliance within the prescribed time with the requirements of a bankruptcy notice under section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883. [The Lord Justice read sub-section 1 (*g*), and continued:—] It has been decided that this sub-section does not mean that the person serving the notice must have been a creditor before the judgment. Obviously such construction would exclude judgments in actions of tort. It includes all cases in which the applicant becomes a creditor by the judgment. The meaning is that he must be a judgment creditor when he gives the notice: *Ex parte Moore*. It is also settled that a judgment against a defendant for costs may be final, though other parts of the judgment direct accounts or inquiries, the result of which may be to find money due to him: *Ex parte Moore; In re Alexander*.

In the present case, if the decree had been a judgment in an action in the Chancery Division or in the Queen's Bench Division, it cannot be denied that it would be a good foundation for a bankruptcy notice. But it is a decree against a co-respondent in a proceeding for divorce ordering him to pay costs. This order was contained in the decree *nisi*, which has since been made absolute. The costs have been taxed, and an order to pay them within a time fixed has since been made, like the four-day order which is familiar in Chancery practice.

The real objection is, that this is not a judgment in an action, to which alone, it is said, section 4, sub-section 1 (*g*), refers.

Now, first of all, the word "action" only occurs in the latter part of the sub-section, which provides that the debtor may show that he has not committed an act of bankruptcy by not complying with the notice when he can satisfy the court that the debt may be expunged by "a counter-claim, set-off, or cross demand," of equal or greater amount, "which he could not set up in the action in which the judgment was obtained." That includes the case of an action in which, for any reason, a counter-claim could not be made, as, for example, where the provisions as to counter-claim do not apply to the particular court in which the judgment was obtained. If there is no such proceeding in the Divorce Court that circumstance does not seem to me to prevent the sub-section from applying.

The objection appears to me to be highly technical. The final decision of a divorce proceeding is termed a "decree." The proceeding itself is usually styled a "cause" or "suit." It is commenced, not by writ, but by a petition and citation, which are served together upon the respondent. But a co-respondent may be decreed to pay damages as well as costs; and, if the decree orders him to pay both, or either, he is to all intents and purposes in the same position as a judgment debtor in an action in the Chancery or Queen's Bench Division, and the same remedies by *fi. fa.* and *elegit* or a receiver may be had in order to render the decree effectual. Before the Divorce Act, 1857, the course of proceedings for an injured husband was to bring an action at common law for criminal conversation against the alleged adulterer, and, if that action succeeded, to apply for an Act of Parliament to dissolve the marriage. This costly proceeding was superseded by that statute, which established a new court, in which husband and wife might by petition apply for dissolution of the marriage (section 27); and if the husband applies, he may join the alleged adulterer as co-respondent (section 28); and may claim damages against him, either by that or by a separate petition (section 33); and the court may (section 34) order the co-respondent to pay all or any part of the costs of the proceedings. By section 31 the dissolution of the marriage is to be by the "decree" of the court. In sections 33 and 34, relating to the damages and costs which the co-respondent may be ordered to pay, the word "decree" is not used. But section 33 provides that all the enactments contained in the Act with reference to the hearing and decision of petitions shall apply to the hearing of a petition for damages, and by section 34 the order for costs may be made when the alleged adulterer is a co-respondent to a petition for dissolution. In practice, I presume, the order usually is made, as it was here, as part of the decree.

Now it seems to me that no difference can for this purpose be made between a decree giving damages and costs against a co-respondent, and a decree giving costs only. If the later Act, the Bankruptcy Act of 1883, has excepted such a person from its description

of a judgment debtor who commits an act of bankruptcy by failing to comply with a bankruptcy notice, this does not appear to be any sufficient reason for such an exception. But, pursuing this investigation, the Judicature Act of 1873 united the Court of Chancery, the Courts of Common Law, of Probate, Admiralty, the Divorce Court, and the London Court of Bankruptcy, into one Supreme Court of Judicature in England (section 3), and by sections 4 and 5 made them the High Court, and by section 16 vested in that High Court the jurisdiction of each and every of them, and also of the courts created by commissioners of assize. Section 100 provides that in the construction of the statute "cause" "shall include any action, suit, or other original proceeding between a plaintiff and a defendant, and any criminal proceeding by the Crown"; "suit" shall include "action"; "action" shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by rule of court, and shall not include a criminal proceeding by the Crown"; and "judgment" shall include "decree." Therefore, a "suit or cause" includes an "action," and a "judgment" includes a "decree."

The Bankruptcy Act of 1883 was passed ten years later, and when it speaks of a "judgment creditor" why should not the word "judgment" include a "decree"? In the Court of Chancery proceedings were formerly called suits, and the decision of a suit was by decree. The suit was commenced by bill, and the appearance of the defendants was obtained by writ of *subpœna*, or in certain cases by service of a copy of the bill. By order 1 of the Rules of Court suits in Chancery are to be called actions, and by order 2 are to be commenced by writ, and by order 40 the judgment of the courts is to be obtained by motion for judgment. Order 68 provides that nothing in the rules shall, save as expressly provided, affect the procedure or practice in proceedings for divorce. Accordingly the Divorce Court is governed by its own rules in these respects, and its causes and suits are not called actions, and its decisions are not called judgments, but decrees. This, and as I think this only, creates the difficulty. In strict language a decree of the Divorce Court is not called a "judgment" nor is a suit for divorce called an "action." Section 4 of the Bankruptcy Act, 1883, contains eight sub-sections, every one of which applies to this debtor unless sub-section 1 (*g*) is an exception. Sub-section 1 (*e*) provides that "execution levied by seizure and sale" of a debtor's goods "under process in an action in any court, or in any civil proceeding in the High Court," shall be an act of bankruptcy.

Therefore if there had been such execution by seizure and sale under this decree, as, I understand, according to the ordinary practice of the Divorce Court, there might be if the co-respondent had goods which could be seized, he might be made a bankrupt. But in sub-section 1 (*e*) there are the words "in any civil proceeding in the High Court," which, it is said, would include this decree in the Divorce Court. However, I cannot see any reason for ascribing to the Legislature an intention to allow the debtor to be made bankrupt under sub-section 1 (*e*) and not under sub-section 1 (*g*). Cotton, L.J., in *Ex parte Chinery* and again in *Ex parte Moore* said that as under sub-section 1 (*g*) there is a new act of bankruptcy created for the first time by the Act of 1883, "we ought to give the words their strict meaning." This language was adopted by the Master of the Rolls in *Ex parte Riddell, In re Earl of Strathmore*. Following that rule of construction, I must reluctantly come to the conclusion that "judgment in an action" does not strictly describe or include a decree in a suit for divorce. Therefore, the decision of the court below was right, and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors, *J. G. Dalzell; Ward, Perks, & McKay.*

From Q. B. Div.
(Lord Esher, M.R., and Lindley & Bowen, L.JJ.) March 2.

DONOVAN v. LAING, WHARTON, & DOWN CONSTRUCTION SYNDICATE (LIMITED). (*a*.)

Master and servant—Negligence—Master's liability—Employment of servant by third party—Negligence of servant while so employed.

The defendants entered into an agreement with a wharfinger, who was engaged in loading and unloading barges at a wharf, to let him have the use of a steam crane and a man who was engaged and paid by the defendants to work it whenever he required the same, for £50 a year. While the wharfinger was engaged in loading a barge at the wharf, one of his men was injured by the negligent act of the man working the crane in the course of the loading.

Held (affirming the judgment of Pollock, B.), *that, though the man who was working the crane was the general servant of the defendants, the defendants were not liable, for, at the time of the accident, the man working the crane was employed under the orders and control of the wharfinger, and for that particular employment he must be regarded as the servant of the wharfinger, and not as the servant of the defendants.*

Appeal from the judgment of Pollock, B., in favour of the defendants at the trial, with a jury, of an action to recover damages for personal injuries.

The plaintiff was in the employment of Messrs. Jones & Co., and the defendants, under an agreement with Jones & Co., supplied them with a steam crane and a man to work it for the purpose of assisting them in loading and unloading vessels at a certain wharf.

The following were the terms of the agreement as set out in the answer of the secretary of the defendant company to the 5th interrogatory:—"My company, in or about the month of August, 1891, verbally agreed with Messrs. Jones & Co. that they should have the use of the steam crane when they required the same, and that my company should supply the fuel and necessary power and also a man to drive such crane, Messrs. Jones & Co. paying to my company therefor the sum of £50 per annum, and also a sum equal to the average sum for the three last years paid to the Hydraulic Co. for power supplied to the hydraulic crane which was formerly used in the place of the steam crane."

On the 3rd of March, 1892, Messrs. Jones & Co. were engaged in loading a barge at the wharf, and the crane was being worked by a man named Wand, who was engaged and paid by the defendants. The plaintiff's duty was to stand upon the edge of the wharf and give the signal to Wand to set the crane in motion. Wand, without waiting for the signal, started the crane, and the arm of the crane struck the plaintiff and injured him.

At the trial the jury found that Wand was negligent, and gave a verdict for the plaintiff for £500. The learned judge, upon the authority of *Rourke* v. *White Moss Colliery Co.*, 25 W. R. 263, 2 C. P. D. 205, held that Wand was, at the time of the accident, acting as the servant of Jones & Co., and not as the servant of

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

the defendants, and entered judgment for the defendants.

The plaintiff appealed.

Lynden Bell (*Cock, Q.C.*, with him), for the plaintiff.—The man Wand remained the servant of the defendants though employed upon this particular work. The defendants supplied the crane and the man, and so far as the management of the crane was concerned the man remained the servant of the defendants. Jones & Co. could not give Wand any orders they pleased; they could only tell him when to begin hoisting and lowering the goods. The fact that a person has to obey certain orders given by another does not make him the servant of that other. It is not enough that the servant should be under the limited control of that other person. The complete control of him must be handed over so as to make him the servant of the other. The decision in *Quarman* v. *Burnett*, 6 M. & W. 499, is in point, and the decision in *Rourke* v. *White Moss Colliery Co.* was based upon the fact stated in the answers to interrogatories, that the engine was at the time of the accident under the control of the contractor. Wand being the general servant of the defendant, the circumstances must, as Lord Watson said in *Johnson* v. *Lindsay*, 40 W. R. 405, at p. 408, [1891] A. C. 371, at p. 382, "be such as to show conclusively that the servant submitted himself to the control of another person than his proper master." That was not proved in this case. Wand therefore remained the servant of the defendants, and they are liable.

He also referred to *Laugher* v. *Pointer*, 5 B. & C. 547; *Jones* v. *Mayor, &c., of Liverpool*, 33 W. R. 551, 14 Q. B. D. 890.

J. Lawson Walton, Q.C., and *J. P. Rawlinson*, for the defendants, were not called upon.

Lord ESHER, M.R.—The plaintiff brought an action for personal injuries sustained by him owing to the negligence of a servant of the defendants, for whose negligence at that time the plaintiff alleged that the defendants were responsible. It appears that Jones & Co. were engaged in loading a barge at their wharf. The defendants hired out to Jones & Co. a crane and a man in charge of it for the purpose of assisting in loading the barge. What is the ordinary way of using a crane on a quay for the purpose of loading a barge? It is well known that the goods which have to be loaded are placed in the crane, and the arm of the crane is then swung round so as to bring the goods over the barge, and those who are engaged in the loading have to give orders as to what part of the barge the goods are to be lowered on to. They direct the man working the crane where the goods are to go. How far the arm of the crane is to be swung depends upon the part of the vessel where the goods are to go. Every motion of the crane must be under the control of those who are loading the ship. Accordingly, when a crane is lent to persons who are loading a ship to be used for that purpose, every motion of the crane—the moment of raising the goods from the quay, the moment of lowering them on to the barge, the part of the barge on to which the goods are to be lowered, the moment when the act of lowering them is to be stopped—must be in accordance with the orders of those who are loading the barge. These are undisputed facts. In the present case the defendants hired out the crane and a man to work it to Jones & Co. to be used in the way I have described. The man was no doubt the servant of the defendants for some purposes. I should think that if he had by his neglect allowed the crane to get out of order for doing its work, and injury was thereby caused to someone, the defendants would be liable. But this accident did not happen from anything of the sort. It happened through the crane being negligently worked. The man was bound to work the crane under the control and orders of Jones & Co. That being so, whose servant was he as regards the working of the crane. It is true that the defendants selected him, and that they paid him his wages. Those are circumstances which, if nothing else intervened, would be strong to show that the man was the servant of the defendants. But as regards the working of the crane, at this particular time he was no longer the servant of the defendants. The operation of loading was conducted solely by Jones & Co., and I have no doubt that if they saw him disobeying their orders or otherwise misconducting himself they could have discharged him from that employment. Was he, then, Jones & Co.'s servant for the purpose of that employment?

If any authority were required for an answer to that question it is to be found in *Rourke* v. *White Moss Colliery Co.* The question there was, in whose service was Lawrence? He was the general servant of the defendants; but it was held that in respect of the particular employment in which he was negligent he was not the servant of the defendants. Cockburn, C.J., said: "It appears to me that the defendants put the engine and this man Lawrence at Whittle's disposal just as much as if they had lent both to him. But when one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him." Can anything be clearer than that? The man there was the general servant of the defendants, but he was lent by them to Whittle, and it was held that he was the servant of Whittle for that employment, and not the servant of his general masters, because Whittle had control of the operations in which he was employed, and his general masters had not.

The passage which has been read from the opinion of Lord Watson in *Johnson* v. *Lindsay* seems to me to be exactly to the same effect. He says: "I do not think it necessary to discuss the question under what circumstances the servant of one man ought to be considered the servant of another; I can well conceive that the general servant of A. might, by working towards a common end along with the servants of B., and submitting himself to the control and orders of B., become *pro hac vice* B.'s servant in such sense as not only to disable him from recovering from B. for injuries sustained through the fault of B.'s proper servants, but to exclude the liability of A. for injury occasioned by his fault to B.'s own workmen." That doctrine is applicable here.

I will only mention the case of *Jones* v. *Mayor, &c., of Liverpool* for the purpose of noticing that the court there thought that there was a distinction between the general master lending his servant gratuitously and lending him for a consideration. I cannot agree with that distinction. It has nothing to do with the question whose servant the man is at the time.

It was also contended that he was the servant of both. He may be the servant of both at the same time, but not with regard to the same acts of service. With regard to the act of service here—namely, the working of the crane—the man was the servant of Jones & Co. alone, and not as regards that, the servant of the defendants. He might, no doubt, have been the servant of the defendants in respect of other things, but not as regards the working of the crane.

The judgment of the learned judge is therefore right, and the appeal must be dismissed.

LINDLEY, L.J.—I am of the same opinion. *Primâ facie* the plaintiff had a colour of right in bringing this action. But upon looking at the facts it appears that the crane was used in loading a ship, that the man Wand was working the crane, and that this was done under an arrangement between the defendants and Jones & Co. The answer to the fifth interrogatory shows what that arrangement was. The key to the whole case lies in this, that the defendants were not loading the barge, and that Jones & Co. were. The crane was being used for Jones & Co.'s purposes, and not for the defendants' purposes. Jones & Co. must be regarded for that job as Wand's masters. That carries the case against the plaintiff and brings it within the decision in *Rourke* v. *White Moss Colliery Co.*, a case which was decided upon sound principles in the Court of Appeal. As to the case of *Jones* v. *Mayor, &c., of Liverpool*, that decision was right, as the only orders the defendants could give to the driver of the watering cart was as to what streets he was to water. With reference to the point which was suggested, that the defendants as well as Jones & Co. might be separately liable as the masters of the man Wand, that suggestion is answered by Littledale, J., in *Laugher* v. *Pointer*, 5 B. & C., at p. 558, where he says that the man "is the servant of one or the other, but not the servant of one and the other; the law does not recognize a several liability in two principals who are unconnected."

BOWEN, L.J.—The law seems to me to be clear. The liability of a master is based, not upon the ground that he ordered the act complained of, but upon the ground of his liability for what his servant does in the course of his employment. We have here only to consider whether, when the accident happened to the plaintiff, the defendants were Wand's masters, not in the sense of being his general masters, but in the sense of having the right at the time to control the act. That has been the test laid down for a great number of years, and nowhere better than by Crompton, J., in *Sadler* v. *Henlock*, 3 W. R., at p. 182, 4 E. & B., at p. 578, where he said: "The test here is whether the defendant retained the power of controlling the work." There are two ways in which a person may contract as regards the carrying out of works. The contractor may contract to do the work, the mode of controlling the means and the end being left to him. In that case the men are, without doubt, his servants. But a contractor may contract in a different manner. He may lend his servants for the purpose of carrying out the end to be accomplished. For the reasons given by the Master of the Rolls it seems clear to me that the defendants, who were called in to assist, placed their crane and man under the control of Jones & Co., and did not, in Crompton, J.'s language, retain the power of controlling the work.

The judgment in *Rourke* v. *White Moss Colliery Co.* seems to me to be perfectly right, and the language which has been read to us from the opinion of Lord Watson in *Johnson* v. *Lindsay* follows the same line. The carriage cases do not seem to me to touch the present case. If a person hires a carriage, the end to be attained is prescribed by the person who hires it. The livery-stable keeper undertakes to carry out that end, but he in no way places his carriage and servant under the control of the hirer, except that the servant is bound to drive where ordered. The control as to the mode of driving to the place indicated is left to the livery-stable keeper's servant. If the coachman acts in a wrong manner the hirer can complain to the coachman's master. If, however, the hirer were to interfere with the driving, and an injury was caused to someone thereby, he would be liable, not as master, but because he interfered and authorized the act. In the present case the defendants were the general masters of Wand, but under an agreement with Jones & Co. they parted with the control over him for that particular work, and the relation of master and servant lasted only as long as they retained the power of controlling him, and when they parted with that control over him the relation ceased for the time. I agree also with what has been said as to there being no difference between lending a servant for reward and lending him gratuitously.

Appeal dismissed.

Solicitor for the plaintiff, *R. H. Ward.*

Solicitor for the defendants, *H. F. Kite.*

From Chan. Div. (Lindley, Bowen, and A. L. Smith, L.JJ.) — Nov. 12, 14.

In re NEW ZEALAND TRUST AND LOAN CO. (*a*.)

Trustee—Vesting order—Stock—Trustee Act, 1850 (13 & 14 *Vict. c.* 60), *ss.* 2, 35—*Trustee Extension Act*, 1852 (15 & 16 *Vict. c.* 55), *s.* 6.

In an order made under section 35 *of the Trustee Act*, 1850, *and section* 6 *of the Trustee Extension Act*, 1852, *vesting the "right to call for a transfer of and to transfer" stock, in new trustees, it is not obligatory to insert the name of any transferee in the order, nor is there any general rule that the words "to any purchaser or purchasers" should be added; the insertion or omission of these words is a matter of discretion for the judge who makes the order.*

In re Peacock, 14 *Ch. D.* 212, *explained.*

The word "stock," as defined in section 2 *of the Trustee Act*, 1850, *comprises shares not fully paid up in any company or society.*

Appeal from Chitty, J.

By a vesting order dated the 8th of March, 1892, made by Chitty, J., in the administration suit of *In re Alcock*, it was ordered, "(1) That Charles Alcock be appointed a new trustee of the estate of Elizabeth Alcock (deceased) in substitution for Arthur Alcock, and jointly with the defendant John F. Alcock. (2) That the right to call for a transfer of, and to transfer, the sums of stock and shares specified in the schedule hereto" (to which the testatrix was beneficially entitled at the time of her decease) "to any purchaser or purchasers, and to receive the dividends accrued and to accrue thereon, do vest in John F. Alcock and Charles Alcock as trustees of the will of Elizabeth Alcock." This vesting order had been served on the New Zealand Trust, &c., Co. Among the stocks and shares specified in the schedule to this order were 491 shares in the New Zealand Trust and Loan Co. These shares, which were of £25 each (on which £5 each only had been paid up), had, in July, 1891, been transferred by Arthur Alcock and John F. Alcock, the two executors and trustees of the testatrix Elizabeth Alcock, into the sole name of Arthur Alcock, who was accordingly, in August, 1891, registered as holder of the shares, and a new certificate for the whole of the shares was issued to Arthur Alcock by the company. In November, 1891, Arthur Alcock absconded, and in January, 1892, a receiving order in bankruptcy was made against him. On the 28th of May, 1892, John F. Alcock and Charles Alcock, the then trustees of the will, sold one of the above-mentioned 491 shares to

(*a*.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

S. R. Earle, and sent the deed of transfer to the company for registration. The company refused to register it, on the ground that the transferors, John F. Alcock and Charles Alcock, were not the registered holders of any of the 491 shares, which were still standing in the sole name of Arthur Alcock, the absconding trustee; and the company insisted that the transferors should first have the shares transferred into their own names before they could require the company to register the transfer to Earle.

The trustees and Earle thereupon applied by way of motion, under section 35 of the Companies Act, 1862, for rectification of the register, by removing the name of Arthur Alcock as the holder of the one share sold, and inserting therein the name of Earle.

On the 2nd of July, 1892, Chitty, J., made an order for rectification of the register in the terms of the applicants' motion.

The company appealed.

Latham, Q.C., and *Howard Wright*, for the appellants.—The vesting order of the 8th of March is not in the usual or proper form. Section 35 of the Trustee Act, 1850 (13 & 14 Vict. c. 60), enacts that it shall be lawful for the court, upon making any order for appointing a new trustee, "to vest the right to call for a transfer of any stock" in the persons who upon the appointment shall be the trustees. This gives the trustees so appointed power to call for a transfer of the stock to themselves only: *In re Smyth*, 4 De G. & Sm. 499. Section 6 of the Trustee Extension Act, 1852 (15 & 16 Vict. c. 55), was not intended to enlarge the jurisdiction; it only gives trustees having the legal right to call for a transfer, the legal right to transfer, *i.e.*, to themselves. The common form of vesting order under these sections contains the words "and let" [the new trustee or trustees] "transfer the said [stock] into his or their own name or names": Seton, 5th ed., vol. 2, p. 1073. This vesting order, however, not only does not contain those usual words, but does contain the words "transfer to any purchaser or purchasers," which ought not to be inserted. [BOWEN, L.J.—How did those words get into the order?] On the supposed authority of *In re Peacock*, 14 Ch. D. 212, but the order there was an exceptional order. [*Farwell, Q.C.*—I do not object to the words "to any purchaser or purchasers" being struck out.] That would not be sufficient for the company. The vesting order at most ought only to give the trustees the right to transfer to themselves, or to name the transferees in the order, as was done in *King of Hanover* v. *Bank of England*, L. R. 8 Eq. 350. The practice of the Bank of England is to have a direction for a transfer "into the names" of the trustees: *In re Glanville's Trusts*, W. N., 1878, p. 21. Further, although it was held in *In re Angelo*, 5 De G. & Sm. 278, that the word "stock" in section 35 of the Trustee Act, 1850, included "shares," it has never been decided that it applies to shares not fully paid up, and in respect of which, therefore, a liability still attaches.

Farwell, Q.C., and *George Henderson*, for the respondents.—The company really want to make the trustees go on the register. The trustees object to do that, as there is a large liability attaching to these shares. The direction as to whom the transfers were to be made was really inserted for the protection of the *cestui que trusts*. It would be dangerous to omit those words in all cases and allow the trustees to transfer to anyone at large. All the common forms of vesting orders do not contain the words used in Seton's Forms, "transfer into his or their own name or names"; in Tripp's Chancery Forms, at p. 223, those words are not used. This is not an appeal from the vesting order made by Chitty, J., on the 8th of March, but only an appeal from the order to rectify the company's register.

Latham, Q.C., in reply.—The company were not before the court when the vesting order was made. The vesting order gives the trustees the right to receive the dividends, and yet they are not liable for calls. Article 16 of the articles of association of the company provides that "the company may decline to register any transfer of shares made by a member who is indebted to them, and may, without assigning any reason therefor, decline to register any transfer of shares not being fully paid up." The vesting order should, therefore, with respect to the right to transfer, contain the words "subject to the articles of the company."

LINDLEY, L.J. [after stating the facts, and reading the order of Chitty, J., of the 8th of March, 1892, proceeded:—].—Having got that order, John F. Alcock and Charles Alcock transferred one of the shares to Earle, whose name is the only one now before us; and the transferors have called on the company to register Earle as the holder of this share. The company, however, decline to do so, on the ground that the order is embarrassing; and if accepted in this form it would, they say, be embarrassing to them hereafter; and they rely upon article 16 of their articles of association as justifying them in refusing to register any transfer of shares not fully paid up.

That gives rise to the question whether there is any reasonable ground of objection, in the company's point of view, to this order.

Mr. Latham has raised several objections. He said, first, that section 35 of the Trustee Act, 1850, does not apply to shares not fully paid up. I was somewhat startled by that. I have known orders made under the Act with regard to shares not fully paid up for the last thirty years. I cannot help thinking, however, looking at section 2, that the language is ample enough to comprise shares not fully paid up. In *In re Angelo* it was held that the definition of the word "stock" in section 2 applied to "shares" in a joint-stock company; but I do not know that the point now taken by the appellants has arisen before for decision with regard to shares not fully paid up. I should say that the practice of making orders under the Act extending to shares not fully paid up is well founded; and in my opinion that objection is untenable.

Another objection was that the name of the proposed transferee ought to appear in the order, and that an order vesting in certain persons the right to call for a transfer ought not to leave out the name of the proposed transferee. The company say they would like the name of the transferee or transferees submitted to them in every case before the order is drawn up. The Trustee Acts, 1850 and 1852, have been in operation for years; orders have been constantly drawn up under them, and there is nothing in them that I know of requiring that the name of a transferee should be inserted in any order. I cannot hold judicially that this order is imperfect or wrong by reason of the omission of the names of the transferees.

Then Mr. Latham says that the insertion of the words "to any purchaser or purchasers" is not warranted by the Acts, and that the words ought to come out. If that is a reasonable objection we must order, in effect, the words to be struck out. Technically we could not alter the terms of the order, because it is not under review, but we could decline to order the company to register the name of a particular transferee. With regard to the power of the court to put

those words in, it appears to me that section 31 of the Act of 1850, although it certainly does not require the court to put them in, yet authorizes them to be put in. Mr. Farwell has given a reason for that, viz., the protection of the *cestui que trusts*. Chitty, J., it seems, put the words in because he felt himself bound by the form of order made in *In re Peacock*, but I cannot myself hold that case to be an authority for the proposition that these words must be put into the order whenever it is desired to transfer the shares to persons other than the trustees themselves, the trustees being the persons in whom the right to call for a transfer is vested. I should have thought it would be better to leave them out in the absence of any special reason for putting them in. But I do not think that the insertion of these words in the order was beyond the discretion of the judge. The company, however, suggest this: "We may be embarrassed, the name of the wrong person may be put into the transfer or there may be some fraud of that kind; the transferors may make a transfer first to A. and then to B., and we may be put upon inquiry who is the purchaser." That is purely a speculative suggestion, and I doubt whether the company would be embarrassed even if that happened; but this is an application by Earle, the transferee, himself. Although the words "to any purchaser or purchasers" may possibly be in common form, it might be better as a general rule to leave them out; but the court has, in my opinion, power to put in the words, and in a reasonable case may put them in.

Mr. Latham says that the transferors should be put under some undertaking to find a transferee acceptable to the directors, and that such undertaking should be put into the order. Of course we cannot put that in. Then Mr. Latham says that we should put into the order an expression that the right to transfer should be "subject to the articles of the company." I do not see why the court should put that in or alter the form of words which has been in use for so many years. Mr. Latham is right in saying that the order does not affect the rights of the company under the memorandum and articles; but it is not necessary to express that in the order. I do not see why we should put in words that are not wanted.

The result is that all the objections fail, and that the appeal must be dismissed with costs.

BOWEN, L.J.—I am of the same opinion.

A. L. SMITH, L.J.—I have nothing to add.

Solicitors, *Freshfields & Williams; Wilson & Son.*

High Court of Justice.

Chan. Div. } Chitty, J. } Feb. 17, 18, 24; March 2.

ATTORNEY-GENERAL *v.* CORPORATION OF MANCHESTER. (*a.*)

Injunction—Nuisance—Smallpox hospital—Quia timet *action.*

An injunction will not be granted in a quia timet *action unless the plaintiff makes out a strong case of probability that the apprehended mischief will in fact arise.*

The site of a proposed smallpox hospital was 200, 240, *and* 450 *yards respectively from the three adjacent public roads, ninety yards from a much-frequented cemetery, and* 256 *yards from the nearest house, there being only fifteen houses within a half-mile radius. The medical evidence being conflicting,*

Held, that, in the absence of strong medical evidence that the proposed hospital would be a nuisance, no injunction could be granted.

Quære, *whether, in the case of a hospital, the health of the public at large may not be considered, to some extent, as against the merely local inconvenience.*

Motion.

Motion by the Attorney-General at the relation of the Withington Local Board and others for an injunction to restrain the defendants from erecting a smallpox hospital on a piece of land, portion of the cemetery belonging to them at Withington, on the ground that such hospital would be a public nuisance.

A previous action against the same defendants, based on the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 112, 131, 285, has already been reported: *Withington Local Board* v. *Corporation of Manchester*, *ante*, p. 306; and an action on the ground of private nuisance: *Crofton* v. *Corporation of Manchester*, 37 SOLICITORS' JOURNAL, 211.

The evidence showed that the epidemic was raging at Manchester, that there was no available site within the city, and that the defendants had no means of acquiring any other site within or without the city within any reasonable time sufficient to enable them to cope with the urgency of the case. In the conduct of the hospital when opened the defendants intended to employ the best methods and appliances known to modern science for preventing the spread of the disease and for the safety of the public health. The hospital would be 200, 240, and 450 yards respectively from the three roads bounding the site selected, and ninety yards from the remaining boundary—viz., the Dissenters' burial-ground, which was much used. The whole cemetery was also much frequented by visitors from the surrounding districts.

The registrar's office was 413 yards off, and the nearest mortuary chapel 180 yards. The district round was sparsely inhabited. There were only fifteen houses within a half-mile radius, the nearest, a cottage, being 256 yards away.

The medical evidence as to the danger of infection was conflicting, but there was no cross-examination on the affidavits. The reports to the Local Government Board in the Fulham Smallpox Case (1885-1886) and on the Epidemic of Smallpox at Sheffield (1887-1888), with the spot maps and curves which may be called "isolemal lines" or "lines of equal infection," were referred to to show how the infection spreads from a given source.

Sir Horace Davey, Q.C., Farwell, Q.C., and *Clare*, for the Attorney-General.—It is *primâ facie* an indictable nuisance to bring smallpox patients along a highway: *Rex* v. *Vantandillo*, 4 M. & S. 73; *Rex* v. *Burnett*, *ib.*, 272. A smallpox hospital is *primâ facie* a nuisance: *Metropolitan Asylum District* v. *Hill*, 29 W. R. 617, 6 App. Cas. 193. Defendant's evidence shows that in the absence of proper precautions the hospital is a source of danger for some undefined distance somewhere about 200 yards round it. It lies on them, and not on us, to show what this distance is, and also to show their proposed precautions are sufficient to prevent the nuisance. They have not discharged this burden, and we are entitled to have matters kept *in statu quo* till the trial.

Sir Richard Webster, Q.C., Byrne, Q.C., and *Macmorran*, for the corporation.—We do not admit that the hospital is a source of danger. The *onus* of proof is on the applicants: *Fleet* v. *Metropolitan Asylums*

(*a.*) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

Board, 1 Times L. R. 80, 2 *Ib.* 361. The balance of convenience is clearly on our side: *Baines* v. *Baker*, Amb. 158 (s. c. Anon. 3 Atk. 750).

Sir Horace Davey, Q.C., replied.

CHITTY, J.—This is the third motion which has been made against the corporation of Manchester in respect of the hospital they propose to open in the district of the Withington Local Board for the reception of smallpox patients. The present action is brought by the Attorney-General, not *ex officio*, but at the instance of relators, and also by private persons as plaintiffs; but the case of the private plaintiffs was not argued at the bar. The foundation of the motion is an apprehended public nuisance, the nuisance being not an actual or existing nuisance, but a future nuisance, which, it is alleged, will arise if the hospital is opened. The action, then, is what is technically known as a *quia timet* action. The question as to the principle on which the court proceeds in granting or refusing an injunction in such actions has been the subject of numerous decisions, among which are *Crowder* v. *Tinkler*, 19 Ves. 617; *Ripon* v. *Hobart*, 3 My. & K. 176; *Haines* v. *Taylor*, 2 Ph. 209; *Hepburn* v. *Lordan*, 13 W. R. 368, 1004, 2 H. & M. 345; *Attorney-General* v. *Kingston*, 13 W. R. 888; *Salvin* v. *The North Brancepeth Coal Co.*, 22 W. R. 904, L. R. 9 Ch. App. 705; *Fletcher* v. *Bealey*, 33 W. R. 745, 28 Ch. D. 688. The principle appears to be the same whether the alleged future nuisance is public or private. In one of the cases to which I have referred the alleged nuisance was a public nuisance; in others a private nuisance. In some, acts had been done which, it was alleged, would result in future mischief or injury, but which had not already resulted in injury or substantial damage; in others, there was mere threat or intention. But in regard to all such cases the principle is the same. Where it is certain that the injury will arise the court will at once interfere by injunction; as, for instance, in the case of a threat to cut a permanent ditch across a public highway. But the court does not require absolute certainty before it intervenes; something less will suffice: see Lord Brougham's judgment in *Ripon* v. *Hobart*. In *Crowder* v. *Tinkler* (the gunpowder case) Lord Eldon, who granted the injunction, spoke of "extreme probability of irreparable injury": 19 Ves., at p. 622. In *Attorney-General* v. *Kingston* Wood, V.C., who refused the injunction, considered the question to be whether there was evidence of an actual nuisance committed, or "evidence of the extreme probability of a nuisance if that which was being done was allowed to continue." In *Fleet* v. *Metropolitan Asylum Board* (the Darenth Hospital Camp case), 1 Times L. R. 80, 2 *Ib.* 361, where the hospital was in actual operation, the court refused the injunction, Cotton, L.J., in his judgment laying it down that "the plaintiffs must make out that there was real danger, otherwise, however much they might feel the hospital to be an annoyance, they could not get an injunction."

The principle which I think may be properly and safely extracted from the *quia timet* authorities is that the plaintiff must show a strong case of probability that the apprehended mischief will, in fact, arise. Before stating the facts I will make a few observations in regard to public nuisance at common law. The plaintiffs' case is that the defendants are proposing to do acts which, if done, will constitute a common or public nuisance, and as such will constitute an indictable offence. A great variety of instances of the different kinds of public nuisances will be found collected in 1 Russell on Crimes, 5th ed., p. 418, *et. seq.*, and in Stephen's Criminal Digest, 3rd ed., p. 126, including *Rex* v. *Vantandillo* and *Rex* v. *Burnett*, both smallpox cases, and cited at the bar in argument before me. These two cases show that, although no actual mischief had arisen from the acts done, there may be an indictable offence if there is danger to the public health. In *The Queen* v. *Lister*—the naphtha case—5 W. R. 626, Dears & B. C. C. 209, the keeping of large quantities of a highly inflammable fluid near a highway to the danger of the public was held to be an indictable offence, though no fire had taken place. In the *Darenth case* Sir E. Fry appears to have adopted, as applicable in such cases, Cockburn, C.J.'s statement of the law, that it must be shown that there is "a well-founded and reasonable apprehension of danger." The apprehended future danger in the present case is danger to the public health. Now, undoubtedly, there are many cases of public nuisance — by interference with an unquestionable right of the public, such, for instance, as the permanent obstruction of a highway, where the court did decline at once to permit evidence to be given of any supposed public benefit arising from the wrongful act complained of, and would refuse to balance the good alleged to accrue to some portions of the public against the mischief to the public in general. But in the case where the health of the Queen's subjects in general is concerned it may possibly be a question whether, if the evidence shows that the maintenance of a smallpox hospital is on the whole, balancing the good against the evil, more beneficial to the health of the public at large, or to that portion of the public that inhabits or frequents the neighbourhood, than the leaving of the persons suffering from the disease scattered in their own homes, some weight might not be properly allowed to this circumstance. If Lord Hardwicke is rightly reported in the case of Coldbath-fields Smallpox Hospital—*Baines* v. *Baker* — he appears to have entertained some such question when he stated his opinion that the hospital was "a charity like to prove of great advantage to mankind." But, although I throw out these observations as being possibly worthy of future consideration, I state expressly that they do not form any ground of my decision on this motion.

I now proceed to deal shortly with the facts. [His lordship stated the facts, and continued:—] About the foregoing facts there is no substantial controversy. The contest begins with the evidence of the medical experts. Each side produces witnesses of high repute, competent from experience and study to speak on the subject of smallpox hospitals. The plaintiffs' evidence includes elaborate reports to the Local Government Board, such as the report of 1887-88 on the Sheffield case, and the report 1885-86. No imputation is made on the good faith of the expert witnesses. There is an honest difference of opinion, and each side maintains vigorously the opinion expressed in the affidavits. But this evidence has not been submitted to the test of cross-examination. The plaintiffs' counsel have not relied on the theory of aerial dissemination of the disease; that theory is not yet established. From the affidavits the plaintiffs' counsel extracted the proposition, which they urged, that a smallpox hospital is a centre from which the disease, somehow or other (it was not for them to say how), spreads to an extent dangerous to public health for the distance of a half-mile radius. It was necessarily admitted that the burden of proof lay on the plaintiffs, but at one time it seemed as if the argument were being put as dividing the evidence into two parts, and as contending that the plaintiffs had made out a *primâ facie* case which shifted on to the defendants a burden they had failed to discharge. But the argument was not so put in the reply, the contention being that there was to be found running through the evidence of the defendants an admission,

express or implied, that it was not safe to leave an intervening clear space of less than 200 yards. I am unable to find any such admission; the substance of the defendants' evidence is that this hospital, situate and carried on as it will be, will not give rise to any appreciable danger to public health.

Much reliance was placed by the plaintiff's counsel on the Sheffield case in 1887. But the Sheffield case presents essentially different conditions from those in the present case. The hospital was placed on the verge of a poor and densely-populated district; there were grave faults in the administration of the hospital, both within and without, and there was a recklessness displayed by the population which seems almost incredible. I confess that I have not been much impressed by the spot maps that accompany and illustrate the report. I question whether they support the inference sought to be established, and whether they are in accordance, as it was said they were, with the strict principles of inductive logic. Each case depends on its own facts; other cases may afford assistance to the experts, but they are not guides which the court is bound to follow. So far as concerns any former case, whether decided in a court of justice or not, the Fulham and Darenth cases appear to be more apposite to the present than the Sheffield case. In the latter, the camp hospital contained 1,000 patients, and the clear space left round it was only fifty yards; yet it was held that the plaintiff had not made out real danger; and this decision was arrived at on the trial, and after the witnesses had been cross-examined. The plaintiffs' counsel resorted to the argument of convenience and inconvenience and the propriety of maintaining the existing *status quo*, urging that, if the injunction was refused, irreparable damage might fall on the inhabitants of Withington, whereas if it were granted but little or no harm would be sustained by Manchester. But this argument cannot prevail; the granting of an injunction might result in penning back this scourge on the citizens and thus inflict on them irreparable injury. In my opinion, however, the evidence in favour of the plaintiffs' case is not sufficiently cogent to make the question of granting or refusing the injunction turn on the consideration of convenience or inconvenience. I have purposely refrained from dealing with the medical testimony in detail. It is seldom advisable in a case of this sort to submit conflicting evidence to any critical examination on a motion. The conclusion at which I have arrived is that the plaintiffs have failed on this motion to make out that there is a probability, much less that there is a high degree of probability, that the apprehended danger will in fact ensue. In parting with the case I think it right to say that the court ought to exercise great caution before it accepts any general proposition of fact which might tend to the closing of many a well-ordered smallpox hospital in the country. The necessity for caution is all the greater because the doctrine of coming to a nuisance was long since been excluded. See, for instance, *Tipping* v. *St. Helen's Smelting Co.*, L. R. 1 Ch. App. 66, 14 W. R. Ch. Dig. 76. I, for the reasons given, refuse the injunction. Costs will be costs in the action.

Injunction refused.

Solicitors, *Chesters*, for *Craven & Crofton*, Manchester; *Austin & Austin*, for *W. H. Talbot*, Town Clerk, Manchester.

Chan. Div.
North, J. } Nov. 26, 27.

In re GOVERNORS OF THE CHARITY FOR THE RELIEF OF THE POOR WIDOWS AND CHILDREN OF CLERGYMEN AND SKINNER. (*a.*)

Charitable corporation—Donation of land—Sale of land—Endowment—Consent of Charity Commissioners—Charitable Trusts Act, 1853, *ss.* 24, 62, 66—*Charitable Trusts Amendment Act*, 1855, *ss.* 29, 48.

Land conveyed to a charitable corporation by a voluntary settlement was afterwards sold by the corporation to a purchaser who took exception to such sale as ultrà vires *without the consent of the Charity Commissioners.*

Held, that this land, not being subject to any specific trust, did not require the consent of the Charity Commissioners for its sale.

This was a summons under the Vendor and Purchaser Act to determine whether the corporation in question could sell land belonging to them without the consent of the Charity Commissioners. The charter of the corporation was granted in 1678 by King Charles II., and by its provisions the corporation were authorized to purchase and hold land not exceeding the yearly value of £2,000 and also to sell their land. Further licences extending the value of the land which they might hold had subsequently been granted to the corporation. The land about which the dispute had arisen, which is situate at Upper Whiston in the county of Yorkshire, had in the year 1717 (subject to some long since expired life interests) been granted to the use of the corporation and their successors for ever (the terms of which conveyance, so far as relates to the present case, appear set out in the judgment). The corporation in May, 1892, entered into arrangements with a certain Mr. Skinner for the sale of the land to him. In his requisitions on title this gentleman raised the objection that the land could not be sold without the consent of the Charity Commissioners. The Act of 1853 (16 & 17 Vict. c. 137) provides by section 27, upon the application to the said board by the trustees or persons acting in the administration of any charity, representing to the said board that under the special circumstances of any land belonging to the charity a sale or exchange of such land can be effected on such terms as to increase the income of the charity or would otherwise be advantageous to the charity such board may, if they think fit, inquire into such circumstances, and if after inquiry they are satisfied that the proposed sale or exchange will be advantageous to the charity may authorize the sale or exchange and give such directions in relation thereto and for securing the due investment of the money arising from any such sale or by way of equality of exchange for the benefit of the charity as they may think fit. Section 62 expressly exempts from the Act various corporations and institutions, such as the universities, the Commissioners of Queen Anne's Bounty, and the British Museum, and any institution, establishment, or society for religious or other charitable purposes, or to the auxiliary or branch associations connected therewith, wholly maintained by voluntary contributions, and where any charity is maintained partly by voluntary subscriptions and partly from income arising from any endowment the powers and provisions of this Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions and the application thereof; and no donation or bequest unto or on trust for any such charity as last

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

aforesaid of which no special application or appropriation shall be directed or declared by the donor or testator, and which may be legally applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said board, or the powers or provisions of this Act, and no portion of any such donation or bequest as last aforesaid or of any voluntary subscription which is now or shall or may from time to time be set apart or appropriated and invested by the governing or managing body of the charity for the purpose of being held and applied or expended for or to some defined and specific object or purpose connected with any such charity in pursuance of any rule or resolution made or adopted by the governing or managing body of any such charity, or of any donation or bequest in aid of any fund so set apart or appropriated for any such object or purpose as aforesaid, shall be subject to the jurisdiction or control of the said board or the powers or provisions of this Act. Section 66 defines endowment and land as follows: "In the construction, of this Act except where the context or other provisions of this Act may require a different construction, the expression endowment shall mean and include all lands and real estate whatsoever of any tenure, and any charge thereon or interest therein, and all stocks, funds, moneys, securities, investments, and personal estate whatsoever which shall for the time being belong to or be held in trust for any charity, or for all or any of the objects or purposes thereof; and the expression land shall extend to and include manors, messuages, buildings, tenements, and hereditaments, corporeal and incorporeal, of every tenure and description.

The Charitable Trusts Act, 1855 (18 & 19 Vict. c. 124), provides:—

Section 1.—The Charitable Trusts Act, 1853, hereinafter called the principal Act, and this Act shall be construed together as one Act, and any provisions of the principal Act inconsistent with this Act are hereby repealed.

Section 29.—It shall not be lawful for the trustees or persons acting in the administration of any charity to make or grant, otherwise than with the express authority of Parliament under any Act hereafter passed, or which may hereafter be passed, or of a court or judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the board, any sale, mortgage, or charge of the charity estate, or any lease thereof in reversion, after more than three years of any existing term, or for any term of life, or in consideration, wholly or in part, of any fine, or for any term of years exceeding twenty-one years.

Section 48.—In the construction of the principal Act and this Act the word charity shall include every institution in England or Wales endowed for charitable purposes, but shall not include any charity or institution expressly exempted from the operation of the Act of 1853, and words applying to any person or individual shall apply also to a corporation, whether sole or aggregate.

S. Strickland, for the purchaser.—Section 62 obliges us to distinguish between a voluntary contribution and an endowment. The ground we take up is that this was an endowment, and that this charity is maintained by an income arising from endowment. In *Governors of the Charity for the Relief of the Poor Widows and Children of Clergymen* v. *Sutton*, 8 W. R. 167, 27 Beav. 651, the then Master of the Rolls, Lord Romilly, explains the meaning of endowment, and states that the word endowment in section 62 has reference to an endowment made for some particular purpose or trust; but it was a mere *obiter dictum*. [He referred to the *Royal Society of London to Thomson*, 29 W. R. 838, 17 Ch. D. 407, and *Finnis to Forbes*, 32 W. R. 55, 24 Ch. D. 391.] Our position is, land must be an endowment. When land is given it is not intended that it shall be applicable as income. As to section 62, the word donation cannot refer to land. It is to be noted that it is used in connection with the word bequest. If the interpretation given by Lord Romilly be accepted, this Act, which was undoubtedly passed to limit the powers of trustees in dealing with charitable funds, will be cut down to very narrow dimensions, and can only apply to specific trusts.

Cozens-Hardy, Q.C., and *Dibdin*, for the corporation.—This land was given to the corporation for the general purposes of the corporation, and there is no question that, prior to the Charitable Trusts Acts, the corporation might have sold the land. We are within the exception in section 62 of the Act of 1855, for otherwise the anomalous result will follow that a gift of, say £10, would not be an endowment within the Act, but a gift of the smallest quantity of land would be. The word "donation" has been applied to gifts of land from the time of Bracton. It is not argued that the property was not given *simpliciter*, or that it was appropriated for any specific purpose. Accordingly it falls within the exception stated by the Master of the Rolls in *Governors for the Relief of Poor Widows, &c.*, v. *Sutton*.

S. Strickland replied.

NORTH, J.—In my opinion the consent of the Charity Commissioners is not necessary. The Corporation of the Sons of the Clergy, as it is generally called, was established by Royal Charter in the year 1678, with power to purchase, hire, receive, and enjoy manors, messuages, lands, tenements, rents, advowsons, liberties, franchises, &c. [His lordship read the charter.] According to the agreed statement of facts the title of the corporation to the land now in question arises under a deed dated 1717, by which, for considerations which I am told were not pecuniary, the owners of the land granted and released it to the persons named therein, their heirs and assigns, to the use of Margaret Dolby for her life, with remainder to the use of John Dolby for his life, with remainder to the use of Elizabeth Bayley for her life (she paying thereout a yearly sum of £10 for the relief of the poor charity children of a certain parish), with remainder to the only proper use and behoof of the corporation and their successors for ever. There are, I think, no other words in the conveyance of importance here.

This property remained vested in the corporation until, in March, 1892, they entered into an agreement for the sale of it to Mr. Skinner. The purchaser is satisfied with the title with one exception. He says that the corporation being a charity cannot legally sell the property without the consent of the Charity Commissioners, and he requires that their consent should be obtained. For some reasons which I do not quite know it has not been thought desirable to apply to them, or at any rate it has been thought right that the corporation should if possible be placed in a position to say that it is not necessary for them to apply to the commissioners. Whether or not they should apply is the question that I have to decide.

There can be no doubt that down to the year 18[illegible] the corporation might have sold the land as they pleased, or let it and applied the proceeds for the general purposes of the charity. Now the question is, have the Acts of 1853 and 1855 made any difference? The Act of 1853 is peculiarly framed, and there had decisions upon it which certainly facilitate my

judgment. [His lordship then read section 24 of the Act of 1853, and continued:—] Therefore there were powers given to do what the trusts of the charity did not authorize, and if the sanction of the commissioners is given it is precisely the same thing as if the express trusts of the charity had authorized it to be done. Then I come to section 62; but before reading it I think I may usefully refer to the 66th section, the interpretation clause, which contains a definition of certain language used in the Act. [His lordship read the definitions of charity, endowment, and land.] There can be no doubt that the words of the interpretation clause include under the phrase endowment all real and all personal estate—that is to say, they do not say that all real and all personal estate shall constitute an endowment; but where the word endowment is used so as to apply to it, it is to apply to all real and all personal estate. If the Act had not contained the 62nd section there is no doubt but that it would have applied to the present corporation. But this 62nd section creates very large exemptions from the Act, and in my opinion it makes no difference whether the charities which are exempted from the Act are dealt with by express exemptions from the original words, or when the words used are general words in the first instance with express exemptions to be taken out of them. It seems to me to come really to the same thing in the end. Now what are the exemptions? First of all there are the universities, the cathedrals and collegiate churches and buildings registered as places of religious worship and used for that purpose, Queen Anne's Bounty, and other named charities, and among the exemptions is also "any institution, establishment, or society for religious or other charitable purposes, or the auxiliary or branch associations connected therewith wholly maintained by voluntary contributions." These cases are entirely exempted, but then the Legislature had to deal with the cases, many of which existed at that time, where an institution for charitable purposes was maintained in part by voluntary contributions and in part by other funds.

[His lordship then read the part of the clause dealing with the subject.]

Pausing there I may observe that I have not now to deal with the case of a body maintained wholly by voluntary subscriptions. It is clear that a charitable body maintained wholly by voluntary subscriptions is entirely outside the Act, and that a body maintained partly by voluntary subscriptions and partly by income from endowment is so far as relates to the voluntary subscriptions outside the Act. That this Act is to apply only to income derived from such endowment itself says, "The provisions of the Act shall with respect to such charity extend and apply to the income from endowment only," and the word endowment includes in the terms of the interpretation clause any real and any personal estate. That being the provision, one understands the meaning of the words that follow:—"No donation or bequest unto or in trust for any such charity as last aforesaid of which no special application or appropriation shall be directed or declared by the donor or testator, and which may be legally applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said board." That is how the clause of the Act stands, and in a case in which this corporation were plaintiffs and Sutton and others defendants, Lord Romilly (27 Beav., at p. 663) says: "It is clear from the language that a donation or bequest would be an endowment, but if invested the income arising from it would be exempted from the control of the board, unless, to use the words of the Act, there was a 'special application or appropriation,' that is to say, an appropriation to some specific, as distinct from the general, purpose and object of the association. My opinion, therefore, founded on the consideration of this section, taken by itself alone, is that the word 'endowment' has reference to an endowment made for some specific or particular purpose or trust. I use the words 'specific or particular purpose or trust' advisedly, because a gift of a sum of money to the corporation *simpliciter*, or a gift in trust for the furtherance of the subjects and purposes for which the corporation was established would be various ways of accomplishing the same end—namely, making a donation to the corporation itself." Just in the same way a donation or conveyance of land would be precisely the same thing as the donation of a large sum of cash or Consols or other securities. Then, at p. 664, Lord Romilly adds: "What words would amount to and constitute a particular and specific trust so as to bring a bequest or donation within the meaning of the word 'endowment,' according to the sense in which it appears to have been used in this section, taken alone, it is not necessary for the present purpose to consider, as no such question arises. When it does the court must determine it." Then, a little further on, he says that the only way in which sections 62 and 66 can be reconciled is "to retain the interpretation I have already given to the word endowment in section 62—viz., the devotion of property to a specific and particular trust, and to give it the same meaning in section 66 (the interpretation clause), that is, to hold that the meaning of this clause is not to enact that the possession by any charity of any property of the various kinds there enumerated constitutes an endowment, but that property of all classes and character there specified may be made the subject of endowment; and therefore land, money, every species of real and personal property whatsoever, including even personal chattels, provided any such were, either by the will of the donor or otherwise, impressed with a particular and specific trust, may be made the subject of endowment in favour of the charity." In that case Lord Romilly did not decide what the meaning of a particular and specific trust is, and I do not pretend to give any precise definition of it. But I find in the very deed of 1717 by which the land was conveyed to the corporation an instance of such a trust, because after the first two life estates the property is limited "to the use of Elizabeth Bayley for her life, she paying throughout a yearly sum of £10 for the support of poor charity children of the parish of All Hallows, Lombard-street, London." That clearly is a "particular and specific trust," but when we come to the remainder, which is "to the only proper use and behoof of the corporation and their successors for ever," that clearly is not a "particular and specific trust" of any kind. It is a gift to the corporation out and out, in terms which would, if they were not a charitable corporation, enable them to apply the property for any lawful purpose just as they could apply subscriptions, but being a charitable corporation it means that they are the owners of the property in fee for the purpose of the charity which they have to administer.

It has been suggested that this land could not be applied as income in aid of the voluntary subscriptions. I do not see the force of that observation. Personal estate might not be so either, and by their charter this corporation have power to deal with, not only real estate but personal estate, and not only cash, but goods, chattels, and things whatsoever aforesaid, "and those goods, chattels, and things" might be things which could not without conversion in some way or sale, be applied in aid of the income by voluntary subscriptions. So far, therefore, as the Act

of 1853 goes it seems to me that this corporation is clearly exempted from the operation of that Act. Then I have to turn to the second Act of 1855, the 29th section of which says: [His lordship preceded to read the section]. No doubt, as Vice-Chancellor Bacon pointed out, if we had merely to consider the earlier Act and the 29th section of the later Act, there would be nice questions to be decided as to how far the provisions of the 29th section of the later Act had superseded or got rid of the 62nd section of the earlier Act. But there is the 48th section of the later Act. [His lordship read section 48.] Now the words in section 29 were charity estate, and section 48 says what meaning is to attach to the word charity. It is not to include a charity which is expressly exempted from the Act of 1853. In my opinion this corporation is exempted by the Act of 1853, and by virtue of section 48 of the Act of 1855, section 29 of the 1855 Act, is prevented from having any application to this case. The words in section 48, "shall not include any charity or institution exempted from the operation of the Act of 1853," in my opinion mean not merely a charity or institution wholly exempted, as relating, for instance, to voluntary contributions, but it expressly applies to any charity or institution expressly exempted in part from the operation of the Act. It applies to it in so far as the Act of 1853 exempts it from its operation.

The result is, that in my opinion the Act of 1855 make no difference. We are, therefore, thrown back on the Act of 1853, and under the Act of 1853 the consent of the Charity Commissioners is not necessary to a sale by this charity.

There will be a declaration that, the court being of opinion that the corporation can sell and convey the above-mentioned hereditaments without the consent of the Charity Commissioners, and that a good title has been shown, &c., the costs of the application must be paid by the purchaser, and there will be interest on the purchase-money in the usual way.

Solicitors, *Maudes & Tunnicliffe*, for *Marsh & Sons*, Rotherham; *Bridges, Sawtell, & Co.*

Q. B. Div.
(Lord Coleridge, C.J., and Cave, J.) — Feb. 1.

SMITH, *Appellant.*
LEGG, *Respondent.* (*a.*)

Metropolis — Building — Notice by district surveyor — Alteration after building completed — Metropolitan Building Act, 1855 (18 & 19 *Vict. c.* 122), *ss.* 45, 46, 105.

Under section 45 *of the Metropolitan Building Act,* 1855, *a district surveyor has power to give to a builder engaged in erecting a building, notice requiring alterations to be made in the work, and by section* 46 *a justice of the peace may order a builder to comply with the requisitions of the notice.*

Held, that, where the notice is not served on the builder until after the building is completed, the builder cannot be ordered to comply with the notice.

Special case stated by a metropolitan magistrate.

The appellant, who was a builder, was employed in January, 1892, by one Tappin to erect for him a structure which was a building within the meaning of the Metropolitan Building Acts. The appellant erected the building and completed it in March, 1892, and after that date ceased to perform any work upon it. The respondent was the district surveyor under the Metropolitan Building Act, 1855, for the district of West Hackney, within which the building was situate. The appellant did not give to the respondent the notice required by section 38 of that Act. The respondent did not discover that the building had been erected until April, 1892. On the 22nd of July, 1892, the respondent gave the appellant a notice under section 45 of the Act requiring him to make certain alterations in the building. The appellant, not having complied with the notice, was summoned before a metropolitan magistrate, who made an order that the appellant should comply with the notice, but on the application of the appellant the magistrate stated this case for the opinion of the court.

Section 45 of the Metropolitan Building Act, 1855, is as follows:—In the following cases, that is to say, if in erecting any building, or in doing any work to, in, or upon any building, anything is done contrary to any of the rules of this Act, or anything required by this Act is omitted to be done; or in cases where due notice has not been given—if the district surveyor on surveying or inspecting any building or work finds that the same is so far advanced that he cannot ascertain whether anything has been done contrary to the rules of this Act, or whether anything required by the rules of this Act has been omitted to be done: in every such case the district surveyor shall give to the builder engaged in erecting such building or in doing such work notice in writing requiring such builder within 48 hours from the date of such notice to cause anything done contrary to the rules of this Act to be amended, or to do anything required to be done by the rules of this Act but which has been omitted to be done, or to cause so much of any building or work as prevents such district surveyor from ascertaining whether anything has been done or omitted to be done as aforesaid to be, to a sufficient extent, cut into, laid open, or pulled down.

By section 46, on non-compliance with such order, a builder may be ordered by a justice of the peace to comply with the requisitions of the notice.

Section 105.—In case where any building has been erected or work done without due notice being given to the district surveyor, the district surveyor may at any time within one month after he has discovered that such building has been erected or work done, enter the premises for the purpose of seeing that the regulations of this Act have been complied with, and the time during which the district surveyor may take any proceeding or do anything authorized or required by this Act to be done by him in respect of such building or work shall begin to run from the date of his discovering that such building has been erected or work done.

F. Low (*Macmorran* with him), for the appellant, contended that the district surveyor had no power to give notice under section 45 in the case of a building which had been completed.

He referred to *Parsons* v. *Timewell*, 44 J. P. 296.

Daldy, for the respondent.—The case is covered by section 105 which applies to cases such as this in which no notice has been given by the builder to the district surveyor. The fact that the building was completed before the surveyor gave the notice to the builder does not affect the application of section 105.

Lord COLERIDGE, C.J.—In this case a building has been erected, and I will assume for the purpose of the argument that the building was of such a character that if notice had been given in time the builder might have been ordered to stop the work or to pull the building down. The building was completed, however, before any notice was given, and apparently

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

before the surveyor was aware of its erection or that the Act had been infringed. The surveyor thereupon gives the builder a notice under section 45 of the Metropolis Building Act, 1855, which would have been an effective notice if it had been given in time. The magistrate made an order in the terms of the notice. It is suggested that the magistrate was right in making the order on the ground that the 105th section of the Act enables a surveyor to enter a building after it has been erected and see whether the Act of Parliament has been complied with, and if it has not, to take such proceedings as the Act justifies him in taking; and the section further provides that the time for taking these proceedings shall be within a month of his discovery of the breach of the Act, apparently whenever that discovery takes place. The first observation which arises upon that section is this, that he is to take proceedings. Therefore we must ascertain what proceedings he could have taken, supposing he had been in time. That throws us back upon the 45th and 46th sections, and the proceedings authorized by those sections are proceedings against a person, either an owner or builder, while the building is in course of erection. During that time either the builder is responsible, and can be ordered to alter the work, or the owner who has employed the builder is responsible, and can interfere with his builder, and the provisions of the Act of Parliament can be complied with. But the condition precedent to the whole of that portion of the Act is that there should be a house or building in course of erection.

In this case there was no house or building in course of erection, and to hold that the 45th section applies in such a case as this would be to hold that even if the building has been completed by the builder, paid for by the owner, sold by him, and perhaps resold, the surveyor may order that the building should be pulled down without making any compensation. That is a strong proposition, but it does not exhaust the difficulty. The order requiring the building to be altered so as to comply with the Act is to be made upon the builder. The builder may have retired from business, is it to be supposed that he is to be compelled to return to business for the purpose of correcting some defect in a building which may have been erected a long time ago.? The builder may have died, what is to happen then? are his executors or administrators to be called upon to pull down a building after their testator is dead? Mr. Daldy is obliged to admit that such a case as I have put must be within the construction of this Act which he contends for, and his only answer is that such a contingency would not happen often; but if it can ever happen, it is a matter which we must take into account in construing the Act of Parliament, and we cannot take into consideration how often or how seldom a thing might happen. If Mr. Daldy's contention is correct we should be driven to suppose that Parliament deliberately intended to enact this, outrage I might almost term it, upon justice, good sense, and the laws of property. I think that it would be most unreasonable to suppose that Parliament intended anything of the kind. But there is also authority to support my view of these sections of the Act, namely, the case of *Parsons* v. *Timewell*. In that case Lush, J., said: "I think that the three sections, 45, 46, and 47, of the Metropolis Building Act, 1855, all go together, and only apply to a building in course of erection." That is distinct authority against Mr. Daldy's contention, but even without that authority we should have come to exactly the same conclusion, although that authority strengthens us in our conclusion. I am therefore of opinion that the magistrate was wrong.

CAVE, J.—I am of the same opinion. I think this is an extremely clear case. Section 45 provides that "in cases where due notice has not been given" the district surveyor shall give to the builder engaged in erecting such building notice in writing requiring him to make any necessary alterations. The notice of the surveyor is not to be given to the builder who omitted to give the notice, but to the builder engaged in erecting the building. It therefore may happen, where the original builder has been discharged, or died, or become a bankrupt, that this notice is given to a man who is not in the slightest degree responsible for the original failure to give the notice; but it is given to him because he is in the position to put matters right.

I should have thought that that enactment was quite clear, but it is suggested that section 105, which contains certain provisions as to limitations of time, enables us to put an unnatural sense, and a sense productive of very great injustice, upon the words of section 45. All that section 105 provides is that where a building has been erected or work done without due notice, the surveyor may, within any time within one month after such discovery, enter the premises to see whether the regulations have been complied with, and the time during which he may take any proceedings authorized or required by this Act to be done by him shall be taken to run from the date of his discovery that such building has been erected or work done. It only says that the time from which he shall take those proceedings shall begin to run from the time he makes the discovery. If when he makes the discovery the building is still going on, and the builder is engaged in erecting the building or doing work upon it, then section 45 comes into operation, and he may make this application accordingly against the builder who is so engaged or so employed, although, as I have said, he was not the builder who made the default in giving notice. But to say that section 105 has no application unless it can be read as against the builder who was engaged in building after he had ceased to be so engaged is nonsense. The section is a perfectly good section in many instances, without reverting to anything so unjust and monstrous as that. Suppose two or three builders have been engaged in the course of construction, owing, as I put it just now, to death or bankruptcy, which of them is the district surveyor to proceed against? Is he at liberty to make his choice and take any one of the three? Or, as my lord put it, may he go after the man who had retired, although he had nothing whatever to do with the original default? Can he compel him to return to business and engage workmen to commit a trespass upon the property of a person who may not be the person for whom the works were done, but who may be a subsequent purchaser and commit an outrageous trespass upon this man's property, and pull down the building which he has paid for, which somebody else erected, and with regard to which he has been in no default whatever, and that without any compensation at all to him? Anything more unjust it would be difficult to conceive. In my opinion the magistrate was clearly wrong in the conclusion he came to, and the appeal must be allowed.

Order quashed.

Solicitor for the appellant, *J. T. Ricketts.*

Solicitor for the respondent, *W. A. Blaxland.*

Court of Appeal.

App. Bankruptcy.
(Lord Esher, M.R., and Lindley and Lopes, L.JJ.)

March 17, 28.

Ex parte HUGHES.
In re HUGHES. (*a.*)

Bankruptcy—Act of bankruptcy—Assignment of property to trustees for creditors generally—Exception of leaseholds—Declaration of trust of leaseholds—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (a).

Section 4, *sub-section* 1 (a), *of the Bankruptcy Act*, 1883, *provides that a debtor commits an act of bankruptcy "if, in England or elsewhere, he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally."*

A debtor executed a deed by which he conveyed and assigned all his property, with the exception of his leasehold property, to trustees for the benefit of his creditors generally. The deed contained a declaration that the debtor should stand possessed of all leaseholds and leasehold interests in trust for and to convey and assure the same as the trustees should from time to time direct. The value of the leaseholds was about one-quarter of the value of the whole property of the debtor.

Held, by Lindley *and* Lopes, L.JJ. (Lord Esher, M.R., *dissenting*) (*affirming the decision of the* Divisional Court), *that the execution of the deed was an act of bankruptcy within section* 4, *sub-section* 1 (a), *of the Bankruptcy Act*, 1883.

Ex parte Foley, In re Spackman, 38 *W. R.* 368, 24 *Q. B. D.* 728, *distinguished.*

Appeal of Hughes, the debtor, from an order of a divisional court, confirming a receiving order in bankruptcy which had been made against him by the judge of the Swansea County Court.

The act of bankruptcy alleged in the petition on which the receiving order was made was that the debtor had executed a deed which was a conveyance or assignment of his property to trustees for the benefit of his creditors generally within the meaning of section 4, sub-section 1 (*a*), of the Bankruptcy Act, 1883. By the deed in question, after reciting that the debtor was jointly and truly indebted to the persons and firms therein mentioned, who were creditors of the debtor, in the several sums of money set opposite their names in the schedule, and that the debtor had proposed and agreed to convey and assign all and singular his property and effects, unto the trustees upon the trusts specified, the debtor conveyed all his freehold and copyhold, but not leasehold, lands and hereditaments, and assigned all his stock-in-trade, goods, and chattels to trustees upon trusts for the benefit of the creditors. With regard to the leasehold property of the debtor the deed contained the following provision:—

"Provided always, and it is hereby declared, that the debtor shall stand possessed of all leaseholds and leasehold interests in trust for and to convey and assure the same as the trustees shall, from time to time direct." The value of the whole of the debtor's property was £3,625, that of the leaseholds alone being £925.

The Divisional Court (Vaughan Williams and Henn Collins, JJ.) were of opinion that the execution of the deed amounted to an act of bankruptcy, and upheld the decision of the county court judge.

Cooper Willis, Q.C., and *F. Cooper Willis*, for the appellant.—The execution of this deed by the debtor did not amount to an act of bankruptcy. In *Ex parte Foley, In re Spackman*, 38 W. R. 368, 24 Q. B. D. 728, it was held that, in order to constitute an act of bankruptcy under section 4, sub-section 1 (*a*), of the Bankruptcy Act, 1883, there must be a conveyance or assignment, in the ordinary sense, of substantially the whole of the debtor's property. In the present case the value of the whole property is £3,625, the value of the leasehold property, which is excluded from the assignment, being £925. The assignment, therefore, is not of substantially the whole property. Further it was laid down in *Ex parte Foley, In re Spackman*, that a declaration of trust is not an assignment within the section.

Ex parte Bourne, 16 Ves. 145; *Ex parte Luckis, In re Wood*, 20 W. R. 403, L. R. 7 Ch. App. 302, were also referred to.

Herbert Reed, Q.C., and *Cluer*, for the respondent.—Although this deed may not, technically speaking, be an assignment as regards the leaseholds, still it is clear from the recital in the deed that the intention of the debtor was to divest himself of all his property so far as it was in his power to do so, and the deed carries out that intention. The debtor has conveyed and assigned all his property that was capable of being conveyed or assigned, and with regard to the remainder, the leaseholds, he has so dealt with them that the property in them is no longer left in him.

They referred to *Young* v. *Fletcher*, 13 W. R. 722.

Cooper Willis, Q.C., replied.

Cur. adv. vult.

March 28.—The judgment of Lord ESHER, M.R. (which was read by LINDLEY, L.J.), was as follows:—In *Ex parte Foley, In re Spackman* the court thought itself bound, in the first place, to construe section 4, sub-section 1 (*a*), of the Bankruptcy Act, 1883, and then to apply it to the facts of the case. The court first determined the rule of construction, and held that it was to be a rule of strict construction, because it dealt with an enactment casting an incapacity of managing his own affairs upon the person to be declared a bankrupt. As a result of this rule of construction the court held that the words "conveyance or assignment" of the debtor's property must be confined to such an act as in ordinary legal language would amount to an assignment or conveyance of the property dealt with, and that a contract or covenant to deal with property in a particular way, or a declaration of trust affecting property in a particular way, are not in ordinary legal language a conveyance or assignment of that property. This construction of the section was the foundation of the judgment elaborately reasoned by Fry, L.J., and clearly stated, I think, by Lopes, L.J., and myself. It was further stated, or was the necessary result of the rule of construction relied on, that the whole of the debtor's property must be dealt with by such an assignment or conveyance as was described in the judgments. I cannot retract from the rule of construction, or the consequent construction of the section, determined in that case. Applying them to the present case, it seems to me that, although a part of the property of the debtor was, within the meaning of the section, "assigned or conveyed," yet that a material, substantial part was not so assigned or conveyed, and, therefore, that the only act of bankruptcy relied upon before us to support the receiving order was not made out. It is not enough to say that the debtor dealt with the whole of his property; it is necessary to make out that he dealt with the whole of it by assigning or conveying the whole of it. I think the appeal ought to be allowed.

(*a*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

LINDLEY, L.J., read the following judgment, in which, after referring to section 4, sub-section 1 (*a*), and to the provisions of the deed, he said:—The only question is whether this deed is a "conveyance or assignment" of the debtor's property to trustees for the benefit of his creditors generally. The appellant contends that it is not, because the leaseholds are not conveyed or assigned, and he relies on *Ex parte Foley, In re Spackman* as an authority in his favour. I will first consider the question apart from that authority, and I will then examine the authority itself. The statute speaks of a conveyance or an assignment to trustees, and those words have to be applied to all kinds of property. What is their meaning when applied to property, which in practice is seldom, if ever, conveyed or assigned to trustees in the strict technical sense? Are the words to be construed as extending to and as including the various methods of dealing with such property to which conveyancers usually have recourse, although such methods are not conveyances or assignments in the proper sense of those terms? Or are the words in question to be construed strictly in their proper sense, so as to exclude their equivalents in a business point of view? I cannot think the latter can be their proper construction. In order to protect trustees from the burdens which would be imposed on them by an assignment of leaseholds, conveyancers seldom, if ever, assign leaseholds to trustees. They have recourse to a declaration of trust, instead of an assignment. The same mode of dealing with them is adopted when leaseholds cannot be assigned without the licence of the lessor, and his licence cannot readily be procured. Any conveyancer, instructed to prepare a conveyance or assignment by a debtor of all his property to trustees for the benefit of his creditors, would draw the deed in the form most appropriate to the various kinds of property to which the deed was intended to apply. A properly drawn deed for such a purpose would contain a grant of the debtor's freehold property, a covenant to surrender his copyhold property (if he had any), an assignment of his debts, stocks, funds, and securities, and a covenant or trust binding him to deal with his onerous property—*i.e.*, his leaseholds and shares liable to calls—as the trustees should direct. Such a deed in such a form would, in my opinion, clearly be in ordinary legal parlance a conveyance or assignment by the debtor of his property to trustees for the benefit of his creditors, although, if its various parts were analyzed, it would be found that the legal estate in some of the property still remained in the debtor. I cannot entertain a doubt that such a deed in such a form would answer the description of a "conveyance or assignment" within the true meaning of those words as used in section 4, sub-section 1 (*a*), of the Bankruptcy Act, 1883. Nor can I entertain a doubt that the deed executed by the debtor in this case is a conveyance or assignment within that clause of the statute.

But then it is said that *Ex parte Foley, In re Spackman* is inconsistent with this view. I cannot so regard it. In that case there was nothing whatever which, by any stretch of imagination, could be regarded as a conveyance or an assignment in any sense whatever. An attempt was made to spell out of some correspondence a trust for creditors, and the court held that, if there was enough to create such a trust, yet there was no such conveyance or assignment as was contemplated by section 4, sub-section 1 (*a*), of the Bankruptcy Act, 1883. The court was not considering the meaning of conveyance or assignment as applied to leasehold property, and although there were some observations to the effect that a mere declaration of trust is not a conveyance or assignment within the meaning of the enactment in question, I cannot think that those observations were intended to apply, or ought to be treated as applying, to a formal conveyance or assignment by a debtor of all his property, except leaseholds, to trustees for the benefit of his creditors, and a covenant or declaration of trust by which his leaseholds are to be held and disposed of for their benefit also. The decision itself was, in my opinion, quite right, but to decide that this deed is not an act of bankruptcy, and to hold that *Ex parte Foley, In re Spackman* compels the court so to decide, would, in my opinion, be quite wrong. I have purposely hitherto refrained from alluding to the law as it stood before 1869. But it is clear that the execution by the trader of such a deed as this would have been an act of bankruptcy by him before 1869. In the Bankruptcy Act of that year a section was introduced similar in terms to section 4, sub-section 1 (*a*), in the present Act, and from 1869 to the present time the execution of such a deed as the present was always regarded as an act of bankruptcy: see *Ex parte Wood*. I regard the present appeal as an experiment, made to induce the court to hold that a deed, which has been regarded as an act of bankruptcy ever since bankruptcy laws have existed, is not to be so regarded any longer. I can find no trace of any intention to alter the law to this extent. The experiment has very likely been encouraged by some of the observations in *Ex parte Foley, In re Spackman*, which was decided in 1890, but, in my opinion, the experiment ought to fail. The appeal ought, I think, to be dismissed with costs.

LOPES, L.J., read the following judgment:—This case is distinguishable fron *Ex parte Foley, In re Spackman*. There was in that case no instrument under seal, no "conveyance," no "assignment," in any sense of those words; here there is an instrument under seal, there is an "assignment." But there are observations in that case, to which I was a party, which, it is said, were unnecessary for the decision of that case, and which go too far. It is said that those observations put too strict an interpretation on the words "conveyance" and "assignment." After a very careful consideration of the matter, I have come to the conclusion that the court in that case did put too strict, too narrow an interpretation upon those words. I think they ought to be construed with reference to the particular property to be dealt with and by the light of the language and practice of conveyancers. If instructions were given to a competent conveyancer to convey and assign all the property of this debtor to a trustee for the benefit of his creditors, part of that property being leaseholds subject to onerous covenants, and subject to a provision against assignment without the licence of the landlord, he would prepare an instrument similar to the deed in the present case, which he would call an assignment. If we were to hold this document not to be an "assignment" within the meaning of section 4, sub-section 1 (*a*), of the Bankruptcy Act, 1883, we should be holding that a deed in the most effectual manner denuding, and intended to denude, the debtor of all his property was not an act of bankruptcy. This would be a reaction on the bankruptcy law, which I cannot think was contemplated by the Legisture. A conveyance of all the property of a debtor to trustees for the benefit of his creditors generally has always been held to be an act of bankruptcy within words of former Acts equivalent to sub-section 1 (*b*) of this section 4. It was said that although in so doing the debtor did not intend to defeat or delay his creditors, yet, it being the necessary consequence of his act, he must in law be taken to have intended it.

He was depriving himself of the power of carrying on his trade, and was putting his property into a course of distribution different from that which would take place under the bankruptcy law. I think it was to get rid of this somewhat forced inference that the mere conveyance or assignment of all the property of a debtor to a trustee for the benefit of his creditors generally was made an independent act of bankruptcy. I cannot think it was intended to alter the law to the extent that it would be altered if a debtor was permitted by deed to divest himself of all his property in the most effectual way, having regard to the nature of the property, and still not bring himself within the bankruptcy law. In my opinion the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Thomas Metcalfe & Sharpe*, for *Leyson*, Swansea.

Solicitors for the respondent, *Robbins, Billing, & Co.*, for *Fisher, Jesson, & Wilkins*, Ashby-de-la-Zouch.

From Q. B. Div. (Lindley, Kay, and A. L. Smith, L.JJ.) March 28.

In re PARSONS AND FURBER'S BILL OF SALE. (*a.*)

Bill of sale—Re-registration—Accidental omission to re-register—Extension of time—Bankruptcy of grantor supervening—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 11, 14.

Under section 14 *of the Bills of Sale Act*, 1878, *the court will not rectify an accidental omission to re-register a bill of sale by extending the time to re-register, as against the trustee in bankruptcy of the grantor, where the bankruptcy has intervened between the lapsing of the original registration and the application for extension of time.*

Crew *v.* Cummings, 36 *W. R.* 908, 21 *Q. B. D.* 420, *followed.*

In re Dobbin, 56 *L. J. Q. B.* 295, 35 *W. R. Dig.* 33, *not followed.*

Decision of the Queen's Bench Division (Lord Coleridge, C.J., *and* Collins, J.) *affirmed.*

Appeal from a decision of a divisional court (Lord Coleridge, C.J., and Collins, J.).

The question was whether, in the case of accidental omission by the assignee of a bill of sale to re-register it at the proper time, extension of time could be allowed, the bankruptcy of the grantor having supervened.

In 1887 a bill of sale for £1,500 was given by one Parsons, and was duly registered. The following year it was assigned for value to one Furber. By accident it was not re-registered, as it required to be, in June, 1892, by virtue of section 11 of the Bills of Sale Act, 1878.

Subsequently to June, 1892, a petition in bankruptcy was presented against Parsons; on the 8th of December a receiving order was made against him, and on the 28th he was adjudicated a bankrupt, and an order was made under section 121 of the Bankruptcy Act, 1883, for the summary administration of his estate.

On the 9th of January, 1893, application was made in chambers on behalf of the holder of the bill of sale for extension of time for re-registration, and on the 11th the judge made an order extending the time, and the usual words making the order subject to any rights which had intervened were struck out. Subsequently the judge, on his attention being called to *Crew* v. *Cummings*, 36 W. R. 908, 21 Q. B. D. 420, set aside his order of the 11th of January.

The Divisional Court affirmed the decision of the judge.

The bill of sale holder appealed.

Sir Horace Davey, Q.C., and *Willes Chitty*, for the holder of the bill of sale.—Extension of time and re-registration should be allowed. *In re Dobbin*, 56 L. J. Q. B. 295, 35 W. R. Dig. 33, applies and settles the question in our favour. If *Crew* v. *Cummings* is against us it is distinguishable from the present case. The case of an execution creditor who had seized, as there, is not the same as that of a trustee in bankruptcy who has taken no step at all, as here.

Dickens, Q.C., and *Muir Mackenzie*, for the trustee in bankruptcy, were not called upon.

LINDLEY, L.J.—By the adjudication of the bankrupt there was a divesting of his property, and a vesting of it in the official receiver. The application to extend the time for re-registration, which is required by section 11 of the Bills of Sale Act, 1878, has been made under section 1a of that Act. The language of that last-mentioned section is very wide in its terms. It says:—"Any judge of the High Court of Justice, on being satisfied that the omission to register a bill of sale or an affidavit of renewal thereof within the time prescribed by this Act . . . was accidental or due to inadvertence, may, in his discretion, order such omission . . . to be rectified . . . by extending the time for such registration on such terms and conditions (if any) . . . . as he thinks fit." There have been decisions on this section, some of which appear hopelessly conflicting. In *In re Dobbin* the court rectified an error which made the registration of a bill of sale void, though the grantor had in the meantime become bankrupt. But in *Crew* v. *Cumming* the Court of Appeal held that it would not be right, if there were a discretion, to rectify a blunder after some third party had acquired a title. On the authority of that case, by which we feel ourselves bound, and upon the present facts, I think it is too late to extend the time. The appeal must be dismissed.

KAY, L.J.—I concur.

A. L. SMITH, L.J.—And I.

Appeal dismissed.

Solicitors, *Richard Furber; Sole, Turner, & Co.*, for *W. C. Cripps*, Tunbridge Wells.

From Q. B. Div. (Lord Esher, M.R., and Bowen and A. L. Smith, L.JJ.) Feb. 2, 3.

LE LIEVRE AND DENNES *v.* GOULD. (*a.*)

Negligence — Misrepresentation — Mortgage — Build agreement— Certificate of surveyor—Liability of s veyor for misstatements without fraud on contract Action of deceit.

A builder who was engaged in erecting houses o certain land under a building agreement mortgaged interest under the agreement. The mortgagees advan the mortgage money to him upon the faith of cert

(*a.*) Reported by ARTHUR LAWRENCE, Esq., Barrister-at-Law.

(*a.*) Reported by JOHN P. MELLOR, Esq., Barrister at-Law.

certificates given by a surveyor, that certain specified stages in the buildings had been completed. The surveyor was appointed, not by the mortgagees, but by a third party, namely, the vendor under the building agreement, to whom the certificates were made out; there was no contract between him and the mortgagees, and he was unaware of the terms of the mortgage deed. The certificates contained untrue statements, the result of the negligence of the surveyor; but there was no fraud on his part.

Held, that, in the absence of fraud or a contractual relationship between him and the mortgagees, the surveyor owed no duty to them to exercise care in giving the certificates, and that an action would not lie against him at the suit of the mortgagees for negligence.

Cann *v.* Wilson, 37 *W. R.* 23, 39 *Ch. D.* 39, *overruled.*

Heaven *v.* Pender, 11 *Q. B. D.* 503, *distinguished.*

Derry *v.* Peek, 38 *W. R.* 33, 14 *App. Cas.* 337, *followed.*

Appeal by the plaintiffs from the decision of the Divisional Court refusing to set aside the judgment of the official referee.

The material facts were as follows:—

The plaintiff Miss Le Lievre was transferee of a mortgage from Dennes, the other plaintiff, of certain land at Ilfracombe and two houses which were being erected upon it by a builder named Lovering under a building agreement between himself and William Hunt, the owner of the land. The plaintiffs sought to recover from the defendant, an architect and surveyor, damages for loss which they alleged they had sustained by reason of having made payments on the faith of certain certificates given by him, which were inaccurate and untrue.

Under the building agreement dated the 23rd of August, 1889, Hunt agreed to convey the land in question, subject to a rent-charge, to Lovering upon the erection to the satisfaction of the vendor or his surveyor of two dwelling-houses upon the land by the 24th of June, 1890.

In order to enable Lovering to build the houses, Hunt agreed to procure for him a loan of £850, to be advanced in instalments as per a schedule of advances which was prepared and dated the 21st of November, 1889, and provided that the first instalment of £50 and the remaining ones of £100 each should be advanced at specified stages of the work, and the final one on the completion of the whole work.

The plaintiff Dennes agreed with Hunt to advance the sum of £850 to Lovering, and by agreement between Hunt and the defendant, Gould, it was provided that the latter should give certificates that the work had reached the stages specified in the schedule of advances, with a copy of which the defendant was then provided.

In pursuance of the arrangement between the plaintiff Dennes and Hunt, and after the agreement between Hunt and the defendant, a deed of mortgage of the land comprised in the building agreement, dated the 30th of November, 1889, was executed between the plaintiff Dennes and Lovering. By this mortgage it was provided that the mortgage money could be advanced in such instalments as the mortgagee or his surveyor should from time to time appoint, provided always that the mortgagee should not be bound to make any advance unless and until the surveyor should have certified in writing that the work had been proceeded with to the satisfaction of such surveyor and in conformity with the building agreement, so as to entitle the mortgagor to the advance certified. There were also covenants for repayment with interest, and the land was conveyed subject to redemption on repayment, together with the benefit of the building agreement.

The defendant Gould was not aware of the provisions of this mortgage deed.

An instalment of £50 was, under the mortgage deed, advanced by the plaintiff Dennes to Lovering in December, 1889, and four other instalments of £100 were advanced upon the faith of written certificates made out by the defendant to Hunt, and dated respectively January 30, March 1, April 24, and July 3, 1890, and which declared "that the sum of £100 is due to Wm. Lovering, Ilfracombe, on account of villas in Kingsley-avenue as per schedule of advances."

The plaintiff Dennes, on the 27th of October, 1890, transferred the mortgage to the plaintiff Miss Le Lievre, and she advanced the remainder of the instalments to Lovering upon the faith of similar certificates given by the defendant to Hunt as before.

The statement of claim alleged that in employing the defendant Gould, and in preparing the schedule of advances, Hunt was the agent of the plaintiff Dennes; that the certificates were untrue to the knowledge of the defendant; that even if there was no fraud on his part that he did not use due care, skill, and diligence to ascertain whether the facts certified were or were not true; and that in so giving the certificates the defendant was guilty of gross negligence, and acted in breach of the duty he owed to the plaintiffs.

The defence denied the employment of the defendant by the plaintiff Dennes, or on his behalf, or that the defendant ever undertook any duty towards the plaintiffs, and further denied the charge of fraud, and alleged that the certificates were given *bonâ fide*, and in the belief that the statements therein contained were true.

At the trial of the action, which was referred to an official referee, it was admitted that the certificates were inaccurate, and that the last certificate, to the effect that the houses were complete, was given upon an assurance of Lovering that the remaining work was to be shortly carried out by a tenant, but which was not done.

The official referee found that Hunt was not the agent of the plaintiffs to employ the defendant to give the certificates; that there was no contractual relation between the plaintiffs and the defendant; and that the defendant had not been guilty of fraud. He held that in point of law the defendant owed no duty to the plaintiffs; that the plaintiffs had no cause of action; and gave judgment for the defendant.

The Divisional Court affirmed the judgment of the official referee, and the plaintiffs appealed.

Jelf, Q.C., and *Montague Lush*, for the appellants, referred to *Heaven* v. *Pender*, 11 Q. B. D. 503; *Cann* v. *Wilson*, 37 W. R. 23, 39 Ch. D. 39; *Derry* v. *Peek*, 38 W. R. 33, 14 App. Cas. 337; *Polhill* v. *Walter*, 3 B. & Ad. 114; *Crawshay* v. *Thompson*, 4 Man. & G., at p. 382; and *Scholes* v. *Brook*, 63 L. T. N. S. 837. [BOWEN, L.J., referred to *Angus* v. *Clifford*, 39 W. R. 498, [1891] 2 Ch. 449, and *Low* v. *Bouverie*, 40 W. R. 50, [1891] 3 Ch. 82.]

The nature of the argument appears sufficiently from the judgments.

Upjohn, for the respondent, was not called upon.

Lord ESHER, M.R.—In this case it is said that the plaintiffs have proved a cause of action against the defendant Gould. It is said, in support of that, first, that there was a contract between the plaintiffs and the defendant, the terms of which were that the defendant should use reasonable care in giving certificates upon which the plaintiffs' money was paid to ascertain the truth of the facts to which he certified. There is no doubt, if there was a contract

between these parties, it was an implied term of that contract that he should use such reasonable care. Secondly, it is said that even if there was no contract between the plaintiffs and Gould, the latter is nevertheless liable in respect of having given these wrong certificates, because he owed a duty to the plaintiffs to exercise care, inasmuch as he knew that the plaintiffs might, or would, act upon them.

Now, as to the first point, it seems to me that there is no evidence of any such contract as alleged, and that in truth there was none. The contract made with the defendant was made by Hunt through Russell, who had the authority of Hunt alone, and made the contract in his name. At that time Dennes was not mortgagee, he had only talked about it, and had no legal or equitable relation to the matter at all. How, then, could he be an undisclosed principal? He was not a principal at all.

We come, therefore, to the second point: have the plaintiffs shown a right of action independent of any such contract? It is clear that the defendant did give certificates which were wrong in point of fact, and did so, carelessly and negligently no doubt. But what duty is there between two people under such circumstances, where there is no contractual relation? A man might act carelessly, if you like with gross negligence, but can the plaintiffs rely on that if there has been no fraud? As affecting the plaintiffs, negligence cannot arise at all until a duty has been established, and what duty is there between persons between whom there is no relation by contract known to the law? Then the plaintiffs seek to rely on the case of *Heaven* v. *Pender*, which established that there is a legal relationship between two persons if of so contiguous a character that if one behaves carelessly he may do the other or his property a physical injury, and that there is thus a duty to take resonable care not to impinge upon him or his property so as to cause an injury. If, for instance, a man is driving a cart on Salisbury Plain and there is no one there, he may drive as carelessly as he likes; that would not be negligence. But if he sees some one coming, a duty is at once imposed to take reasonable care not to cause injury. It is that contiguity or neighbourhood which gives rise to the obligation. Now, if the case of *Cann* v. *Wilson* stood alone, it would carry this case. But it does not; it is bad law, and the proposition upon which Chitty, J., acted in that case was a wrong one, and was overruled by the House of Lords in *Derry* v. *Peek*, which restored the law to what it was before *Cann* v. *Wilson*. *Derry* v. *Peek* re-established that when there is no contract between the parties, no action is maintainable unless there is fraud. If it were otherwise, the necessity of the finding of fraud by the jury in all the class of cases on statements by directors would not arise. And it never was the law that statements by directors, wrong in point of fact, but not fraudulent, were actionable. There is a long line of cases as to that. And when the case of *Derry* v. *Peek* was decided in the Court of Appeal, the court seemed to think that there was a distinction between chancery fraud and common law fraud. There is no such distinction; the effect of *Derry* v. *Peek* was that fraud in fact is so terrible a thing to charge that it ought not to be charged against a man unless he had an evil mind. It had been the common law rule all along that if a man told a wilful lie intending it to be acted upon, that was fraud all over. There is also another state of things, in which it can be said that a man has a wicked mind, and that is if he makes a statement intending it to be acted upon, but not only not knowing, but reckless as to whether it is true or false; if he says, for instance, "I intend A. to act upon my statement, but I don't know whether it is true or false, and I don't care." That view has been adopted for a long course of years, and if that is so it follows that negligence, however great, is not fraud.

Here the official referee who heard the case came to the conclusion that the defendant, though he acted carelessly, was not guilty of dishonest conduct, and negligently and carelessly to give an incorrect certificate gives no right of action for fraud at law or for deceit in equity, unless it is done with a wicked mind. I am of opinion, therefore, that this appeal should be dismissed, with costs.

BOWEN, L.J.—I am of the same opinion, and I will add nothing on the first point. As to the third point, the official referee found no fraud in the sense in which the law understands it—*i.e.*, no dishonest conduct—and that the defendant, though mistaken and careless, was not dishonest. It is therefore impossible that we should allow a new trial in face of that finding unless there were some ground of surprise. The official referee, as it seems to me, at first went wrong, but then recovered himself and decided right in point of law. The second point was the contention which the plaintiffs based upon the case of *Cann* v. *Wilson*. They said that although the surveyor was not dishonest, he was grossly negligent, and argued that, assuming he owed a primary duty to his employers and not to the plaintiffs, nevertheless that he knew, or ought to have known, that the certificates he gave would be made the bases of the advances by the plaintiffs, and that, that being so, a duty was thereby established to use care in regard to the mortgagee. Now I think it is not shown that such a duty exists, for *Cann* v. *Wilson* was overruled by *Derry* v. *Peek*. The latter case decided two things, the first of which was that you could not succeed in an action of fraud without proving that the defendant was fraudulent. It is singular that any doubt should have been cast upon that proposition. But I think there are two reasons which, in some minds, seem to have led to confusion. The first of these is the fact that equity judges have to decide law and fact together, and it often happened that an equity judge decided that there was fraud where gross negligence existed. If such a case had been tried at common law the judge would have pointed out to the jury that gross negligence did not amount to fraud, although it might amount to evidence of fraud if so gross as to be incompatible with the idea of honesty. But those cases piled themselves up until it came to be the idea that gross negligence was fraud. In all those cases, however, fraud and dishonesty was the proper *ratio decidendi*, and gross negligence was only one of the elements which the judge had to consider in making up his mind whether there had been fraud in the conduct of the defendant.

There also seems to me to be a misapprehension on the part of those who are not conversant with *Nisi Prius* actions as to the direction which is always given by the judge in an action of fraud—viz., that if the defendant told a thing, knowing it to be untrue, and intending it to be acted upon; or made it, intending it to be acted upon, but not knowing and not caring whether it was true or false, then he would be liable for fraudulent misrepresentation. Now his mind would be wicked in such last-mentioned circumstances, not because he was negligent but because of his wicked indifference to truth. In the first case it is his knowledge of falsehood which makes the fraud; in the second it is his wicked indifference.

Now there seems to have been some idea that when a jury were asked whether the defendant made a statement not knowing and not caring whether it was true or false, that the expression "not caring

had something to do with negligence. But "not caring" does not mean not taking the care or trouble to find out, but not caring in his heart and conscience whether the statement was true or false.

The House of Lords in *Derry* v. *Peek* said, as common lawyers had always said, that in an action of deceit there must be fraud, and that negligence alone would not do, although in some cases it may have been of such a kind that the probabilities all pointed to fraud. They also said that a negligent misrepresentation can only amount to a cause of action if a duty exists not to be negligent, and in a class of cases of which *Derry* v. *Peek* was one the House of Lords thought that no such duty existed. Is there any such duty here? It is said by the plaintiffs that *Cann* v. *Wilson* shows that there is. I am not considering whether the law might not be stricter than it is, for we must consider what the law is, not what it might be. *Heaven* v. *Pender* and that class of cases have been cited also as showing a duty on the part of the defendant to the plaintiffs. It is as plain as daylight that the owner of a chattel—say a horse, or gun, a chattel of such a character that if it be used carelessly it will injure some one—is bound to be careful. Exactly the same duty exists on the part of the owner of premises, if he knows them to be dangerous, and people come there by his permission, and the reason that the duty is imposed upon him is that he has the conduct of things which he knows people are going and have the right to use. The case of *Heaven* v. *Pender* was an instance of that duty. But how can that or any other case, decided under totally different aspects and considerations of law, affect this case, which, if the defendant were held liable, would mean that the issuer of a certificate would be liable for carelessness to any person whom he thought might use it. But that is not the law; a certificate is not like a dangerous instrument, and unless a man who draws one intends to deceive, he cannot in the absence of contract be so liable.

After *Cann* v. *Wilson*, which was decided upon a misapprehension of the true effect of *Heaven* v. *Pender*, Romer, J., had the case of *Scholes* v. *Brook* before him, in which his attention was directed to *Derry* v. *Peek* as explained in the case of *Angus* v. *Clifford*, and the learned judge said: "Cases have been cited which, it is said, established such a liability. But, apart from *Cann* v. *Wilson*, it appears to me that the authorities may be divided into two classes. One of these classes is when one person invites another to come upon his premises, in which case the person giving the invitation must use reasonable care to insure that the condition of the premises does not subject the person invited to danger. Another class is when a person becomes liable for using or leaving about in such a way as to cause danger an instrument which is dangerous in itself. Beyond those two classes, I am not aware for the moment of any circumstances under which a person can be held liable in a case such as that which has been argued before me. But the present case falls within neither of those two classes. An invitation to advance money or to take shares on a valuation or on a prospectus does not, I think, come within the first class, nor can a valuation or a prospectus be considered a dangerous instrument within the meaning of that term as used above by me; and, that being so, I think that, if the plaintiff had not established a contract, this action must have failed, unless I followed *Cann* v. *Wilson*; but with reference to that case, after the speeches of the learned lords in *Derry* v. *Peek*, I find a difficulty in following it, and I think the case would not have been decided as it was after the judgment of the House of Lords, which, by implication, negatives the existence of any such general rule as laid down in *Cann* v. *Wilson*." It is obvious, therefore, that Romer, J., in deciding *Scholes* v. *Brook*, put aside the case of *Heaven* v. *Pender* in the same way as I have endeavoured, following the Master of the Rolls, to put it aside.

I should not have said so much had it not been for the reappearance of the old misapprehension as to the effect of the decision in *Derry* v. *Peek*, for I have myself laid down until I am almost tired of doing so, as I daresay are other judges, what that case did, and what it did not, decide; and the same point I elaborated at length in the cases of *Angus* v. *Clifford* and *Low* v. *Bouverie*.

A. L. SMITH, L.J.—In deciding against the plaintiff in this case we must overrule *Cann* v. *Wilson*. Now the defendant says, in his defence, that he owes no duty to the plaintiffs unless they can show, which they cannot, that he contracted with them to give the certificate. I think the defendant is right in saying that, unless the plaintiffs can make out a duty. The plaintiffs say, however, that *Heaven* v. *Pender* imposed a duty, but that case, as was pointed out by Romer, J., in *Scholes* v. *Brook*, applies to a different class of cases, and in my opinion it has no bearing here, so that it will not help the plaintiffs. Here there was clearly no contract proved, and no duty apart from it, therefore no duty was established. But it was still said by the plaintiffs that the defendant negligently made a representation by which they had been injured, and they cite *Cann* v. *Wilson*. But that case was decided by Chitty, J., after the decision of the Court of Appeal in *Peek* v. *Derry* and before it had been reversed by the House of Lords, and it seems to me that he there based his judgment that an action could be brought upon the ground that the defendant owed a duty to the plaintiffs irrespective of contract, and upon the ground of the defendant having made an untrue misrepresentation recklessly, though not fraudulently, and with the intention that it should be acted upon.

In my opinion, after *Derry* v. *Peek*, the decision in *Cann* v. *Wilson* can no longer be considered law, and I think that the decision of the Divisional Court in this case was right, and must be affirmed.

Solicitors for the appellants, *Todd, Dennes, & Lamb.*

Solicitors for the respondents, *Woodcock, Ryland, & Parker*, for *Ffinch & Chanter*, Barnstaple.

High Court of Justice.

Chan. Div. } Nov. 30; Dec. 1, 6-8, 10, 13;
Chitty, J. } Feb. 16, 28.

WALLIS v. HANDS, NEWMAN, SCOTT, AND THE DISTRICT OF BRISTOL COLLIERIES CO. (a.)

Lease—Surrender by act and operation of law—Change of possession—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 3—*Covenant for quiet enjoyment*—Interesse termini—*Action for damages.*

There is no surrender by operation of law of a lease in possession on the grant of a new lease purporting to be a lease in possession, unless the old tenant gives up possession to the new tenant at or about the time of the grant of the new lease to which he assents.

The foundation of the doctrine that the acceptance of a new lease by an existing tenant operates as a surrender

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

in law is estoppel by act in pais. *The grant of a new lease to a stranger, with the tenant's assent, and change of possession preceding or following the lease, brings such a case within the scope of the same doctrine.*

Secus, *where there is mere oral assent of the tenant and no change of possession.*

An interesse termini *is not an interest that will support an action on a covenant for quiet enjoyment in a lease, the essence of a breach of such a covenant being a disturbance of the lessee's possession, nor will it support an action for trespass or for damages.*

Davison *v.* Gent, 5 *W. R.* 229, 1 *H. & N.* 744, *considered and applied.*

Dictum *of* Stirling, J., *in* Baring *v.* Abingdon, [1892] 2 *Ch.* 374, *at p.* 381, *explained.*

Locke *v.* Furze, 14 *W. R.* 403, *L. R.* 1 *C. P.* 441, *and* Gillard *v.* Cheshire Lines Committee, 32 *W. R.* 943, *distinguished.*

Action.

This was an action relating to certain collieries at Mangotsfield, in the county of Gloucester, heard as a witness action. The property had been the subject of numerous and conflicting dealing, the complicated facts relating to which were fully stated and discussed in his lordship's judgment. The following are material for this report.

In 1884 a lease was granted by Newman to Powell and two others for a term of forty-five years from the 24th of June, 1884. It comprised the upper series of coal in Mangotsfield, known as the Parkfield seam, but no other series, lying within a district of some 700 acres. It included also certain surface rights, and was renewable for a further period of 45 years. The lessees took possession under this lease and worked the coal, but their work had come practically to a standstill in or before the beginning of 1887. The means of the lessees were exhausted and the rent was in arrear when the transactions in which the plaintiff took part were begun.

On the 8th of August, 1887, a lease was granted by Newman to the plaintiff for a term of forty-two years from the 24th of June, 1887. It comprised (*a*) the upper series as in the lease of 1884, (*b*) the lower series under the same area, (*c*) the coal in an additional area, and (*d*) certain machinery and plant then on the property. The royalty reserved was less by a halfpenny than the royalty under the lease of 1884. There were also reserved a dead rent, surface rent, and rent for machinery and plant. The lease contained a proviso for re-entry for non-payment of rent, and for breach of the covenants to work, but no clause dispensing with the necessity of a legal demand for the rent. This lease was granted with the consent of the lessees under the lease of 1884. Such consent was given, but orally only, by their solicitor, acting on their behalf and with their authority, on the occasion of the delivery of his lease to the plaintiff.

The plaintiff had not entered into possession under this lease, nor had he done any working thereunder according to his covenants. The lease of 1884 was not delivered to the plaintiff or to the lessor Newman or his solicitors upon the grant of the the lease of 1887, which latter lease purported to be a lease in possession, but appeared to have remained in the hands of the lessees or their solicitor. This lease of 1884 had been dealt with adversely to the plaintiff as if it were a subsisting lease as follows:—It was assigned by the lessees to the defendant Scott by indenture dated the 13th of February, 1888; and it was assigned by Scott to the defendant company by indenture dated the 30th of May, 1888. It had since the issuing of the writ been reassigned by the defendant company to Scott, in whom it was now vested, if subsisting.

On the 30th of December, 1889, Newman granted to Scott a lease for forty years from the 24th of June, 1889, of the lower series only of the coal lying under the land described in the 1884 lease. On the 31st of December, 1889, Scott granted to Hands an underlease of the coal comprised in the lease of the 30th of December, 1889, reserving a nominal reversion only, and Hands worked coal by virtue of this underlease. On the 30th of December, 1889, Newman entered into an agreement in writing with Scott to grant to him a lease of the additional area comprised in the 1887 lease, so as to make Scott's holding co-extensive with the coal comprised in the 1887 lease. On the same day Scott agreed with Hands to assign or underlet to him this additional area.

The relief claimed by the plaintiff under these circumstances was a declaration that the lease of 1887 was valid, and the plaintiff's title prior to that of any of the defendants; a similar declaration as to another lease of 1885; injunctions to restrain a sale of the property, or any part, and to restrain working of the coal by Hands and the defendant company; and damages as against Newman for breach of the covenant for quiet enjoyment implied in the lease of 1887, and as against Hands and the company in respect of their working.

Alexander, Q.C., and *Christopher James*, for the plaintiff.—The grant of the lease of 1887 with the assent of the lessees under the lease of 1884 operated as a surrender of that lease by operation of law, and a deed or note in writing was not required in such a case by the Statute of Frauds. Next, if we establish our title to this lease of 1887, there is nothing to prevent our succeeding on the claims for damages against the defendant Newman on his implied covenant for quiet enjoyment under the lease of 1887, and against the defendant Hands for his working of coal comprised in that lease, whether the lease of 1884 has been surrendered, as we contend, or not, although our interest in the latter case is no more than *interesse termini*: *Gellard* v. *Cheshire Lines Committee*, 32 W. R. 943.

They also referred to *Baring* v. *Abingdon*, *ante*, p. 22, [1892] 2 Ch. 374, at p. 381.

Whitehorne, Q.C., and *T. L. Wilkinson*, for the defendant company.—The plaintiff cannot prevail without getting rid of the lease of 1884. If that lease is subsisting we have it. The authorities on surrender by operation of law fall into two groups. In the first, where surrender prevailed, possession of the property had been given and taken in every single case. In the second, where surrender failed, possession was not so given and taken. *Thomas* v. *Cook*, 2 B. & Ald. 119, is the strongest case for the plaintiff. The other cases are *Walker* v. *Richardson*, 2 M. & W. 882; *Lyon* v. *Reed*, 13 M. & W. 285, where the exact point was raised, showing that the two last named cases are not of general application; *Doe d. Huddleston* v. *Johnston*, McCl. & Y. 141; *Johnstone* v. *Hudlestone*, 4 B. & C. 922; *Davison* v. *Gent*, 5 W. R. 229, 1 H. & N. 744; *Nickells* v. *Atherstone*, 10 Q. B. 944; *Oastler* v. *Henderson*, 2 Q. B. D. 575, 25 W. R. Dig. 198. The principle of *Lyon* v. *Reed* was approved of by Lord St. Leonards in *Crespigny* v. *Blood*, 3 Jo. & Lat. 133. Some act of notoriety is wanted to make a surrender by operation of law or the very mischief against which the Statute of Frauds is directed, arises. There is no jurisdiction to make such a declaration of title as is asked for, notwithstanding ord. 25, r. 5.

They referred to the preamble to 25 & 26 Vict. c. 67; 15 & 16 Vict. c. 86, s. 50; and *Trustees of Birkenhead Docks* v. *Laird*, 2 W. R. 7, 4 De G. M. & G. at p. 738.

Levett, Q.C., and *Pauli*, for the defendant Newman.—Possession is necessary to support an action of trespass: Roscoe's Nisi Prius, 16th ed., p. 930. See *Harrison* v. *Blackburn*, 13 W. R. 135, 17 C. B. N. S. 678. [They also referred to Co. Litt. 296 b; *Lowe* v. *Ross*, 5 Ex. 553; *Turner* v. *Cameron's Coalbrook Steam Coal Co.*, 5 Ex. 932]. The Court of Appeal in *Gillard* v. *Cheshire Lines Committee* did not mean to overrule all these cases, otherwise a man might come under a lease of ninety-nine years in the last year and say I have an *interesse termini*, and all prior acts were acts of trespass. Then a man cannot sue for breach of a covenant for quiet enjoyment where no enjoyment is proved: see Bullen and Leake's Pleadings, 3rd ed., p. 206, and *Coe* v. *Clay*, 5 Bing. 440.

Webster and *T. Lee Roberts*, for the defendants Hands and Scott respectively.

Alexander, Q.C., in reply.—None of the cases say that change of possession is essential for surrender by operation of law. The action is well brought for a declaration of title alone, as is shown by ord. 25, r. 5, in connection with the Judicature Act, 1873, s. 24 (7), and Forms, Appendix A, pt. 3, s. 4: Annual Practice, 1893, vol. 2, p. 22. See also *Harrison* v. *Duke of Rutland*, *ante*, p. 322, [1893] 1 Q. B. 142. We could not have safely brought an action for recovery of land. [CHITTY, J., referred to *Gledhill* v. *Hunter*, 28 W. R. 530, 14 Ch. D. 492.] This is a case for the court to exercise its discretion and make the declarations that we ask: see *Evans* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, 36 W. R. 328, 36 Ch. D. 626, at p. 640. Next, the owner of an *interesse termini* can maintain an action on the case for any damage done to the property. This is not an action in trespass. Lastly, he may sue for breach of a covenant for quiet enjoyment: *Lock* v. *Furze*, 14 W. R. 403, L. R. 1 C. P. 441.

16th Feb.—CHITTY, J.—[His lordship, after stating the facts and deciding an issue of fraud, raised against the plaintiff by certain of the defendants, against such defendants, and in favour of the plaintiff, continued:—] The next point raised by the defendant Newman against the lease of 1887 was that it had been determined by re-entry in April, 1888, under the provision for non-payment of rent. But it was admitted that no legal demand had been made for the rent, and this point was abandoned.

The next question is whether the lease of 1884 has, as the plaintiff contends, been surrendered by operation of law.

The plaintiff has never been in possession of the property demised by the lease of 1887. Consequently, as between the lessees of 1884 and those claiming under them, on the one hand, and the plaintiff on the other, there has been no change of possession. In these circumstances, it is contended for the plaintiff, as a proposition of law, that the grant of a new lease in possession with the oral assent merely of a person in possession under a prior subsisting lease operates as a surrender in law of the prior lease, and consequently that such grant and mere oral assent are sufficient to take the case out of the operation of the 3rd section of the Statute of Frauds, which enacts that no lease shall be surrendered unless by deed or note in writing or by act and operation of law.

The third section of the statute 8 & 9 Vict. c. 106, avoids a surrender in writing unless made by deed, except in cases where the lease itself might have been created without a deed. The lease of 1884 required a deed for its creation.

All the authorities bearing on the question of surrender by operation of law were cited and commented on at the bar. The question again raises the controversy which subsisted at one time between the Courts of King's Bench and the Exchequer, illustrated by *Thomas* v. *Cook* and *Lyon* v. *Reed*, and discussed at length in 2 Smith's L. C., p. 884 *et seq.*, 8th ed., p. 923 *et seq.*, 9th ed. But it appears to me that this controversy was, so far as concerns the question before me, set at rest by the judgment of the Court of Exchequer in *Davison* v. *Gent*. In *Thomas* v. *Cook* there was in fact a change of possession, the old tenant Cook having gone out of possession when the plaintiff accepted Perkes as his tenant (see the observations of Lord St. Leonards in *Creagh* v. *Blood*, 3 Jo. & Lat. 160).

In his judgment in *Davison* v. *Gent* Pollock, C.B., states the law thus:—"It must therefore be taken to be established that where a lessee assents to a lease being granted to another, and gives up his own possession to the new lessee, that is a surrender by operation of law." This statement appears to me not to be qualified by any subsequent expressions in the same judgment. It substantially reconciles *Thomas* v. *Cook* with the principles enumerated by Parke, B., in *Lyon* v. *Reed*, so far as relates to leases in possession. It is not, perhaps, of any great practical importance in which of the two following ways the proposition of law is stated, viz.:—(1) There is no surrender by operation of law unless the old tenant gives up possession to the new tenant at or about the time of the grant of the new lease to which he assents; or (2) the change of possession is a necessary part of the consent. I prefer, however, the first as being the more correct form. To hold that mere oral assent to the new lease operates as a surrender in law would be a most dangerous doctrine; it would practically amount to a repeal of the Statute of Frauds, and let in all the mischief against which the statute was intended to guard.

The policy of that statute is carried still further by the statute 8 & 9 Vict. c. 106, which requires a deed in cases where formerly a mere writing would have sufficed. The foundation of the doctrine that the acceptance of a new lease by an existing tenant operates as a surrender in law is estoppel by act *in pais*, the law attributing the force of estoppel to certain acts of notoriety, such as livery of seisin, entry, acceptance of an estate, and the like; and the grant of a new lease to a stranger with the tenant's assent and change of possession preceding or following the lease bring such a case within the scope of the same doctrine, which mere oral assent would not do (see Shelford's Real Property Statutes, by Carson, 9th ed., p. 258).

The plaintiff's counsel relied on a *dictum* of Stirling, J., in *Baring* v. *Abingdon*, that the granting of a new lease to a stranger with the assent of the lessee operates as a surrender of the old lease. But on the facts of the case it appears that there there was a change of possession; the learned judge himself refers to *Davison* v. *Gent*, and I have his authority for stating that he did not intend to express any opinion on the point whether a change of possession was necessary. For the reasons stated I am of opinion that the lease of 1884 was not surrendered by operation of law.

The plaintiff claims damages against the defendant Newman for breach of the covenant for quiet enjoyment implied in the lease of 1887. Such an implied covenant is, generally speaking, an unqualified covenant, but extends only to lawful interruptions. The dealings by Newman in December, 1889, and any entry thereunder are not relied upon by the plaintiff as breaches of the implied covenant, because, according to the plaintiff's case, they are unlawful as against him, claiming, as he does, under the prior lease of 1887.

The alleged breach arises, as I understand the argument for the plaintiff, upon the lease of 1884. The mere fact of the existence of that lease is of itself no breach. The plaintiff was aware of the existence of this lease when he accepted the lease of 1887, and had taken his own measures, though ineffectual, for protecting himself against claims under the lease of 1884. It may be questioned whether, in these circumstances, the implied covenant would extend to disturbances by virtue of the lease of 1884: see 9 Bythewood, 3rd ed., p. 381, and Dart's Vendors and Purchasers, 6th ed., p. 886; and see also *Birmingham, Dudley, and District Railway Co.* v. *Ross*, 36 W. R. 914, 38 Ch. D. 295, on the analogous case of an implied grant of light. The question, however, was not argued, and I pass it by. I rest my decision on the following grounds:—First, on the facts which show that the negotiations which resulted in the grant of the lease of 1887 were conducted throughout on the footing that, as between the plaintiff and the defendant Newman, the plaintiff should buy up from the lessees the lease of 1884. I think that there was an implied agreement between the plaintiff and the defendant Newman that the plaintiff should make his own terms with the lessees. This being so, the plaintiff cannot set up claims under the 1884 lease as breaches of the covenant for quiet enjoyment. Secondly, the essence of a breach of a covenant for quiet enjoyment in a lease appears to me to be a disturbance of the lessee's possession: see *Sanderson* v. *The Mayor of Berwick*, 33 W. R. 67, 13 Q. B. D. 547. There has been no disturbance of possession. The plaintiff has merely an *interesse termini* under the lease of 1887; he has not only never been in possession of the property comprised in that lease, but there is no evidence of his ever having even attempted to take possession or having required Newman to put him in possession.

The law provides a person having an *interesse termini* with an adequate remedy against the grantor of the term without there being any necessity to have recourse to an action on the covenant for quiet enjoyment; he can bring an action against the grantor of the term for not putting him in possession: see *Coe* v. *Clay* and *Jinks* v. *Edwards*, 4 W. R. 303, 11 Exch. 775. This right of action is also founded on implied covenant. The present action is not to enforce any such right, nor are there any facts proved which would give rise to it. Although the authorities have been searched through by counsel, none can be produced to show that a person having a mere *interesse termini* can maintain an action on a covenant for quiet enjoyment. In *Locke* v. *Furze*, which was cited as the nearest authority on the point, the plaintiff was in possession when the lease, originally reversionary, but then possessory, was avoided by title paramount; and he remained in possession for a short period (some twenty days) during the currency of the term granted by the avoided lease upon the covenant in which the action was brought. It is, consequently, no authority on the point. [His lordship next decided that the plaintiff could not succeed on his claim in the action for damages against the defendant company, and then continued:—]

Thirdly, the plaintiff claims damages against Hands in respect of his working. The plaintiff's allegation against Hands is that he was working coal comprised in the lease of 1887 without specifying from what part of the property the coal has been worked. Hands, by his silence in his defence, admits this paragraph. Having but an *interesse termini* under the 1887 lease, the plaintiff cannot maintain an action of trespass against Hands on his title under that lease. His proper course, as against Hands, was to bring an action to recover possession. It is settled law that a person having a mere *interesse termini* cannot bring an action of trespass: see *Harrison* v. *Blackburn*, 13 W. R. 135, 17 C. B. N. S. 678, at p. 691; and *Turner* v. *Cameron's Coalbrook Steam Coal Co.*; and Woodfall's Landlord and Tenant, p. 197, 13th ed., p. 205, 14th ed. This is in substance an action of trespass. The plaintiff's counsel, however, cited the decision of the Court of Appeal in *Gillard* v. *Cheshire Lines Committee*. The court there held that a person having a mere *interesse termini* could maintain an action for injury to his right. The cases on trespass, though not cited, were, of course, present to the minds of the members of the court who so held; there was no intention to overrule them, either directly or indirectly. The circumstances, shortly stated, were that the plaintiff had agreed to take a theatre for eight weeks to commence on a future day. Before his right of entry accrued the defendants, who were strangers, by excavations on their own property, deprived the theatre of the support of the adjacent land so that the theatre was rendered unsafe, and was closed during the eight weeks by the proper authorities. The judgment turned on the proposition that the defendants had injured the plaintiff's proprietary rights. While accepting that decision, as I am bound to do, without question, I think that it does not apply to the facts of this case. The plaintiff has deliberately refrained from exercising his right of entry under his voidable lease of 1887. I think that he is not entitled to any damages; if I thought otherwise, I should assess them at a mere nominal sum.

The reasons upon which I refuse to give the plaintiff damages are sufficient, and more than sufficient, to justify my refusing to grant an injunction.

The right order will be to give the plaintiff declarations on the two points on which he succeeds, and to dismiss the rest of the action. The declarations will be: (1) that the lease of the 8th of August, 1887, was not obtained by fraud on the part of the plaintiff, and (2) that the same was not duly determined in April, 1888, by re-entry by the defendant Newman by virtue of the condition for re-entry contained in the lease.

The right order as to costs is to give no costs except that the plaintiff should pay the costs of the defendant company, against whom he has altogether failed.

Feb. 28.—The case was mentioned this day, and, it being intimated that there might be further litigation between the parties, his lordship said that the order must be expressed to be without prejudice to the plaintiff's right to bring an action to recover possession, and must further declare that the lease of 1884 was not surrendered by act and operation of law, or otherwise, and that the plaintiff had no title either at law or in equity to that lease.

Solicitors for the plaintiff, *Whites & Co.*

Solicitors for the defendant Newman, *Prior, Church, & Adams*, for *Meade-King & Bigg*, Bristol.

Solicitor for the defendant Hands, *John Hands*.

Solicitors for the defendant Scott, *Learoyd, James, & Mellor*, for *W. J. Nicholas*, Bristol.

Solicitors for the company, *Greenop & Sons*.

Chan. Div. Stirling, J. } Jan. 26, 31; Feb. 25.

CHRISTIE v. TAUNTON, DELMARD, LANE, & CO. (LIMITED).

In re TAUNTON, DELMARD, LANE, & CO. (LIMITED). (*a.*)

Company—Winding up—Debenture—Equitable assignment—Calls prior and subsequent to winding up—Set-off—Companies Act, 1862, *s.* 75.

T., who was the registered holder of debentures in a company, in March, 1890, *deposited some of them with a bank to secure a debt, and executed a memorandum of deposit and a blank transfer, but no notice was given to the company. These debentures were exchanged for others subsequently issued by the company, and the new debentures were deposited with the bank by T. on the 3rd of September*, 1890, *who did not execute any fresh memorandum or transfer. None of the new debentures were payable before the 31st of December*, 1890.

T. was also holder of ordinary shares in the company, which were not fully paid up, and on the 3rd of November, 1890, *a call was made upon the ordinary shares, payable on the 20th of November*, 1890, *at the bank, who were also the company's bankers. On the 4th of November*, 1890, *notice of the call was given to the bank, who were authorized to retain the proceeds of the call in payment of an overdraft. On the 6th of November*, 1890, *the bank gave the company notice of the deposit of T.'s debentures. The bank on the 12th of November*, 1890, *commenced an action on behalf of the debenture-holders against the company, and on the 19th of November the company went into voluntary liquidation. In the action sufficient assets of the company had been realized to pay the debentures in full, and in the winding up calls had been made on T.'s shares which had not been paid.*

Held, that in respect of the call made on the 3rd of November, 1890, *the company were entitled to set off the amount of such call against what was due on the debentures; but that, in respect of the calls made in the winding up, they were not entitled to do so. The liability to pay calls did not, under section 75 of the Companies Act*, 1862, *become a debt due until the winding up commenced, and therefore the case was governed by* Watson v. Mid-Wales Railway Co., 15 *W. R.* 1107, *L. R.* 2 *C. P.* 593.

Adjourned summons.

This was a summons in the above-mentioned action, and raised the question whether calls on certain shares in the defendant company could be set off against what was due upon certain debentures.

The company was incorporated under the Companies Acts in January, 1889, the share capital being £125,000 divided into shares of £10 each, some of which were preference and the others ordinary shares. Under the memorandum and articles of association the company had power to borrow or raise money on debentures. Article 13 enabled the directors to make calls, and article 15 provided that such calls should be deemed to be made at the time when a resolution of the directors to that effect was passed.

The company raised money on debentures upon each of which was indorsed a condition (*inter alia*) that the registered holder for the time being of the debenture should alone be deemed to be entitled to the principal moneys and interest thereby secured, and that the company should not be bound to enter in the register or recognize any trust or equity affecting such debenture or any principal moneys and interest thereby secured. Richard Taunton became entitled to, and the registered holder of, a large number of these debentures. On the 24th and 28th of January and the 5th of March, 1890, he deposited debentures of the nominal value of £5,250 with the Birmingham and Midland Bank by way of security for a debt, and executed a memorandum of deposit and a blank transfer, but no notice of the deposit or transfer was given to the company. Subsequently the company issued fresh debentures and agreed to exchange those previously issued to Taunton for debentures of the new issue of equal nominal amount, and the bank, to enable this exchange to be carried out, gave up the old debentures to Taunton, who on the 3rd of September, 1890, deposited with the bank the debentures he had received in substitution for them. None of these debentures became payable at an earlier date than the 31st of December, 1890. No fresh memorandum or transfer was executed by Taunton.

In and prior to January, 1890, and thenceforth down to the commencement of the winding up Taunton was the holder of 1,567 ordinary shares, upon which previously to October, 1890, £8 10s. only had been paid up. On the 25th of October, 1890, Taunton paid to the company £250 in advance of calls on those shares, and again on the 1st of November, 1890, he paid the company a sum of £600, also in advance of calls.

On the 3rd of November, 1890, a resolution was passed by the directors of the company that a call of £1 per share be made on the ordinary shares, payable on the 20th of November at the Birmingham and Midland Bank, who were the company's bankers. On the 4th of November notice of this call was given to the bank, who were authorized to retain the proceeds in payment of an overdraft.

On the 6th of November, 1890, the bank gave the company formal notice that the debentures had been deposited by Taunton with them by way of security, and the secretary of the company without (as was stated) consulting the directors entered notice of the deposit on the register of debentures and informed the bank that he had done so.

On the 12th of November, 1890, the above-mentioned action was commenced by the bank on behalf of the debenture-holders. The company on the 19th of November, 1890, passed, and on the 5th of December, 1890, confirmed, a special resolution that the company should be wound up voluntarily. In the action assets of the company had been realized sufficient to pay the debentures in full. In the winding up all that remained unpaid on Taunton's shares had been called up, but no part of such calls had been paid by him. The bank then made this application to the court to decide the question whether the calls could be set off against what was due on the debentures that had been equitably assigned to the bank.

Beale, Q.C., and *T. W. Baker*, for the bank.—There is no right of set-off here. The special terms of the debenture do not affect the case, for the company cannot attach such terms so that the debt shall not be assignable by the person to whom the debenture has been issued. In the case of married women interests in property cannot be created which would not have the ordinary incidents of property, and amongst them the power of assignment: *Tullett* v. *Armstrong*, 1 Beav. 1. The company cannot say to the assignee of the debenture, "I am your debtor, but I shall not pay until you come and get registered": *Binney* v. *Ince Hall Coal and Cannel Co.*, 35 L. J. Ch. 363, 14 W. R. Ch. Dig. 24. Here the company accepted notice of the assignment. The sole question is whether, independently of the terms of the debenture, there is any right of set-off. There was no debt due and payable at either the date of the

(*a.*) Reported by W. A. G. WOODS, Esq., Barrister-at-Law.

assignment and our notice or at the date of the winding up. The right of set-off is a statutory right. In equity the fact that there was no legal debt did not prevent the set-off, but the rule went no further: *Cavendish* v. *Geaves*, 5 W. R. 615, 24 Beav. 163; *In re China and Labuan Steamship Coal Co., Mackenzie's case*, 17 W. R. 343, L. R. 7 Eq. 240. There is no estoppel in equity here, and no consideration was given after the date of the notice: *Ex parte Swann*, 16 W. R. 560, L. R. 6 Eq. 344; *Ex parte Oriental Commercial Bank*, 18 W. R. 474, L. R. 5 Ch. App. 358; *In re Hercules Insurance Co., Brunton's case*, 23 W. R. 286, L. R. 19 Eq. 302; *Higgs* v. *Assam Tea Co.*, 17 W. R. 1125, L. R. 4 Ex. 387. The right of set-off was gone, if not at the time of the assignment, at any rate at the time of notice to the company: *Watson* v. *Mid-Wales Railway Co.*, 15 W. R. 1107, L. R. 2 C. P. 593. There is no case in which a claim to set off a sum due on a future certain date has been allowed. The call made in the winding up was only a liability, and was neither due nor payable at the time of the notice.

Buckley, Q.C., and *Kirby*, for the liquidator.—We agree there is no set-off in respect of a debt not ripened: *Watson* v. *Mid-Wales Railway Co.* The court in that case decided that a debt arising out of an antecedent contract could not be set off. Here the debt was due but not payable. It must be regarded on the 6th of November as if the assignment had been then executed, for notice completes the transfer. Taunton was then subject to the set-off. As to the calls made subsequently by the liquidator, section 75 of the Companies Act, 1862, provides that the liability of any person should be considered a debt due when the liability commenced. Before the Act the time of liability was referred back to the earlier date: *Williams* v. *Harding*, L. R. 1 E. & I. App. 9, 14 W. R. H. L. Dig. 3. The call relates back to membership of thec ompany: *In re China and Labuan Steamship Coal Co., Mackenzie's case; Jeffryes* v. *Agra and Masterman's Bank*, 14 W. R. 889, L. R. 2 Eq. 674. At the date of the assignment no call was made; the subsequent call related back, and there was then a debt due but not payable, a liability subject of set-off of a *chose in action* equitably assigned: Judicature Act, 1873, s. 25, sub-s. 6; *In re Overend, Gurney, & Co., Ex parte Grissell*, 14 W. R. 1015, L. R. 1 Ch. App. 528. A contributory debtor to a company cannot set off a debt due and payable. *Watson* v. *Midland Railway Co.* does not touch this case. The debenture which accrued due after the 20th of November is a good set-off against the bank, because on the 6th of November, when the bank became assignee, it was a debt, although not payable. In a case to which section 75 of the Companies Act, 1862, applies you are to carry back the liability so as to give an equity against the assignee. Again, in the terms of the debenture the parties are dealing with a particular instrument: *New London and Brazilian Bank* v. *Brocklebank*, 30 W. R. 422, 737, 21 Ch. D. 302. There it was held that shares in a settlement were liable to the incident that the legal holder of the shares was subject to a lien for sums due, and the lien prevailed over the settlement, although it accrued due subsequently. The same principle applies here. *Bradford Banking Co.* v. *Briggs*, 35 W. R. 521, 12 App. Cas. 29, is not excluded for all purposes.

Beale, Q.C., replied.

Cur. adv. vult.

Feb. 25.—STIRLING, J.—The question raised by this application is whether the calls on certain shares which at, and previously to, the commencement of the winding up of the company stood in the name of Richard Taunton, can be set off against what is due on certain debentures which were originally issued to Richard Taunton, and were registered in his name, but which had been assigned in equity to the Birmingham and Midland Bank (Limited). [His lordship stated the facts, and continued:—] I have to consider first of all whether what remains due of the call of £1 made on the 3rd of November, 1890, can be set off. Under the last clause of the conditions indorsed upon the debenture the principal secured thereby became payable on the 5th of December, 1890. The conditions show that the debentures were meant to be assignable. There is no evidence that the debts in respect of the debentures and of the shares originated in the same contract or transaction; on the contrary, they seem to have originated quite independently; and, therefore, set-off cannot be claimed on any such grounds as prevailed in the case of *Government of Newfoundland* v. *Newfoundland Railway Co.*, 13 App. Cas. 199, 36 W. R. Dig. 46. The bank never presented to the company any transfer which would have entitled them under the conditions indorsed on the debentures to be registered as the holders of those deposited by Taunton; all they did was to give notice to the company of the equitable deposit having been made. The conditions provide that "the company shall not be bound to enter in the register or recognize in any way any trust or equity at any time affecting such debenture." On behalf of the bank it was contended that the rights of equitable assignees cannot be over-ridden by such a provision. I think it unnecessary on the present occasion to decide whether that contention is well founded or not; for in fact the company did enter notice of the bank's title on the register, and the bank must, I think, be taken to stand in the position of equitable assignees of a *chose in action* who have given notice of their assignment. What, then, is that position?

I consider it first on the supposition that the company had not gone into liquidation, but was now sued by the assignees of the debentures. On the one hand the case of *Watson* v. *Mid-Wales Railway Co.* shows that after notice of an equitable assignment of a *chose in action* the debtor cannot set off as against the assignee a debt which accrues due subsequently to the date of notice, even although that debt may arise out of a liability which existed at and previously to the date of notice. On the other hand the case of *Wilson* v. *Gabriel*, 11 W. R. 803, 4 B. & S. 243, shows that the debtor may set off as against the assignee a debt which accrued before notice of the assignment. It is perhaps of importance to consider the principle on which that decision was given. The action was one for freight. There was a plea of set-off for money lent, paid and received, goods sold and delivered, interest and accounts stated; replication on equitable grounds that before the defendants became indebted to the plaintiff for any of the freights the plaintiff agreed to assign the freights to a firm of Early & Smith for value and also to secure repayment of money already advanced by them to the plaintiff, and that the amount so due to Early & Smith exceeded the amount of the debts in the declaration mentioned, and that the defendants had notice of this before any of the debts or freights became payable; but the replication did not state that the defendants had notice of the assignment before the right of set-off arose, and it was held that the replication was no answer to the plea. For the grounds of the decision I will refer to the judgment of Blackburn J., which is as follows:—"The plaintiff here sues for a debt and the defendants plead a set-off. There was debt due when the action commenced, and, therefore, at law the defendants have a perfect right to set off against it a debt due to them. Messrs. Early & Smith, the real plaintiffs in the cause, call on us

to do what they otherwise would have called on a court of equity to do—namely, grant an injunction to prevent this; for that is what this replication amounts to. It is not, as Mr. Brown contends, that we are to see affirmatively that this is an equitable set-off; but we are to see whether the plaintiff has a right to ask a court of equity to prevent the defendants setting up their legal right of set-off. Equity never will do that when equities are equal. The contract under which the freight ripened into a debt was, before it became one, assigned for money to Messrs. Early & Smith, and the defendants had notice of that. It is perfectly clear in equity that from the moment the assignment of a *chose in action* is notified to the party concerned the assignee is owner of that contract and all belonging to it. Here Messrs. Early & Smith allowed the plaintiff to appear to be the true owner of this freight, and upon that what was the right between them and the other party, either by natural equity or the artificial thing we call by the name equity? So early as *George* v. *Clagett*, 7 T. R. 359, the ground of which is correctly stated in the well-considered judgment of the Exchequer in *Isberg* v. *Bowden*, 8 Ex. 852, 859, it was held that where a factor sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor against a demand in respect of those goods made by the principal. I quite agree with what Mr. J. W. Smith says in the beginning of his note, Leading Cases, vol. 2, p. 108, 5th ed., 'This decision too clearly results from principles of natural equity to need much discussion or explanation.' This replication is, therefore, bad."

In *Isberg* v. *Bowden* the law with respect to principal and agent is thus stated:—"Where a principal permits an agent to sell as apparent principal and afterwards intervenes, the buyer is entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been then the real contracting party, and is entitled to the same defence, whether it be by common law or statute, payment or set-off, as he was entitled at that time against the agent, the apparent principal." I think that if the company were being sued by the bank it would be entitled to be placed in the same position as it occupied relatively to Taunton on the 6th of November, 1890, on which day Taunton was indebted to the company for calls payable on the 20th of November, while the company was indebted to Taunton on the debentures, which did not become payable until a later date. If, then, no winding up had intervened, and Taunton, or the bank in Taunton's name, had sued on the debentures, the question would be whether the company could set off the debt which accrued on the 3rd of November (the date of the call), but did not actually become payable until the 20th of November. Neither *Watson* v. *Mid-Wales Railway Co.* nor *Wilson* v. *Gabriel* covers this point so far as actual decision goes, for in the former no debt had accrued due to the defendants at the date of notice, and in the latter the debt at the date of the notice appears to have been both due and payable. I think, on the principle laid down by Blackburn, J., in *Wilson* v. *Gabriel*, the set-off ought to be admitted. If it be inquired whether a court of equity would in an action at law brought before the Judicature Acts have interfered by way of injunction to prevent the company from setting up the legal right of set-off, I think the answer must be in the negative. Not only did the bank neglect to avail itself of the conditions of the debenture by taking a transfer capable of registration, but it did not even perfect its equitable title by giving notice until after the debt had accrued due, and (what is still stronger) until after the bank had notice that it had accrued. Again, if recourse be had to the analogy of the rule laid down in *George* v. *Clagett*, I think that if the set-off were not admitted, the company would be placed in a less favourable situation as against the bank than was its position as regards Taunton, and it is to be observed that in *George* v. *Clagett* it appears from the report that the plaintiff, the undisclosed principal, gave notice of his title to the defendants on the 20th of November, 1795, and that the defendants were allowed to set off a bill which was payable two months after the 24th of September, 1795, and was consequently not actually due on the 24th of November, the date of the notice. I think, therefore, that in any action by the bank on the debentures the company must have been allowed to set off the amount due in respect of the call made on the 3rd of November, 1890. It follows that a similar set-off must be allowed upon a proof against the company in the winding up: *Mersey Steel and Iron Co.* v. *Naylor*, 31 W. R. 80, 32 W. R. 989, 9 Q. B. D. 648 (667, 668), 9 App. Cas. 434. Here, as I understand, the bank claims against the property which formed the subject of the security; but I apprehend that in such case the set-off might, under the procedure of the Court of Chancery have been claimed by a cross bill (see *Dodd* v. *Lydall*, 1 Hare, 333) and under the present practice by a suitable pleading; and as the parties agree that the question to be determined is one of right, and not of procedure merely, I think that the set-off must be admitted as regards the balance remaining unpaid of the call made on the 3rd of November, 1890.

I have next to deal with the calls made in the winding up. The claim to set-off in respect of these is based on the 75th section of the Companies Act, 1862. [His lordship read the section, and proceeded:—] It is said that as the event of the company being wound up has occurred the call in question must be taken to be a debt which accrued due before notice of the assignment though it did not become payable until a later date, and consequently must be set off in the same way as the call made on the 3rd of November, 1890. I think, however, that until the winding up commenced there existed in respect of this call merely a liability on the part of Taunton, and consequently that this portion of the case is governed by the decision in *Watson* v. *Mid-Wales Railway Co.* I do not think that this conclusion conflicts with the case of *In re China and Labuan Coal Co., Mackenzie's case*, for there the assignment did not take place until after the commencement of the winding up, and consequently (in my view) after the liability had ripened into a debt. Lord Romilly says (p. 244): "Of course, no question arises where the assignment takes place before the winding up, but if the winding up should take place before the assignment of the *chose in action*, then, in my view of the case, it is provided that after the winding up has taken place and before any calls are made the owner of the debenture shall not be at liberty to assign it and get money which he can dispose of, so that when the call is made he has nothing which can be made available to pay it." I understand his lordship there to intimate that if in the case with which he had to deal the assignment had taken place before the winding up his decision would have been different.

I think, therefore, that the set-off cannot be admitted as regards the call made in the winding up.

Solicitors for the bank, *Beale & Co.*, London and Birmingham.

Solicitors for the liquidator, *Field, Roscoe, & Co.*, for *Smith, Pinsent, & Co.*, Birmingham.

Chan. Div.
Kekewich, J. } March 1, 14.

In re BACON.
GRISSELL *v.* LEATHES. (*a.*)

*Administration—Annuity—Tenant for life—Remainderman—*Corpus *or income.*

B. granted certain annuities by bond, and subsequently died leaving his widow the testatrix, his universal legatee and sole executrix. Under her will her residuary estate was held in trust for a tenant for life, with remainders over to other persons.

Held, that each payment of the annuities, as it became due, must be raised out of the corpus *of the estate.*

Adjourned summons.

G. C. E. Bacon granted by bonds under his hand and seal three annuities. He subsequently died in the year 1880, having by his will constituted his widow, H. Bacon, universal legatee and sole executrix of his estate.

The will was proved by the widow. She died in 1891, having by her will settled her residuary estate upon trust for the defendant, Philip Leathes, who was unmarried, for life, with remainder to his children, and subject thereto upon trust for her sister and her children. Substantially the whole of her property was derived from her husband.

The question raised by this summons by the plaintiffs, who were the trustees of the will, was whether the annuities were payable out of capital or income of the estate of the testatrix or out of both capital and income, and in what proportions, and in what manner the annuities should be paid or provided for.

Ingle Joyce, for the tenant for life.—The question is, in payment of debts by instalments, how are they to be paid as between tenant for life and remainderman. The tenant for life is entitled on each payment of the annuity to a charge on capital for the amount paid, keeping down the interest thereon: *In re Harrison, Townson* v. *Harrison*, 38 W. R. 265, 43 Ch. D. 55; *Allhusen* v. *Whittell*, L. R. 4 Eq. 295, 15 W. R. Ch. Dig. 122.

Ingpen, for the reversioners.—As little should be borne by capital as possible, instalments should not be calculated as they become due: *Yates* v. *Yates*, 28 Beav. 637, 9 W. R. Ch. Dig. 9; *In re Muffett, Jones* v. *Mason*, 37 W. R. 9, 39 Ch. D. 534.

G. W. Tallents, for the trustees.

Ingle Joyce replied.

KEKEWICH, J.—The annuities which are the cause of difficulty in this case were granted, not by the testatrix, but by her husband: but inasmuch as she had little, if any, property beyond that derived under her husband's will, it was admitted that for all practical purposes the annuities must be treated as debts chargeable against her estate, and I propose to deal with the case on that footing. On principle, and apart from authority, I should have thought that there was no room for doubt concerning the relative rights of tenant for life and remainderman. An annuity for life, secured by bond or otherwise, is only distinguishable from a debt for a lump sum payable in instalments in this, that there is necessarily a doubt how long the annuitant will live, and the liability for each periodical payment partakes of the contingency. This, however, cannot make the annuity less a charge on the estate liable to pay it or impose any greater burden on a limited owner than would attach to him if the contingency did not exist. If it be necessary or convenient to raise the charge by sale of the entire estate, or part of it, he will from time to time lose the income of so much capital as is employed in meeting the charge, and if, instead of a sale, recourse is had to a mortgage, he will be bound to keep down the interest on that mortgage, and his income will be reduced to that extent. But this seems to be the limit of his liability, and he cannot be required to provide in advance, to his detriment, for payments which may never become due. Convenience, of course, will prevent frequently recurring sales or mortgages, for it must be to the interest of the tenant for life quite as much as that of the remainderman to avoid, as far as possible, transactions which, other objections apart, are sure to prove costly. But it must be a matter for arrangement and consideration in each case what part of the settled property must be sold, or what sum must be raised by mortgage to satisfy the annuitant's demands and make provision for the future, so far as provision can reasonably be made. If the tenant for life is able and willing to meet the periodical payments, it may be convenient to the estate that he should do so, and he will be entitled to a charge for the amount advanced, with interest, just as much as a stranger. That being my view of the position, apart from authority, I turn to the decided cases to see if there is any which conflicts with it. I confess to some surprise at not finding the point as one of administration practice established beyond doubt, and I cannot but think that the real reason for this should be sought in the acknowledged rights of both annuitants and beneficiaries not requiring judicial decision. The authorities cited appear to me to recognize such a rule as I have endeavoured to express, and only to apply it differently because each has to deal with different circumstances. There is no occasion for me to refer to more than three of them. The judgment of Wood, V.C., in *Allhusen* v. *Whittell* has from its date been regarded as establishing the rule applicable to such circumstances as there occurred. The only point in which it approaches the present case is that respecting contingent legacies, and all that the Vice-Chancellor did as regards them was to hold that, although a proper amount must be set apart to meet contingent legacies when payable, the tenant for life of the residue out of which those legacies would ultimately be taken was entitled to the income of the fund set apart until required for that purpose. In *In re Muffett, Jones* v. *Mason* Chitty, J., had to consider how an annuity, for which a testator's estate was liable, ought to be paid as between the tenant for life and remainderman, and according to the head note he held that the annuity must be capitalized and borne by the tenant for life and remainderman in proportion to the value of their respective interests. Not being able myself to extract this from the reported judgment, or to understand precisely what was done, I thought it right to send for the order. That order declares that the sum certified to have been paid to the annuitant out of income, and all future payments of such annuity, or the sum necessary to purchase an annuity in lieu of the said annuity, ought to be raised or provided for by the sale or mortgage of a sufficient part of the testator's estate, and it directs a sale or mortgage of the freehold or leasehold property of the testator for the purpose of raising the costs payable thereout, and also the sum certified to have been paid out of income as above mentioned, and such sum as may be necessary for the purpose of securing the future payment of the annuity. That directly confirms the view which I have expressed respecting the rights of the parties, and makes precisely such a declaration and

(*a.*) Reported by FRANCIS T. DUKA, Esq., Barrister-at-Law.

gives such a direction as that view would justify and suggest.

The case before North, J. (*In re Harrison, Townson* v. *Harrison*), is really only another example of the application of the same principle. The circumstances were different, the chief difference being that there were three properties, and it was necessary to distribute each payment rateably between them. Also a different rule was suggested in argument. But the judgment proceeds on the same lines as that of Chitty, J. I do not quite understand what the learned judge means by saying that he did not think the tenant for life entitled to have the estate sold bit by bit, but he certainly did not intend that the tenant for life should not have a real charge with all its incidents. In this instance also, in my endeavour to make sure what was intended and done, I sent for the order, but it has never yet been drawn up. The registrar's notes informed me that Mr. Swinfen Eady was to prepare minutes. I therefore communicated with him, and he has been good enough, for my benefit, to communicate with his clients. It appears that the omission to draw up the order was the result of a natural and reasonable reflection that it would be better to realize the estates first, and work out the rights of the parties with reference to actual values thus ascertained. I understand that the estates have now been sold, and that North, J., will be asked, if he has not already been asked, to allow the order to be drawn up now, or to make some supplemental order on this footing. It is merely a question of working out the principle above mentioned with reference to the particular circumstances of the case. It will, I think, be found that other authorities are in harmony with this, or, at any rate, any apparent departure from it is due to special circumstances. In *Yates* v. *Yates*, 28 Beav. 637, for instance, the practical difficulty was occasioned by the fact that, until sold, a large part of the real estate on which the annuity was charged produced no income.

The precise form of the order to be made may require some consideration, but, in substance, it should follow that in *In re Muffet*, the effect of which I have already stated.

Solicitors, *Gregory, Rowcliffes, & Co.; Hopgoods & Dowson.*

Prob. Div. & Adm. Div. Admiralty. } Jan. 31.

"THE SOTO." (*a.*)

Practice—Taxation of costs—Solicitor—Allowance to country solicitor attending hearing—Discretion.

It is a general rule, for the guidance of the Admiralty registrar in taxing costs between party and party, that, where a solicitor in the country retained for one of the parties employs a London agent, a charge for the attendance of the country solicitor at the hearing will not be allowed; but this rule is not inflexible, and will be relaxed if it appears that the attendance of the country solicitor at the hearing was necessary for the proper execution of the suit.

This was a summons taken out on behalf of the owners of the steamship *Earl of Chester*, the plaintiffs in an action of damage against the steamship *Soto*, to review the assistant registrar's taxation of the plaintiffs' bill of costs.

Jan. 24.—The summons was adjourned into court.

(a.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

Holman, for the plaintiffs.

Nelson, for the defendants, the owners of *The Soto.*

Cur. adv. vult.

Jan. 31.—BARNES, J.—In this case a summons had been taken out by the plaintiffs' solicitors on behalf of the plaintiffs to review the taxation of the plaintiffs' costs, and the summons came before me in the ordinary course in chambers. As the matter was one of importance I thought it right to adjourn it into court, and it came on immediately afterwards in court before me, and was argued by counsel, though I am afraid they had not so full an opportunity of referring to all the authorities as they would have had if the matter had been in court originally. The summons, as I have said, was to review the taxation by the assistant registrar of the plaintiffs' bill of costs, and the items in relation to which the taxation was questioned was these: "On the 13th of June journey to London. Attending all the witnesses. Attending court on the 14th of June when the case part heard. In court on the 15th, when the case concluded, and *Soto* held alone to blame for collision. Paid railway expenses Paid hotel expenses." There were some other matters objected to, but it is not necessary to consider them, no special importance attaching to them.

The suit was between the owners of *The Earl of Chester* and the owners of *The Soto*, arising out of a collision which occurred between these two vessels on the 7th of April, 1892. *The Earl of Chester* belonged to Cardiff, where her owners carry on business, and *The Soto* was a Spanish vessel belonging to Barcelona. *The Earl of Chester*, if I recollect the facts right, sunk after the collision, and *The Soto* was so much damaged that she had to be beached, and afterwards, I think, was taken to Cardiff. *The Earl of Chester* had sailed from Cardiff shortly before the collision with a cargo of coals. The owners of *The Earl of Chester* placed the conduct of the proceedings on their behalf in the hands of Messrs. Downing & Handcock, solicitors at Cardiff, whose London agents are Messrs. Downing, Holman, & Co. The owners of *The Soto* were represented by Messrs. Lowless & Co., solicitors of this city.

The hearing took place before me on the 14th and 15th of June last, and I found *The Soto* alone to blame. The managing clerk of Messrs. Downing & Handcock, who, as I understand, had taken, or supervised the taking, of the statements of the witnesses and conducted the proceedings on their behalf, attended the hearing before me in London, and it is in respect of his expenses and charges for so doing that the present question arises.

The assistant registrar, in his answer to the objections as to the disallowance of the costs of the attendance of the country solicitor, says that it has been up to the present time the invariable practice not to allow them. He has therefore not exercised any discretion in the matter.

It was contended by counsel for the plaintiffs that the attendance of the managing clerk of the plaintiffs' solicitor was necessary in the interests of his clients, and that the assistant registrar ought in his discretion to have allowed the items objected to. On the other hand it was argued that it had been a rule of practice not to allow them.

As the point is of general importance I have referred to such authorities as have any bearing on the question, and have made inquiry as to the practice in the other divisions. The following cases all bear upon the subject:—*Bell* v. *Aitkin*, 16 W. R. 704, L. R. 3 C. P. 320; *Potter* v. *Rankin*, L. R. 4 C. P. 76, 17 W. R. C. L. Dig. 31; *In re Snell*, 25 W. R.

736, 5 Ch. D. 816; *In re Foster, Ex parte Dickens*, 26 W. R. 915, 8 Ch. D. 598; *In re Storer*, 32 W. R. 767, 26 Ch. D. 189; *Ex parte Snow, In re Sherwell*, W. N., 1879, p. 22.

Bell v. *Aitkin* was a case in which the action was for an infringement of a patent. The cause of action arose at Stockport. The trial took place in London and lasted several days, and a verdict was ultimately found for the defendants. The defendants' country attorney, who had been engaged in getting up the evidence, attended at the trial as well as the London attorney. On the taxation of the defendants' costs the master allowed the attendance of the London attorney, but not of the country attorney, considering himself bound by a general rule not to allow both, and not, therefore, at all entering into the circumstances of the particular case before him. Bovill, C.J., said, in the course of his judgment: "But cases may arise in which it is necessary that the attorney who has had the conduct of the case from its commencement and is acquainted with all the facts should be present at the trial, and I think that the present was such a case. The master does not appear to have exercised his discretion in the matter, but to have considered himself bound by an inflexible rule that costs such as those in question shall be disallowed. I think that the rule is not inflexible, and that, in this case, it is right that the master should take the facts into his consideration and exercise his judgment upon them." Byles, J., gave judgment to the same effect, and Keating and Montague Smith, JJ., concurred. That case was referred to in *Potter* v. *Rankin*, where there was a rule moved for for a review of the taxation, and the court refused the rule, observing that the circumstances of the case relied upon, namely, *Bell* v. *Aitkin*, were very peculiar. The court gave no further judgment upon this particular point, and do not seem to have dissented from the principle which is adopted by the judges in the course of the judgments in *Bell* v. *Aitkin*.

The result of the cases seem to me to be that an allowance for the attendance of the country solicitor at the hearing in London is within the discretion of the taxing officer, and that although, as a general rule, no allowance will be made, yet such an allowance will be made in exceptional cases where it is necessary that the solicitor who has had the conduct of the case from the commencement, and is acquainted with all the facts, should be present at the trial. This is what I understand to be the practice in the different divisions of the court, though perhaps there is some difference in the strictness with which the general rule has been applied, and I am informed that in the Admiralty registry it has in some cases, and very exceptional cases, been relaxed.

The question is whether it was necessary that the country solicitor or his managing clerk should attend the hearing, and it is desirable to consider that question carefully, because, although this case was one of difficulty and magnitude, it did not surpass in that respect many heavy collision cases in this court, and the present decision will affect a number of admiralty cases.

The practice of disallowing the costs of the attendance of the country solicitor in an admiralty case probably originated under circumstances very different from those existing in the present day. In former time advocates and proctors alone had the privilege of practising in the High Court of Admiralty. This exclusive right was abolished in 1859 by the 22 & 23 Vict. c. 6; and in 1861 by the 24 Vict. c. 10, s. 10, certain restrictions against proctors acting as agents for solicitors were done away with; but there seems little doubt from a perusal of the Admiralty Court Rules of 1859 and 1871 that the mode of conducting the cases continued very much the same as before. The London proctor appears to have been treated as having the real conduct of the case, though his instructions come from the outport solicitor, and the fees allowed and forms of bills of costs found in Williams and Bruce, 1st ed., Appendix, pp. lxx. to lxxviii., and pp. ccvi. to ccxxxiv., are in accordance with this view. Amongst these forms is given, at p. ccx., a list of outport charges, and to this a note is appended as follows:—"The outport charges are the charges of the country solicitor. They are frequently small in amount, because it often happens that nearly all the matters in respect of which costs are allowed as costs in the cause are transacted in London by the London agent. The outport charges are usually made out in a separate bill annexed to the bill of costs. In taxing the outport charges the charges for all matters done in the country in respect of which, if done in London, specific charges might be made are allowed in the usual way. But in addition to these charges a sum is ordinarily allowed under the head of *Agency*. This is intended to remunerate the country solicitor generally for necessary work and labour in respect of matters for which specific charges cannot be made. The sum allowed, of course, varies greatly, according to circumstances." It seems fairly clear that all the work was treated as conducted in the London registry, though there might be certain matters which were dealt with by the country agent, for an agent's charge was allowed.*

In the present day, since the establishment of the district registeries by virtue of the Judicature Acts, many cases are conducted entirely in the local registry until the hearing, and in any such case, when the hearing, as is usual in the Admiralty Division, takes place in London, the country solicitors on either side have the whole management of the case.

In 1870 a registry of the High Court of Admiralty was established at Liverpool under the 33 & 34 Vict. c. 45, and I am informed by the officials in the Liverpool District Registry that in cases conducted in the Liverpool registry it has been the practice since its foundation to allow the costs of the attendance of the Liverpool solicitors at the hearing in London, in cases in which the witnesses have been examined and depositions have been taken by them. By that I understand cases in which the Liverpool solicitors have themselves taken the real conduct of the proceedings and have had the responsibility of taking the statements of the witnesses. In cases where the solicitors of both parties practice in London no question arises, but where one side is represented in London and the other at an outport, or the one is represented at one outport, and another at another, and the case is conducted in London, the question to be decided in this case does arise. In this respect an admiralty action does not differ from some other actions tried in London. There are, however, certain peculiarities in an admiralty action which are not applicable to most other actions. The hearing of an admiralty case usually takes place within a very short time of the occurrence which gave rise to it, owing to the rapid despatch rendered necessary in a court where the witnesses are mostly seafaring men. The statements of the witnesses represented at an outport are taken by the solicitor with great accuracy; the witnesses usually arrive in London on the night before the hearing, under the arrangements

* The practice of bringing in an outport bill was discontinued in 1873, consequent upon the decision of Sir Robert Phillimore in *The City of Brussels*, 21 W. R. 71, L. R. 4 A. & E. 196.

which it is necessary to make for this class of witnesses, and the London agent in such a case may have no opportunity of examining them. In the conduct in court of a difficult collision case it is, according to my experience at the bar, most important that the solicitor who is responsible for the case and the preparation of the evidence should be present, and that counsel should have his assistance. The presence of the solicitor having the conduct of the case who has seen the witnesses is necessary, in many instances, for their proper examination in this class of case, and sometimes as a check even over the witnesses of his own side, or over the independent witnesses of the other side who have given him statements, and he is often obliged at a moment's notice to go into the witness-box to deal with statements made by these witnesses.

There are, therefore, in the Admiralty Court cases in which, owing to the exigencies of modern business and the conditions under which the cases are fought, the presence of the country solicitor may be necessary for the proper conduct of the cause, and where such is the case I am of opinion that the costs of his attendance at the hearing should be allowed.

If this principle is cautiously and properly applied no improper charge is thrown on the losing side, whereas if it is not applied and the general rule is adhered to in all cases, a successful suitor may have to bear the costs of the attendance of his own solicitor, though that solicitor's presence was necessary for the successful prosecution of his suit.

In the present case the attendance of the managing clerk of the plaintiffs' Cardiff solicitors appears to me to have been necessary, and I refer the case back to the registrar to review the taxation, and in doing so he will have to reconsider the allowance of the London agent of the plaintiffs' Cardiff solicitors, because if the country solicitor is allowed for, only such assistance as was necessary for him at the hearing can be allowed.

Solicitors for the plaintiffs, *Downing, Holman, & Co.*

Solicitors for the defendants, *Lowless & Co.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lindley and A. L. Smith, L.JJ.) [and Q. B. Div.] (Lord Coleridge, C.J., and Lopes, L.J.) — April 11; May 8.

DE BERNALES *v.* "NEW YORK HERALD." (*a.*)

Practice—Writ of summons—Service—Person carrying on business in name other than his own—Foreigner residing abroad—Claim for injunction—Issue of concurrent writ for service out of jurisdiction—R. S. C., 1883, *ord.* 11, *r.* 1 (f); *ord.* 48a, *r.* 11.

By ord. 48a, *r.* 11, "*Any person carrying on business within the jurisdiction in a name or style other than his own name may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules relating to proceedings against firms shall apply.*"

A foreigner resident abroad was the proprietor of a newspaper called the New York Herald, *printed and published at New York. He had an office within the jurisdiction, over the door of which was the name of the newspaper, the office being occupied by a telegraphic correspondent for the purpose of transmitting news to New York. At the head of one of the columns of the newspaper were the words,* "New York Herald—*James Gordon Bennett, proprietor.*" *Copies of the newspaper were occasionally sold there. The plaintiff issued a writ of summons against the* New York Herald, *claiming damages for an alleged libel which had been published in the newspaper, and an injunction against any future publication.*

Held, by the Queen's Bench Division, *that ord.* 48a, *r.* 11, *did not apply so as to allow service of the writ of summons upon the proprietor of the newspaper abroad, even if he were carrying on business within the jurisdiction under a name or style other than his own name, and that leave ought not to be given under ord.* 11, *r.* 1, *to issue a concurrent writ for service upon him out of the jurisdiction, although an injunction to restrain the publication of the libel was claimed, no grounds being shown for apprehending that the publication of the libel would be repeated.*

Held, by the Court of Appeal, *that the proprietor of the newspaper did not carry on business within the jurisdiction in a name or style other than his own name, and that, therefore, ord.* 48a, *r.* 11, *did not apply.*

Appeal from chambers.

This was an appeal by the plaintiff from an order of Kennedy, J., in chambers setting aside the order of a master allowing substituted service of a writ of summons on the defendant, and an application by the plaintiff, referred by Kennedy, J., in chambers, to the court, for leave to issue a concurrent writ for service out of the jurisdiction.

The action was brought to recover damages for libel. A claim for an injunction to restrain the publication of the libel was afterwards added by amendment. The alleged libel consisted of an insinuation that the plaintiff was the perpetrator of certain notorious frauds. Before the commencement of the action a person other than the plaintiff was tried and convicted of the fraud in question. The alleged libel was published in America in a newspaper called the *New York Herald*, the sole proprietor of which, James Gordon Bennett, was an American citizen resident in Paris. The newspaper was printed and published in New York, and another edition of it in Paris. There was an office in London taken by Bennett and occupied on his behalf by a telegraphic correspondent for the purpose of the transmission of news to New York and to Paris for publication in the newspaper. Copies of the American edition were sold at the London office, including a copy of the issue containing the alleged libel. At the head of one of the columns of the newspaper was the statement "*The New York Herald*—James Gordon Bennett, Proprietor." Attempts were made on behalf of the plaintiff to serve the writ of summons at the London office upon some person having control of the business there, but it was found to be impossible to effect such service. The plaintiff then applied to the court, and on the 3rd of February the master made an order that service of a copy of the order and of a copy of the writ of summons by sending the same by a prepaid postal letter addressed to the defendant at the London office should be a good and sufficient service of the writ. Kennedy, J., in chambers, set aside the order of the master, on the ground (amongst others) that Bennett was the sole proprietor of the *New York Herald*, and was an American citizen residing in Paris.

The plaintiff appealed.

Ord. 48*a*, r. 11, provides that "any person carrying on business within the jurisdiction in a name or style other than his own name may be sued in such name

(*a.*) Reported by T. R. COLQUHOUN DILL and W. F. BARRY, Esqs., Barristers-at-Law.

or style as if it were a firm name; and so far as the nature of the case will permit, all rules relating to proceedings against firms shall apply." Rule 1 of the same order deals with the suing of partners in their firm name, and rule 3 provides that "Where persons are sued as partners in the name of their firm under rule 1 the writ shall be served either upon any one or more of the partners, or at the principal place within the jurisdiction of the business of the partnership upon any person having at the time of service the control or management of the partnership business there; and, subject to these rules, such service shall be deemed good service upon the firm so sued whether any of the members thereof are out of the jurisdiction or not, and no leave to issue a writ against them shall be necessary.

Percy Gye, for the plaintiff.—Gordon Bennett is carrying on business within the jurisdiction, under the style of the *New York Herald*. The plaintiff is entitled, under ord. 48*a*, r. 11, to sue him in that style, and to have the benefit of the rules as to proceedings against firms which are contained in that order. The writ might have been served upon the manager of the plaintiff's business if he had not avoided service. We are therefore within the rule as to substituted service laid down in *Field* v. *Bennett*, 56 L. J. Q. B. 89, 35 W. R. Dig. 162. The fact that the defendant is resident out of the jurisdiction does not prevent the plaintiff from serving the writ here upon the manager, the practice which was formerly governed by *Russell* v. *Cambefort*, 37 W. R. 701, 23 Q. B. D. 526, and *Western National Bank of New York* v. *Perez, Triana & Co.*, 39 W. R. 245, [1891] 1 Q. B. 304, has been altered by the rules under order 48*a*, which were framed to meet those cases, and to enable a plaintiff to obtain judgment against persons carrying on business in England and resident abroad. The judgments in *Grant* v. *Anderson*, [1892] 1 Q. B. 108, 40 W. R. Dig. 191, contain expressions adverse to this view, but the only substantial decision in that case was that the defendants were not carrying on business within the jurisdiction. Secondly, if the court will not allow substituted service of the writ, leave to issue a concurrent writ for service upon the defendant out of the jurisdiction ought to be granted; the writ claims an injunction against the future publication of the libel complained of, and that brings the case within ord. 11, r. 1 (*f*): *Tozier* v. *Hawkins*, 34 W. R. 223, 15 Q. B. D. 680.

Temple Franks, for the defendant.—Ord. 48*a*, r. 11, does not apply to a single foreigner residing abroad. The new rules as to partnerships apply to English partnerships only, and have not altered the previously existing practice as to suing and serving foreigners. Further, the *New York Herald* is not a "name or style" in which a business is carried on, it is merely the title of a newspaper, and cannot be used as a substitute for the defendant's name. The defendant's name is well known, and the attempt to sue him as the *New York Herald* is made with a view of bringing him within ord. 48*a*, r. 11. [He was stopped as to this point.] No leave for service of the writ abroad ought to be granted, because the defendant is resident out of the jurisdiction—not temporarily abroad or absent for the purpose of avoiding service: *Smalpage* v. *Tonge*, 34 W. R. 768, 17 Q. B. D. 644. The claim for an injunction cannot be sustained, because the paper is not published in England and the nature of the alleged libel is such that it is extremely unlikely that it will be repeated. The plaintiff, therefore, has not brought himself within ord. 11, r. 1.

Gye replied.

Cur. adv. vult.

April 11.—LOPES, L.J.—In this case the learned judge refused to allow substituted service. I am of opinion that he was right. The writ is issued against the *New York Herald*. The sole proprietor of that newspaper is Gordon Bennett, an American citizen residing in Paris. I regard the name of the *New York Herald* as an *alias* for the name of Gordon Bennett; and I deal with the case as if the writ was issued against Gordon Bennett individually. The object of issuing the writ against the *New York Herald* is obvious. It is an attempt to bring the case within the language of ord. 48*a*, r. 11, with which I will presently deal. Independently of that order the case is on all fours with *Field* v. *Bennett*, where it was held that substituted service cannot be allowed where personal service is impossible. Personal service is impossible here; the learned judge, therefore, was right in setting aside the order for substituted service. But it is said the code of rules contained in order 48*a* has enlarged the jurisdiction of the courts by including foreign firms within their scope. It is unnecessary in this case to express any opinion as to the effect of those rules in the case of the joint property in this country of a foreign firm carrying on business here. The *New York Herald* is not a "foreign firm." It is not "a firm" at all. The *New York Herald* is an *alias* in this country for Gordon Bennett, and Gordon Bennett is an American citizen permanently residing in Paris. The rule relied on is rule 11. [His lordship read rule 11, and continued:—] I cannot think that the authors of this rule intended that service might be effected on an individual foreigner permanently residing abroad, simply because he carried on business in this country under an assumed name, where it could not have been effected upon him if he carried on business here in his own name. The code of rules contained in order 48*a* is difficult to understand, but whatever their effect and meaning may be, I decline to put upon them a construction to my mind so unreasonable as this. The point therefore fails. The learned judge was asked on another summons to give leave for service of a notice of writ on the defendant under order 11, on the ground that an injunction was claimed. The writ as originally issued had not claimed an injunction, but had been subsequently amended. That summons was referred to the court. I think this leave ought not to be given, and for these reasons. I do not believe the claim for an injunction is made *bonâ fide*, but merely to bring the case within order 11. There is no evidence of any apprehended repetition of the libel, and, indeed, having regard to the circumstances, it is most improbable that it will be repeated. The injunction, if granted, would not be made effectual against the defendant, who is not within the jurisdiction. The giving leave to serve notice of writs out of the jurisdiction is a matter of judicial discretion. We should not, in my opinion, be properly exercising that discretion if we gave leave in this case.

The appeal against the refusal of the learned judge to allow substituted service will be dismissed, with costs, and the application for leave to serve notice of the writ abroad will be refused with costs.

Lord COLERIDGE, C.J.—I entirely concur.

The plaintiff appealed.

May 8.—*Crump, Q.C.*, and *Percy Gye*, for the plaintiff.

Temple Franks for the defendant.

The COURT (Lord ESHER, M.R., and LINDLEY and A. L. SMITH, L.JJ.), dismissed the appeal upon the ground that under the circumstances the defendant did not carry on business within the jurisdiction in

the name of the *New York Herald*, and that, consequently, ord. 48*a*, r. 11, did not apply.

Appeal dismissed.

Solicitors for the plaintiff, *Brandon & Nicholson.*

Solicitors for the defendant, *Lewis & Lewis.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Kay, L.JJ.) — May 1.

DRIVER *v.* BROAD. (*a.*)

Contract—Statute of Frauds, s. 4—Interest in land—Contract for purchase of debentures — Company — Charge on undertaking and property — Floating security.

A company issued debentures whereby it charged its undertaking and all its property whatsoever and wheresoever, both present and future. One of the conditions indorsed on the debentures provided that the charge thereby created should be a floating security; and another condition provided that the moneys secured by the debentures should become payable if the company created any specific charge on any of its freehold or leasehold property in priority to the debentures. The company was possessed of certain leasehold property.

Held, that a contract for the purchase of such debentures was a contract for an interest in land within section 4 of the Statute of Frauds.

Judgment of Mathew, J. (ante, *p.* 415), *affirmed.*

Appeal from a judgment of Mathew, J., on further consideration (*ante*, p. 415).

The action was brought for breach of a verbal contract for the sale by the plaintiff and the purchase by the defendant of twenty debentures in a company called Broad's Patent Night Light Co. (Limited).

The question reserved for further consideration was whether the contract for the sale and purchase of these debentures was a contract for an interest in land within the 4th section of the Statute of Frauds.

The debentures were first mortgage debentures, whereby the company charged with the payment of the principal money and interest therein contracted to be paid "its undertaking and all its property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being."

The debentures were issued subject to certain conditions indorsed thereon. Condition 1 was as follows:—"This debenture is one of a series of like debentures issued, or to be issued, by the company for the aggregate sum of £30,000 in the sums of £100 each, and all which said debentures, whatever the date of issue, shall rank *pari passu* in point of charge, and the charge hereby created shall be a floating security, and accordingly the company, until the appointment of a receiver or the commencement of a winding up, shall be at liberty, but only in the ordinary course of its business, to sell, deal with, and dispose of the property charged, and to give receipts for money, and divide its profits as if none of the said debentures had been issued. Provided that this condition shall not authorize the creation of any specific or floating charge ranking equally with, or in priority to, the said debentures, or any specific or floating charge except subject to the charge hereby created." Condition 13 provided that the principal moneys secured by the debentures were to become payable in certain cases—viz. (*inter alia*): "If the company creates any specific charge on any of its freehold or leasehold property in priority to the debentures." Condition 14 provided as follows:—"The registered holders of one-half in value of the outstanding debentures of this issue may by writing appoint some person approved by them or him to be receiver, or a receiver and manager, of the property charged by the debentures, and such appointment may be made when the company has made default for more than two calendar months in the payment of any principal moneys or interest hereby secured, or when any order has been made or effective resolution has been passed for the winding up of the company, and section 24 of the Conveyancing Act, 1881, shall be regarded as modified accordingly. The receiver shall have power to sell the mortgaged property, and the provisions of the said Act as to sales by a mortgagee shall be applicable."

The company was possessed of certain leasehold property consisting of a factory and warehouses where its business was carried on.

Mathew, J., held that the contract for the sale and purchase of these debentures was a contract for an interest in land within the 4th section of the Statute of Frauds, and, there being no memorandum in writing of the contract, he gave judgment for the defendant.

The plaintiff appealed.

E. Morten, for the plaintiff.

A. T. Lawrence and *J. G. Wood*, for the defendant.

Lord ESHER, M.R.—The question is whether these debentures charged land so that the contract for the purchase of them was a contract for an interest in land within the Statute of Frauds. They are expressed to charge the company's "undertaking and all its property whatsoever and wheresoever, both present and future." Part of the property of the company is land and buildings. It is impossible to say that land and buildings do not come under those words. But that is not all. There are the conditions to be looked at, and condition 13 says that the principal moneys are to become payable if the company creates any specific charge on any of its freehold or leasehold property in priority to the debentures. The meaning of that must be that the debentures have created a charge not specific on the company's freehold and leasehold property. It is clear, then, that the debentures did create a charge on land, and the contract for the purchase of them was a contract for an interest in land within the meaning of the statute. It is said that is not so, because the debentures create only a floating charge. But where there is a charge on land it is not the less a charge on land because it is a floating charge. A floating charge means this—a charge on the property of the company subject to the power of the directors to dispose of any part of such property in the ordinary course of their business. It was such a charge that was considered in the case of *In re Florence Land and Public Works Co., Ex parte Moor*, 27 W. R. 236, 10 Ch. D. 530. I am of opinion that this appeal must be dismissed.

LOPES, L.J.—I am clearly of opinion that these debentures, which charged the company's "undertaking and all its property, whatsoever and wheresoever," created a charge on land, and, therefore, the contract between the parties was a contract for an interest in land, and ought to have been in writing. It is said that, the charge being only a floating security, the Statute of Frauds does not apply. But the case of *In re Horne and Hellard*, 29 Ch. D. 736, 33 W. R. Dig. 234, shows that the fact of a charge on land being a floating security does not make it any the less an interest in land,

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

KAY, L.J.—I am of the same opinion. The effect of these debentures is clearly to give an immediate charge on all the property of the company. As to its being a floating charge, that means that power is reserved to the company to dispose of any part of its property in the ordinary course of its business, as though the debentures did not exist. It does not mean that it is not a charge. The company being possessed of land, it is clear the debentures gave an interest in land within the meaning of the statute.

Appeal dismissed.

Solicitor for the plaintiff, *James White.*

Solicitors for the defendants, *Faithfull & Owen*, for *E. Hillman*, Lewes.

From Q. B. Div. (Lord Esher, M.R., and Lopes and A. L. Smith, L.JJ.) April 25.

DOUGAL *v.* MCCARTHY. (*a.*)

Landlord and tenant—Lease for a year—Tenant remaining in possession at end of year—Consent—Tenant from year to year—Terms of original lease—Implication of law.

Where, on the expiration of a lease for a year, the tenant remains in possession with the consent of the landlord, and nothing is said or done inconsistent with his holding on under the terms of the lease, the implication of law is, that a tenancy from year to year has been created on the same terms in so far as they are not inconsistent with a tenancy from year to year.

Appeal by the plaintiff from a judgment of Hawkins, J.

The action was brought to recover £70 for two quarters' rent of three rooms in a house in the Strand, payable under an agreement in writing dated the 16th of February, 1891. The agreement was made between the plaintiff as landlord and the defendant Justin McCarthy and six other persons, being the directors of the Irish National Press Association, as tenants. It was expressed to be made as a separate and personal agreement by each of the tenants. The premises were let for one year, commencing on the 1st of February, 1891, at the rent of £140, payable quarterly in advance, payments to be made on the 14th of February, the 14th of May, the 14th of August, and the 14th of November.

The tenants entered into occupation of the premises and the year's rent was duly paid. At the expiration of the year the tenants remained in possession, and in fact so continued till the 14th of May, 1892.

On the 25th of February, 1892, the plaintiff wrote to the secretary of the Irish National Press Association:—"Will you kindly send me a cheque, £35, for quarter's rent due on the 14th inst." This letter was not answered.

On the 26th of March, 1892, the secretary, Mr. Dennehy, wrote to the plaintiff:—"I am instructed by Messrs. Justin M'Carthy, M.P., Thomas Sexton, M.P., John Barry, M.P., Thomas A. Dickson, M.P., T. M. Healy, M.P., and John Murrough, M.P., to inform you that it is their intention to discontinue their present tenancy of the offices at 62, Strand, London, at present occupied by them for the purposes of this company, and I am directed to give you notice that they will not continue same beyond the period required under their agreement. I shall, of course, be glad if you can see your way to take up the premises on the 14th of May, or even earlier. We shall, of course, give you every facility for the securing of a new tenant, and I am sure you will meet us in the same spirit."

On the 31st of March, 1892, the plaintiff's solicitors wrote to Mr. Dennehy:—"Dear Sir,—Mr. Dougal has handed us your letter giving notice to give up No. 62, Strand, London, which notice will expire on the 1st of February, 1893. Our client will be ready to meet you if you have an assignee of the premises, or will be happy to consider a surrender of the present term if other suitable terms are submitted. We are instructed to ask you to be good enough to pay us the quarter's rent due the 1st of February, and shall be obliged by a remittance at your early convenience." No answer was sent to this letter.

On the 10th of May, 1892, the plaintiff's solicitors wrote to Mr. Dennehy:—"Referring to our letter of the 31st of March, a half-year's rent, amounting to £70, becomes due on the 14th inst., . . . and we have instructions to proceed to recover this if the amount is not paid by the date appointed." In reply to this Mr. Dennehy wrote:—"I shall have a meeting of the directors of this company on Saturday, when I shall bring your letter of the 10th inst. under their notice."

On the 17th of May, 1892, the defendant wrote to the plaintiff's solicitors:—"I had nothing to do with the arrangements, but of course my name was, and I believe still is, on the board of directors. Your client, I feel sure, is perfectly certain to get his rent without any trouble. I shall send your letter on to the secretary of the company in Dublin."

On the 20th of May Mr. R. Chance, the solicitor to the company in Dublin, wrote to the plaintiff's solicitors, saying that there was some misapprehension, and that all rent up to the 1st of February then last had been paid. The letter proceeded:—"My clients are quite prepared to pay a reasonable sum for use and occupation up to the date when they ceased to use the offices."

On the 23rd of May the plaintiff commenced this action, claiming two quarters' rent alleged to be due on the 14th of May. The defendant's case was that on the expiration of the agreement of the 16th of February, 1891, he became a tenant at will, so that he could determine the tenancy at any time thereafter, and, inasmuch as he had tendered possession of the premises as from the 14th of May, 1892, he was only liable for use and occupation for the period between the 1st of February and the 14th of May. The defendant paid into court the sum of £70 under a master's order, and he was willing that out of that sum £40 10s. should be paid to the plaintiff in respect of such use and occupation.

At the trial before Hawkins, J., without a jury, the learned judge gave judgment for the defendant, being of opinion that there was nothing in the evidence to show that on the expiration of the first year a tenancy from year to year had been created.

The plaintiff appealed.

J. E. Bankes, for the plaintiff.—Where there is an unconditional consent by both parties to a holding over on the expiration of a tenancy for a year, the inference of law is that a tenancy from year to year has been created on the terms of the original tenancy so long as they are consistent with a tenancy from year to year: *Right* v. *Darby*, 1 T. R. 159; *Richardson* v. *Langridge*, 4 Taunt. 128; *Waring* v. *King*, 8 M. & W. 571. Payment of rent in advance is not inconsistent with a tenancy from year to year.

J. W. McCarthy, for the defendant.—The man remaining in possession by consent at the end of the

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

year's tenancy is not of itself sufficient to give rise to the inference of law, that a tenancy from year to year has been created. The only tenancy thereby created is a tenancy at will. Before a tenancy from year to year can be implied, there must be something done, such as the payment and receipt of rent, which points unequivocally to an intention between the parties to enter into a new contract for a tenancy from year to year. In each case it is a question of fact what inference ought to be drawn. In this case the learned judge has drawn the correct inference.

Lord ESHER, M.R.—I cannot agree with the judgment of Hawkins, J. There is no dispute as to the facts of the case. Mr. Justin McCarthy and others became tenants to the plaintiff of certain premises on certain agreed terms for one year to end on the 1st of February, 1892. The agreed terms included, among others, the amount of rent and the times of payment. On the expiration of the year the tenants did not go out, but remained in possession of the premises for some considerable time. The evidence shows clearly that the plaintiff consented to their so remaining in possession, and that he consented to their so remaining in possession as tenants. He treated them as being tenants on the terms of the former tenancy—*i.e.*, he treated them as being tenants for another year subject to all the terms and conditions of the old tenancy. It was on that footing that he demanded of them a quarter's rent in his letter of the 25th of February. They, on their part, remained in possession, but up to the 26th of March they said nothing. On that day the letter which has been read was written on their behalf to the plaintiff.

Now I think the doctrine laid down by Lord Mansfield in *Right* v. *Darby* is correct: "If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards," which is exactly what happened here—it being a question for a jury, if there is one, whether the parties did so consent—"the law implies a tacit renovation of the contract"—*i.e.*, the law implies a tenancy for another year, and so on from year to year, on the terms of the old tenancy. If the tenant remains in possession, but at the same time makes some statement which is inconsistent with his being in as tenant—if, for instance, he claims to be owner—the jury would then say that he he was holding over in defiance of the landlord, and not continuing in possession by consent. In that case the implication of law spoken of by Lord Mansfield would not arise. If he remains in possession as tenant, but proposes some new stipulation, which is inconsistent with his continuing in possession on the old terms, though it is clear that he intends to remain as tenant, I do not think it necessary to determine whether in that case the implication of law would be done away with. But if the jury find that he has not said or done anything inconsistent with his holding on under the old terms, then the law implies the creation of a new tenancy from year to year on the terms of the old contract, in so far as they are not inconsistent with a tenancy from year to year. That seems to me to be the effect of the judgments of Lord Mansfield and Buller, J., in *Right* v. *Darby*. Therefore, if there is a consent to remain as tenant, and there is nothing to rebut this implication, the result in law is a tenancy from year to year on the terms of the old tenancy in so far as they are not inconsistent with a tenancy from year to year.

Now, to apply that to the present case, the letter of the 26th of March shows that these people were holding over; and, inasmuch as a jury ought not to infer that they intended to be trespassers, it ought to be taken that they were holding over as tenants. But the letter is express on the point, it speaks of their "present tenancy," which must mean a tenancy which came into existence after the first year's tenancy had come to an end. I think it is clear that they knew they were liable for another term; and the letter is practically a notice to quit at the end of the year. It asks the plaintiff to take up the premises on the 14th of May; but it does not allege a right on the part of the tenants to give up the premises on the 14th of May. This letter, so far from saying anything inconsistent with the implication of law arising from holding over with the consent of the landlord, clearly admits it. The prope inference to draw from the letter is that they consented to remain as tenants, and did not attempt to impose any term on the landlord inconsistent with their continuing as tenants on the old terms. Therefore, in accordance with the implication of law, they are tenants from year to year on the terms of the original holding, in so far as those terms are not inconsistent with a tenancy from year to year. The agreement to pay rent in advance is not inconsistent with a tenancy from year to year. Therefore, I think the judgment of Hawkins, J., was wrong, and the appeal must be allowed.

LOPES, L.J.—Lord Mansfield in *Right* v. *Darby* laid down the law as follows:—"If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract."

First let us take the case where there is a holding over by the tenant, but nothing is said by either landlord or tenant. In such a case the proper direction to the jury would be that from those circumstances there followed an implication of law that a tenancy from year to year had been created on the terms of the agreement which had expired, so far as they were not inconsistent with a tenancy from year to year. Next let us take the case where after the expiration of the year letters or communications pass between the parties. It would then be a question for the jury whether such letters or communications showed that the parties consented to the tenant's holding over. If the jury found there was such consent, then the same implication would arise as before, unless there was anything further which negatived such implication. In the present case the tenant in fact held over, and the landlord assented to such holding over in his letter of the 25th of February. If the defendant had not answered this, and nothing further had passed, I think the implication of law would have arisen. But then came the letter of the 26th of March. If that letter were capable of the construction that it negatived the implication which would otherwise have arisen, then the question whether it in fact did so would be for the jury. But can it possibly be said that this letter negatives that implication? I do not think it can. It seems to me that the letter confirms the implication. It is true it contains an appeal to the plaintiff to allow the tenants to go out on the 14th of May; but it shows they did not imagine they had a right to terminate the tenancy on that day. I therefore agree that the appeal must be allowed.

A. L. SMITH, L.J., concurred.

Appeal allowed.

Solicitors for the plaintiff, *Burch, Whitehead, & Davidsons.*

Solicitors for the defendant, *Kime & Hammond.*

From Q. B. Div. (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) — March 13.

NECK v. TAYLOR. (a.)

Practice—Security for costs—Counter-claim—Defendant residing out of jurisdiction—Counter-claim arising out of same matter as claim.

Where a counter-claim arises out of the same matter as the claim, so that the counter-claim is in reality in the nature of a defence to the claim, the court will not, in its discretion, order the defendant to give security for the costs of the counter-claim merely because he is a foreigner resident out of the jurisdiction.

Appeal from the Queen's Bench Division (Lord Coleridge, C.J., and Collins, J.) rescinding an order made in chambers that the defendants should give security for the costs of his counter-claim.

The action was to recover £69 10s. 3d., the balance of an account for board and lodging. The defendant, in her defence, alleged that she had paid the plaintiff the amount due, and by way of counter-claim alleged that the plaintiff detained certain trunks and jewellery as security for the amount of her claim, and claimed the return of the property and damages for their detention. The defendant was a foreigner resident out of the jurisdiction, and the judge at chambers, affirming the decision of the master, made an order that the defendant should give security for the costs of the counter-claim. The Divisional Court rescinded this order.

The plaintiff appealed.

Rose-Innes, for the plaintiff.

Beven, for the defendant.

The following cases were referred to:—*Winterfield* v. *Bradnum*, 26 W. R. 472, 3 Q. B. D. 324; *Mapleson* v. *Masini*, 28 W. R. 488, 5 Q. B. D. 145; *Sykes* v. *Sacerdoti*, 15 Q. B. D. 423, 34 W. R. Dig. 46; *Lake* v. *Heseltine*, 55 L. J. Q. B. 205, 34 W. R. Dig. 46.

Lord ESHER, M.R.—The decisions which have been referred to lay down this rule, that where a defendant who is resident abroad sets up a counter-claim in respect of a wholly distinct matter from that which is the subject of the plaintiff's claim, the question will be considered from the point of view of the defendant being in reality a plaintiff, and security for the costs of the counter-claim will be ordered unless there is something to show that such an order should not be made. But where the counter-claim is not in respect of a wholly distinct matter, but arises out of the same matter, transaction, or contract on which the plaintiff's claim is founded, then the court will not order the defendant to give security for costs merely because he is resident out of the jurisdiction, but will take the whole matter into consideration, and consider what is fair and just between the parties, and will exercise its discretion accordingly. That rule applies whatever form the counter-claim may take, if in fact it arises out of the same matter, transaction, or contract on which the plaintiff's claim is founded. In the present case the counter-claim is in respect of the very same transaction as the plaintiff's claim. It is in reality a defence to the action, though in form a counter-claim. The appeal must therefore be dismissed.

LINDLEY, L.J.—I am of the same opinion. The matter in the counter-claim is so closely connected with the claim as really to form part of the defendant's defence. It would not be fair or just to make the defendant give security for costs as the price of setting up such a counter-claim.

LOPES, L.J., concurred.

Appeal dismissed.

Solicitor for the plaintiff, *Guilford E. Lewis.*

Solicitors for the defendant, *Ravenscroft, Hills, & Woodward.*

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

From Q. B. Div. (Lord Esher, M.R., and Bowen and A. L. Smith, L.JJ.) — Feb. 6.

WILSON, SONS, & CO. (LIMITED) v. BALCARRES BROOK STEAMSHIP CO. (LIMITED). (a.)

Practice—Parties—Joinder of defendant—R. S. C., 1883, ord. 16, r. 11—Foreigner resident out of jurisdiction—Order to add as defendant—Discretion—3 & 4 Will. 4, c. 42, s. 8.

Where there are two joint contractors, and an action is brought against one only, the other being a foreigner resident out of the jurisdiction, the defendant is not entitled as of right, under ord. 16, r. 11, to have the other joint contractor added as a defendant.

Held, further, that, upon the facts, the court ought not to order that the other joint contractor should be added as a defendant.

Semble, *that, under ord. 16, r. 11, the court has a discretion to order other defendants to be added, but that such discretion ought to be exercised as nearly as possible in accordance with the principles upon which a plea in abatement would, before the Judicature Act, have succeeded or failed.*

This was an appeal from a decision of the Divisional Court (Day and Collins, JJ.) discharging an order of Wright, J., at chambers.

The action was brought upon a joint guarantee given by the defendants, the steamship company, and one Benier, against certain disbursements. Benier was a foreigner resident at Antwerp, and he had chartered a ship, of which the defendants were owners, for a voyage from Antwerp to Santos. The plaintiffs, who carried on business both in England and at Santos, were agents both for the ship and charterer at Santos. Certain disbursements for lighterage and other matters became necessary at Santos. Questions as to who was liable for these disbursements arose, and it was therefore agreed, in order to accelerate the discharge of the ship, that the plaintiffs should make the disbursements, and that the defendants and Benier should jointly guarantee repayment of them to the plaintiffs in England.

By the agreement, the guarantee was given without prejudice to the rights of each party.

An application was made by the defendants to Wright, J., at chambers under order 16, r. 11, that Benier should be added as a co-defendant. Wright, J., while saying that if it were a matter of discretion he should not make the order, felt himself bound by the case of *Pilley* v. *Robinson*, 36 W. R. 269, 20 Q. B. D. 155, and made the order.

The Divisional Court reversed the order on the ground that, as Benier was a foreigner resident outside the jurisdiction, the defendants were not entitled as of right to have him added as a co-defendant, and that upon the facts the order ought not to be made.

The defendants appealed.

Carver, for the defendants.—This being a joint

(a.) Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

debt, we are entitled to have Benier joined as a co-defendant: *Kendall* v. *Hamilton*, 28 W. R. 97, 4 App. Cas. 504; R. S. C., ord. 16, r. 11. The guarantee is to be performed in England; it is a guarantee to pay in London. At any rate, there is a discretion, and in this case the discretion ought to be exercised by making the order. R. S. C., ord. 11, r. 1 (*g*), also applies.

He cited *Massey* v. *Heynes*, 36 W. R. 834, 21 Q. B. D. 330; *Pilley* v. *Robinson*, 36 W. R. 269, 20 Q. B. D. 155; and *Sheppard* v. *Baillie*, 6 T. R. 327.

H. F. Boyd, for the plaintiffs.—The defendants are not entitled to have Benier joined. Before the Judicature Acts no plea in abatement could have been pleaded in a case such as this. If there be a discretion under ord. 16, r. 11, the court will not interfere with the exercise of it by the court below unless they can see clearly that it was wrongly exercised. Although Benier is outside the jurisdiction, the defendants can give him a third-party notice: *Swansea Shipping Co.* v. *Duncan*, 1 Q. B. D. 644, 24 W. R. Dig. 205; *Dubont & Co.* v. *Macpherson*, 38 W. R. 62, 23 Q. B. D. 340.

Carver, in reply.—It was a common law right that you should not be sued alone, and it is an absolute right under order 16; there is no discretion.

Lord ESHER, M.R.—The plaintiffs have sued the defendants, the steamship company, upon a joint guarantee. Thereupon a summons is taken out by the defendants who have been served in this country asking to join Benier. The question is, What are the rights of the defendants under that summons? Wright, J., said that if it were a matter of discretion he should not make the order, but the case of *Pilley* v. *Robinson* had been cited, which seemed to show that he was bound to make the order. It was argued in the Divisional Court that the defendants had an absolute right to the order. Benier is a foreigner resident abroad, and therefore the questions are (1) whether the defendants had an absolute right to the order that he should be joined as a defendant; (2) whether, if the judge at chambers had a discretion, he would be wrong if he exercised it by refusing to allow Benier to be brought in as a co-defendant. Had the defendants an absolute right? By the common law, if the plaintiff sued a defendant alone for a joint debt, and it came out that it was due from him and someone else, the plaintiff failed. But the statute of 3 & 4 Will. 4, c. 42, s. 8, said that the point must be taken by the defendant by plea. But the statute further drew a distinction, saying that if both defendants were resident in this country the plea in abatement operated as an absolute right to compel the joint contractor to be joined. But if the co-defendant who had not been sued was resident abroad, the plea in abatement could not be validly pleaded. Then came the Common Law Procedure Act, enabling you to serve a defendant who was abroad. That did not do away with the Statute of William. When the Judicature Act was passed it did away with that Act. It allows you to serve a defendant abroad in a great many more cases than the other statute. By doing away with the plea in abatement it does away with the application of the Statute of William to that case. It intended the larger power given by the new procedure to be applied in the same way as the law would have been by the existing machinery. If that be true and both defendants are in this country, and you use the machinery in the same way, you could say that the defendant has a right to bring in the other defendant. The form in the Judicature Act gives a discretion. It is not necessary to say that if the co-defendants are in this country, under no circumstances can you refuse to order the other to be joined. But as a general rule, unless there is something quite extraordinary, I should say the court is bound to order the defendant to be brought in. If the other defendant was abroad, then before the Judicature Act you could not compel the other defendant to be brought in, and, therefore, if one of the defendants is abroad and you are to use the machinery in the same way, there is a discretion; but I should say it ought to be exercised as nearly as possible as it was before. It is a matter of discretion, and therefore the court has jurisdiction to say he should be joined, but that discretion ought to be exercised with considerable care. If there were an absolute right to have a joint contractor joined, although he is resident abroad, it would give rise to considerable difficulties. Suppose the court ordered that such a joint contractor should be joined, he cannot be served with the writ without leave. Hence, after ordering the man to be brought before the court, the court might say "No, we cannot order him to be served," and therefore they would have ordered him to be brought in, and then would have said "No, we cannot order him to be served." If Benier is a joint contractor with them it seems that there must be a right to contribution, and the defendants can bring him in as a third party. If there is not a right to contribution, then the defendants are bringing him in for some indirect purpose, such as cross-examination.

We know that Wright, J., has not exercised his discretion fully. I say it is a matter of discretion, and, therefore, I shall exercise it the same way as he would have done, if he had thought it a matter of discretion.

This appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion. A plea in abatement upset the plaintiff, whether the defendants were resident within the jurisdiction or not, before 3 & 4 Will. 4, c. 42. But 3 & 4 Will. 4, c. 42 altered that, and said that a plea in abatement should not be allowed unless the defendants were within the jurisdiction. Then came the Judicature Act, which swept away pleas in abatement for non-joinder. It was still the right of the defendant in a sense to ask to have all the co-contractors sued the same way as himself, subject to the modifications pointed out in the statute. Lord Cairns said in *Kendal* v. *Hamilton* that it is an ordinary rule that where all the joint contractors are within the jurisdiction all ought to be sued, and that though the plea in abatement is abolished, the court still has the power of compelling the joint contractor to be added as a defendant. Lord Cairns never said that the substance of the old law had been affected in any serious degree by the Judicature Act. Unless it is just to impose this condition on the plaintiff we should not do it. The form of the rule leaves it in the discretion of the court. I should pause before I compelled the plaintiff to follow the other co-defendant perhaps all over the globe. There is no absolute right. As to to the way in which the discretion ought to be exercised, I agree with Wright, J.

A. L. SMITH, L.J.—The question is whether a joint defendant resident in this country and sued by the plaintiff can compel the plaintiff to join the defendant resident outside the jurisdiction.

Wright, J., came to the conclusion he had to make the order on the case of *Pilley* v. *Robinson*. It appears to me that whether the right is absolute or not, the defendant is ordinarily entitled to compel the plaintiff to sue the other joint contractor in the case when the two defendants are residing in this country. Then the defendant has a right to go to the judge and compel the other joint debtor to be added. That is not this case. Here the other joint debtor

is outside the jurisdiction. Before the Judicature Act the defendant could not plead a plea in abatement because he could not aver that the other joint debtor was within the jurisdiction of the court. Then came the Judicature Act, under which there is a discretion, and if Wright, J., had exercised his discretion he would not have made the order, nor would the Divisional Court, nor will I.

Appeal dismissed.

Solicitors for the plaintiffs, *Ince, Colt, & Ince.*

Solicitors for the defendants, *Wynne, Holme, & Wynne*, for *Simpson, North, & Johnson*, Liverpool.

App. Bankruptcy.
(Lord Esher, M.R., and Lopes and A. L. Smith, L.JJ.) May 5.

Ex parte LESTER & CO.
In re HANNAH LYNES. (*a.*)

Bankruptcy — Bankruptcy notice — Judgment debt — Married woman—Separate estate—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-sections* 1 (g), 2 —*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-section* 5.

A bankruptcy notice cannot be issued against a married woman under section 4, *sub-section* 1 (g), *of the Bankruptcy Act*, 1883.

Ex parte appeal of Lester & Co. from the refusal of the registrar to issue a bankruptcy notice against Hannah Lynes.

Lester & Co. had recovered final judgment for £54 against the separate estate of Hannah Lynes, who was a married woman carrying on business separately from her husband, which judgment remained unsatisfied.

By section 1, sub-section 5, of the Married Women's Property Act, 1882, "every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she was a *feme sole*."

By section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883, a debtor commits an act of bankruptcy "if a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him . . . a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, and he does not . . . comply with the requirements of the notice."

Section 4, sub-section 2, provides that a bankruptcy notice under the Act shall be in the prescribed form.

The prescribed form is that given in Form No. 6 in the appendix to the Bankruptcy Rules, 1886 and 1890, and is as follows:—"Take notice that within seven days after the service of this notice you must pay to the sum of £ claimed by him as being the amount due on a final judgment obtained by him against you," &c.

Lynn, for the appellant.—The registrar held that he was precluded from issuing a bankruptcy notice against a married woman by reason of the decision in *Ex parte Coulson*, 36 W. R. 142, 20 Q. B. D. 249, but that case is not applicable, because the married woman there was not carrying on trade separately from her husband. If this bankruptcy notice cannot issue, then section 1, sub-section 5, of the Married Women's Property Act, 1882, is rendered nugatory.

Lord ESHER, M.R.—I am of opinion that a bankruptcy notice cannot issue in this case. The person upon whom it is proposed to serve the notice is a married woman trading separately from her husband. It is true that such a person can be made a bankrupt, but the question in this case is whether this bankruptcy notice can be served upon her. The notice is issued under section 4, sub-section 1 (*g*), of the Bankruptcy Act, which provides that the notice shall require the debtor to pay the judgment debt in accordance with the terms of the judgment; but the notice must be in the form prescribed by the statute, and the form of a bankruptcy notice given in the appendix to the Bankruptcy Rules applies only to the case of a judgment in which the debtor is personally liable, and does not follow the terms of a judgment against the separate estate of a married woman. This notice, therefore, is not in accordance with the terms of the judgment, because it requires this married woman to pay the amount of the judgment personally, which she is not bound to do, as she is only liable to the extent of her separate estate.

It does not follow that a married woman may not be made a bankrupt in some other way.

LOPES, L.J.—The bankruptcy notice must be in accordance with the terms of the judgment, and must be in the form given in Form No. 6 in the appendix to the Bankruptcy Rules. That form is not applicable to the case of a judgment against the separate estate of a married woman. This decision does not interfere with what was said by the court in *Pelton* v. *Harrison*, [1892] 1 Q. B. 118, 40 W. R. Dig. 181, and it is not correct to say that section 1, sub-section 5, of the Married Women's Property Act, 1882, will be rendered nugatory, for it would be effective in the case of a married woman being made a bankrupt in some other way.

A. L. SMITH, L.J.—In *Ex parte Hughes, In re Howes*, 40 W. R. 647, [1892] 2 Q. B. 628, the court held that the bankruptcy notice must be in accordance with the judgment. In this case the judgment is against the debtor's separate estate, and the only bankruptcy notice which could be issued under the Act is one which required her to pay the debt personally. It was not, therefore, in accordance with the terms of the judgment.

Appeal dismissed.

Solicitor for the appellant, *J. H. Gibson.*

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

High Court of Justice.

Chan. Div.
North, J. April 14.

BRIGHTON MARINE, &c., CO. v. WOODHOUSE. (*a.*)

Arbitration—Enlargement of time by consent for delivering defence—"Steps in the proceedings"—Arbitration Act, 1889, *s.* 4—*R. S. C.*, 1883, *ord.* 64, *r.* 8.

In an action by the plaintiffs against their contractor under an agreement which provided that all disputes should be referred to arbitration, the defendant had delivered no pleadings, but when the original time for putting in a defence was about to expire, he wrote to the

(*a.*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

plaintiffs asking for fourteen days further time to put in his defence, which was granted, and subsequently wrote asking for ten days further time, which was also granted. On motion by the defendant to stay proceedings under the Arbitration Act, 1889, *s.* 4,

Held, that obtaining by consent an enlargement of time wherein to plead was not "taking a step in the proceedings" within the Arbitration Act, s. 4, *and that there must be an order to stay proceedings.*

Motion.

By two agreements dated respectively July 16, 1891, between the plaintiffs and defendant in this action, it was provided that in case of default by the defendant, a contractor, the plaintiffs might suspend him from completing the works and take possession of the premises and plant; it was also agreed that matters in difference between the parties should be referred to arbitration. Disputes having arisen, the plaintiffs, on the 5th of November, 1892, gave the defendant notice of suspension, and on the 10th of November took possession. On the 26th of January, 1893, the plaintiffs brought this action for a declaration that they had exercised their power of suspension, and for an injunction to restrain the defendant from interfering with the works. On the 6th of February the defendant entered an appearance. On the 10th of February the plaintiffs obtained *ex parte* an *interim* injunction against the defendant, and on the 3rd of March moved to continue the injunction, when, the defendant giving an undertaking, the motion stood over. The statement of claim was delivered on the 11th of March. On the 21st of March the defendant wrote to the plaintiffs asking for fourteen days further time wherein to plead, which application was granted. On the 29th of March the defendant gave notice of motion that the matters in difference between the parties having been agreed to be referred to arbitration, all proceedings in the action might be stayed under the Arbitration Act, 1889, s. 4 On the 5th of April the defendant again wrote to the plaintiffs, asking for ten days further time wherein to plead, which was granted. The defendant now moved to stay proceedings. The Arbitration Act, 1889, s. 4, provides that "if any party to a submission . . . . commences any legal proceedings in any court against any other party to the submission . . . . in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before delivering any pleadings, or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court . . . . may make an order staying the proceedings."

Byrne, Q.C., and *Baines*, for the motion, referred to *Chappell* v. *North*, [1891] 2 Q. B. 252, 39 W. R. Dig. 12.

Farwell, Q.C., and *Methold*, for the plaintiffs.—The action should not be stayed. The defendant's obtaining the plaintiffs' consent to an extension of time "a step in the proceedings" under section 4. The steps in the proceedings are taken under ord. 64, r. 8, which allows the time for delivering any pleadings to be enlarged by consent without application to the court: *Smith* v. *British Marine, &c., Association*, W. N., 83, p. 176. The plaintiffs gave time in the belief that the action would be carried on.

Baines, in reply, cited *Willesford* v. *Watson*, 21 W. R. 350, L. R. 8 Ch. App. 473.

NORTH, J.—I think that I ought to make the order asked for. The application is made under the Arbitration Act, 1889, s. 4. [His lordship then read the section, and continued:—] Now in this case the defendant has put in no defence, and so far he is in time. But then he must move before taking any steps—that is to say, before putting in a defence, or taking any other steps. The question is, Has he taken any other steps in the proceedings? It is said that he has, because when the original time limited for the putting in of a defence was about to expire the defendant wrote to the plaintiffs asking for an extension of time of fourteen days, and subsequently asked for ten days more, which expire to-morrow, and to which the plaintiffs consented. In my opinion that was not "taking steps in the proceedings," but outside them. Mr. Farwell says that that was taking steps under ord. 64, r. 8, but that rule —[his lordship here read the rule]—does not make the obtaining time by consent a step in the proceedings; that rule is framed in order to avoid expense, and if consent to enlarge the time is given, then the step of applying to the court is dispensed with. That such enlargements of time for delivering pleadings by consent are not "steps in the proceedings" is settled by *Chappell* v. *North*, where Denman, J., said: "Three different matters were relied on as being steps in the proceedings by the plaintiffs. The first was that he had obtained a series of consents from the defendant for the extension of time for the delivery of a reply. No doubt if the consent had been refused the plaintiff would have had to take out a summons, and that summons would have been a step. But I do not think that the obtaining a consent which was asked for, for the very purpose of avoiding the necessity of taking a step can itself be regarded as a step taken." It is said that that case was decided on another point, and that the application there to stay proceedings did not succeed. But this point was decided there by Denman, J. Then Mr. Farwell relied on *Smith* v. *British Marine, &c., Association*, where an action was not stayed because time had been obtained to plead, but as the report does not state whether the time was obtained by order or consent the point material for the decision of this case is left out. Then it is said by Mr. Methold it is in the discretion of the court as to whether the proceedings shall or shall not be stayed, and that when the plaintiffs gave time they did so in the belief that the applications were made for the purpose of going on with the action, and that therefore this motion should be refused. But at the time of the second application by the defendant notice of motion had already been given. I cannot therefore accede to Mr. Methold's argument. There must be an order to stay proceedings and refer the matter to arbitration, with liberty to apply.

Solicitors for the defendant, *Thomas White & Co.*

Solicitors for the plaintiffs, *Bolton & Co.*

Chan. Div. Kekewich, J. — Jan. 26.

WILLIAMS *v.* JENKINS. (*a.*)

Settled Land Act—Tenant for life—Suspension or cesser of life estate—Person having powers of tenant for life —Trust for accumulation of income for payment of debts—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-sections* 2, 5, 7; *s.* 58, *sub-section* 1 (*vi.*).

A testator devised real estate to trustees upon trust to permit his daughter to receive the rents, issues, and profits thereof during her life for her separate use, and directed

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

that, if a claim for £1,000, settled on the marriage of his daughter, should be enforced for payment, "then all her interest and benefit from the estate" should "cease until all the debts and claims on the same" should be paid. After the testator's death the trustees of the daughter's settlement demanded payment of the £1,000. The personal estate of the testator was insufficient for the payment of the debts due from, and claims against, his estate. The testator's daughter, who was his heiress-at-law, claimed to have the powers of a tenant for life under the Settled Land Act, 1882.

Held, that the daughter's life estate was suspended only; that the trustees might properly have received the income and paid it over from time to time in reduction of the debts; and that there was, in substance, an estate for life subject to a trust for accumulation of income for payment of debts; and

Held, therefore, that the testator's daughter was a person having the powers of a tenant for life within the meaning of the Act.

Adjourned summons.

John Jenkins, by his will dated the 20th of January, 1874, gave, devised, and bequeathed all his real and personal estate to his trustees, Lewis Jenkins and John Jenkins, upon trust to make certain payments void under the Mortmain Acts, and then "upon trust to permit my daughter Elizabeth, the wife of Morgan Williams, to hold and receive the rents, issues, and profits thereof during her life, and retain the same for her own separate use and benefit absolutely, free from the debts, control, or engagements of her present husband or any future husband she may marry, subject to educating her children, after deducting the payments as aforesaid, and fair payment to the said Lewis Jenkins and John Jenkins for their services as trustees, and if the claim of the £1,000 settled on the marriage of my said daughter Elizabeth be enforced for payment, or any disturbance made respecting the same, then all her interest and benefit from the estate to cease until all the debts and claims on the same be paid." The testator then made certain dispositions of the rents and profits in favour of the children of his daughter after her death.

The settlement referred to in the will was made in 1867, and the testator thereby charged his real estate with the payment of £1,000 to the trustees thereof. The testator died on the 23rd of January, 1874, leaving Elizabeth Williams his only child him surviving, and after his death the trustees of the settlement demanded payment of the £1,000. The personal estate was insufficient to pay the debts of and claims against the estate.

This was an originating summons taken out by Elizabeth Williams, asking for a declaration that she was tenant for life, or had the powers of a tenant for life under the testator's will, within the meaning of the Settled Land Act, 1882.

Badcock, for Elizabeth Williams.—The testator's daughter is beneficially entitled to possession, and is therefore tenant for life: Settled Land Act, 1882, s. 2, sub-section 5. As heiress-at-law she is tenant for life under the settlement by virtue of that sub-section and sub-section 2 of section 2. At any rate she is a person having the powers of a tenant for life, there being an implied trust for the accumulation of income for payment of debts. Section 58, sub-section 1 (vi.)

He referred to *In re Atherton*, W. N., 1891, p. 85.

Warlters Horne, for the children of Elizabeth Williams, adopted the above contention.

Warmington, Q.C., and *S. B. L. Druce*, for the trustees of the will.—The case comes within the principle of *In re Strangways*, *Hickley* v. *Strangways*, 35 W. R. 83, 34 Ch. D. 423. The applicant is not tenant for life, though she may become so when the debts are paid. The trust is for the payment of debts out of either *corpus* or income, and does not come within section 58.

Badcock, in reply.—If the debts are charged upon *corpus* the case is within sub-section 7 of section 2.

KEKEWICH, J.—It was the intention of the Legislature to confer powers of sale and other powers upon persons who could fairly be called tenants for life of settled land. A difficulty occurred to the Legislature in the numerous cases in which persons are entitled to life estates subject to charges, portions, and the like. As regards incumbrances and charges, this difficulty is met by section 2, sub-section 7, of the Act, which enacts that "a person being tenant for life within the meaning of the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent." By a later section—section 58—the same policy is pursued with reference to landed owners who are not properly tenants for life, for the Legislature must have intended to comprise by the description in section 58 persons not included in section 2. The persons described in section 58, sub-section 1 (vi.), are not tenants for life, but persons having the powers of tenants for life: "A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, . . . or is subject to a trust for accumulation of income for payment of debts or other purpose." Therefore, if you have property given to trustees upon trust to accumulate income for the payment of debts, and, subject thereto, upon trust for A. for life, then A. has the powers of a tenant for life pending the trust for accumulation, and notwithstanding that the trust for accumulation will, in all probability, extend beyond his life. It cannot be said of A., in such a case, that he is tenant for life within the meaning of any sub-section of section 2, but, for the purposes of the Act, he is entitled to exercise the powers of the tenant for life. In *Hickley* v. *Strangways* the court held that the person there claiming to be tenant for life took no estate or interest at all; that a term of twenty years had priority to the alleged estate for life; that it was not an estate for life in possession; and that, therefore, there was no tenant for life under section 2, and no person having the powers of a tenant for life under section 58. An interest which could not come into possession until the expiration of the term could not be recognized as an interest subject to a trust.

In the present case the testator was entitled to real estate subject to certain charges — "debts and claims" he calls them—on the same, that is, money which could be raised by proper proceedings out of the estate. One of these charges was a sum of £1,000 which he had agreed to pay on the marriage of his daughter, whom he was minded to make the tenant for life under his will. This sum was a debt of the testator's, and his personal estate, being insufficient to pay his debts, it became by that mere fact a charge on his real estate. He wished to make his daughter tenant for life, and that, subject to her life estate, the property should descend to her children. He gives the property to her for life for her separate use, subject to educating her children and making certain payments which he particularly mentions. Combining that with the previous language in the will, there is, I think, a devise of the property to the trustees, and having regard to the direction to pay debts, the legal estate must be in the trustees. Having thus given his daughter a life estate, the testator proceeds as follows:—[His lordship read the clause set out above.] The clause seems to point to the

entire cesser of her life estate, but though he uses the word "cease," he adds the words "until all the debts and claims on the estate be paid," so that I think he means something less than cesser in the proper sense of the word. In my opinion the daughter's estate does not cease altogether, but is suspended until the debts and claims are paid, and then revives. Then what becomes of the estate in the meantime? Someone must have the estate, and someone must pay the debts. The trustees have the legal estate, as I have already said, and during the suspension of the daughter's life interest, instead of treating her as equitable tenant for life, they are to pay the debts and claims. But when these have been paid, the daughter comes in again by virtue of her suspended estate. Now there are only two ways in which this differs from an estate for life subject to a trust for accumulation. First of all, there are no words directing accumulation, and, secondly, there is no trust for payment out of income, except by implication. As to the first point, it would be a narrow construction of the Act to hold that the words "subject to a trust for accumulation" apply only where there is found a trust for accumulation such as is found in well-drawn precedents. Then, as to the second objection, the trustees here could properly receive the income and pay it over from time to time in reduction of the mortgage debts. In substance, therefore, I think the trust is really one for the accumulation of income for payment of debts. The testator's daughter is tenant for life subject to such a trust, and, therefore, has the powers of a tenant for life under the Act, including a power of sale.

Solicitors, *Crowders & Vizard; J. H. Wrentmore*, for *Frank James & Sons*, Merthyr Tydfil.

Chan. Div. } Kekewich, J. } Dec. 3, 10.

In re HENGLER.
FROWDE *v.* HENGLER. (*a.*)

Will—Trust for conversion—Unsaleable property retained—Tenant for life and remaindermen—Apportionment of loss or profit.

A testator directed that his residuary estate should be sold and converted on a particular day, and that a share of the proceeds should be held upon trust for his wife for life, with remainders over. The residuary estate included a circus, which it was found impossible to sell advantageously, and which had been carried on at a loss by the executors since the day named for the sale and conversion of the estate. In a summons asking for directions how such losses and any future losses (or profits) should be apportioned as between capital and income,

Held, that the amount of annual profit or loss should be apportioned between the capital and the income of the testator's estate by inquiring what sum, put out at interest at four per cent. per annum on the day appointed for sale and conversion, and, as regards succeeding years, accumulating at compound interest calculated at the like rate, with yearly rests, would, together with such interest and accumulations, after deducting income tax, be equivalent, at the end of each year, to the amount of such profit or loss, and by crediting such sum to, or charging it against, the capital of the testator's estate, the rest of such profit or loss being credited to, or charged against, the income thereof.

Adjourned summons.

Frederick Charles Hengler, by his will, dated the 29th of April, 1882, after directing that two of his sons should have the use and occupation of his circus buildings at Liverpool, Glasgow, Kingston-upon-Hull, and Dublin, until the 1st of March, 1892, provided that on that day, or if the sons should cease, to carry on business as circus proprietors in partnership before that date, then when they should so cease, the trustees were to have the circuses valued and to offer them to the two sons at a valuation, any circus not purchased by the two sons to be sold under the power of sale thereinafter contained. The testator then expressed his wish that no part of his real or personal estate should be sold until after the 1st of March, 1892; but that expression of his wish was not to fetter his trustees in the exercise of the discretion thereinafter given to them as to the time of sale. The testator then gave the residue of his estate to his trustees upon trust, that they should "as soon as conveniently may be after the said 1st day of March, 1892, or (subject to the directions hereinbefore contained as to my said business) before that date if they, she, or he shall in their, her, or his discretion deem it advantageous to my estate so to do," sell the same. After paying debts and legacies the trustees were to invest the residue of the proceeds, and to stand possessed of the residuary trust moneys and the investments for the time being representing the same upon trust during the widowhood of the testator's wife, Mary A. F. Hengler, to pay to her the income of a fourth, and to pay the income of the remaining three-fourths to the testator's three sons and five daughters, and subject thereto in trust for the sons and daughters in equal shares.

The will contained no power to the trustees to postpone conversion after the 1st day of March, 1892.

The will was proved by the plaintiffs and the defendant, Mary A. F. Hengler, who were the executors, on the 16th of December, 1887.

At the time of his death the testator held the lease of a circus in London, at a ground-rent of £1,300. The lease had then about twenty-five years to run. This circus, not being specifically mentioned in the will, passed as residue.

The rent and outgoings of the London circus were very large, and considerably exceeded the income. It had, however, been found impossible to sell the property advantageously, and the evidence showed that it would be best for all parties that the property should be managed under the superintendence of the trustees as a going concern.

The court had already dealt with the question of how the rent of the London circus ought to be borne up to the 1st of March, 1892, but now the question arose how the loss since that date, and future losses (or profits), ought to be apportioned.

Warmington, Q.C., and *Theobald*, for the widow, referred to *In re Foster, Lloyd* v. *Carr*, 39 W. R. 31, 45 Ch. D. 629; *In re Earl of Chesterfield's Trusts*, 32 W. R. 361, 24 Ch. D. 643; *Beavan* v. *Beavan*, 32 W. R. 363n., 24 Ch. D. 649n.; *In re Hobson, Walker* v. *Appach*, 34 W. R. 70; *In re Flower, Matheson* v. *Goodwin*, 63 L. T. N. S. 201, 39 W. R. Dig. 9; and contended that the principle laid down and acted upon in those cases should be followed.

Renshaw, Q.C., and *T. R. Hughes*, for other beneficiaries, and *P. O. Lawrence*, for the trustees, left the question to the court.

They referred to *Gow* v. *Forster*, 32 W. R. 1019, 26 Ch. D. 672, and *In re Clapham, Rutter* v. *Clapham*, W. N., 1886, p. 54.

KEKEWICH, J., made the following order:—It appearing that an advantageous sale of the testator's circus buildings in London has not hitherto, since the

(a.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

1st of March, 1892, been possible, and that an advantageous sale thereof may not be effected for a considerable period of time, this court doth declare that as from the 1st of March, 1892, the profit made or loss sustained in respect of such circus buildings in each year until the sale thereof ought to be apportioned between the capital and the income of the testator's estate in manner hereinafter directed. And it is ordered that, for the purpose of such apportionment, the following inquiries be made after the last day of February, 1893, and the last day of February in each succeeding year until such sale or further order; that is to say: (1) An inquiry what was the amount of profit or loss in respect of such circus buildings during the year ending on such last day of February. (2) An inquiry what sum put out at interest at four per cent. per annum on the 1st of March, 1892, and as regards such succeeding years, accumulating at compound interest calculated at the like rate, with yearly rests, would, together with such interest and accumulations, after deducting income tax, have been equivalent on such last day of February to the amount of such profit or loss. And this court doth declare that the sum ascertained by the last foregoing inquiry ought to be credited to or charged against the capital of the testator's estate, and that the rest of such profit or loss ought to be credited to or charged against the income thereof.

Solicitors, *Collins, Robinson, Collins, & Driffield*, Liverpool; *Teebay & Lynch*, Liverpool; *Toulmin, Lawrence, & Shield*, Liverpool.

Chan. Div.
Vaughan Williams, J. } Jan. 25.

In re PIONEERS OF MASHONALAND SYNDICATE (LIMITED). (*a.*)

Company—Winding up—Fully paid-up shareholder—Grounds for winding up—Ultrà vires—*Issue of shares at a discount—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 79, *sub-section* (5).

A fully paid-up shareholder presented a petition to wind up the above-named company, alleging that a number of the shares had been issued at a discount, and that the petitioner and the other shareholders had been prejudiced thereby; that the company was insolvent, but that the assets were of considerable value, and, if prudently realized, would be sufficient, not only to pay and satisfy the company's debts and liabilities, but to pay a substantial dividend to the members; and that, under the circumstances, it was "just and equitable" that the company should be wound up.

Held, that the fact that a winding up would result in a surplus for the shareholders, if those who had obtained shares at a discount were made to pay up the difference between what they had actually paid and the nominal amount of their shares, did not give the petitioner the right to a winding-up order, and that the petition must, therefore, be dismissed.

The distinction drawn by Lord Herschell *in* Ooregum Gold Mining Co. of India *v.* Roper, ante, *p.* 90, [1892] *A. C.* 125, *was not between a company as a going concern and a company in liquidation, but between the rights of the company and the rights of the creditors of the company.*

Petition.

This was a petition by a fully paid-up shareholder of the Pioneers of the Mashonaland Syndicate (Limited) for a winding-up order.

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

The statements in the petition, so far as material, were to the following effect:—

1. That the company was a company limited by shares incorporated under the Companies Acts, 1862 to 1890, as a company limited by shares.

2. That the nominal capital of the company was £50,000, divided into 48,000 ordinary shares and 2,000 founder's shares of one pound each.

3. That the petitioner was the holder of 2,000 ordinary shares, and 1,200 of the founder's shares had been issued.

4. That it had recently come to the knowledge of the petitioner that the company had issued or purported to issue over 10,000 ordinary shares to persons who were the holders of shares in the New Mashonaland Exploration Co. (Limited), in liquidation, and received for each one pound share the sum of three shillings, and a transfer of an equal number of shares then held by such shareholders in the said New Mashonaland Exploration Co. (Limited) which were of no value whatever.

5. That the company was insolvent and unable to pay its debts.

6. That the assets of the company were of considerable value, and if prudently realized would be sufficient not only to pay and satisfy the company's debts and liabilities, but to pay a substantial dividend to the members.

7. That the petitioner and other shareholders of the company had been greatly prejudiced by the issue of the shares at a discount as mentioned in paragraph 6 of the petition.

8. That in the circumstances it was just and equitable that the company should be wound up.

The question argued was whether the above allegations were sufficient to warrant a winding-up order.

Dunham, for the petition, referred to the *Ooregum Gold Mining Co. of India* v. *Roper*, *ante*, p. 90, [1892] A. C. 125.

Bramwell Davis, for the company, in opposition to the winding up.—The petition is demurrable. A fully paid-up shareholder has no *locus standi* to present a petition on the ground of insolvency of the company nor on the ground that an act *ultrà vires* has been committed by issuing shares at a discount.

He referred to *In re Irrigation Co. of France, Ex parte Fox*, L. R. 6 Ch. App. 176, 19 W. R. Dig. 54, 58; *In re Rica Gold Washing Co.*, 27 W. R. 715, 11 Ch. D. 36; *In re Diamond Fuel Co.*, 28 W. R. 309, 13 Ch. D. 400.

Dunham, in reply, said that a winding-up order was the only means whereby persons to whom shares had actually been allotted at a discount could be made to contribute to the assets (*Ooregum Gold Mining Co. of India* v. *Roper*), and that it had never been laid down as an absolute rule that the commission of an act *ultrà vires* is not a ground for the presentation of a petition to wind up.

VAUGHAN WILLIAMS, J.—It is said that clause 7 of the petition does not mean that the company is legally insolvent, *i.e.*, unable to pay its debts now and in the future, but only that the company is insolvent in the sense that it is unable to pay its debts as they become due, and that if clause 7 be read in conjunction with clause 8, the proper inference is that the company, though unable to pay its debts now, would, on the realization of its assets, have sufficient to pay its debts and leave a surplus. I am inclined to think that I ought to take that view of the meaning of the petitioner, and that is the view which I took in the remarks which I have already made, and I dispose of the case upon that view; but, even if the petitioner has that part of the case decided in his favour, he has

not, in my opinion, any right to the order which he asks for. His counsel, in argument on his behalf, admits that the only ground upon which he can support his petition is under the "just and equitable" clause (Companies Act, 1862, s. 79, sub-section 5). In my opinion, it is not just and equitable that he should have a compulsory order to wind up the company. It was very fairly admitted in the argument that it would not be "just and equitable" that I should make the order if that which the petitioner is complaining of here were a matter which he could have had dealt with in the ordinary tribunals by the ordinary process. It was admitted that if this were merely a case where the directors of the company were going to do something which was *ultrà vires* the petitioner could not come here and ask for a winding-up order for the purpose of preventing them from doing that, and it was objected that the petitioner must not apply to the court for the extraordinary remedy of a winding-up order, because he had a remedy by an ordinary action. In answer to that it is said that the right which the petitioner seeks to enforce is one which he can only enforce by means of a winding-up order.

The petitioner says that certain shares of the company were issued at a discount, and that although, as between the company and the shareholders to whom the shares were issued, the company could not insist on the difference between the actual amount and the nominal amount of the shares being paid up, yet if a winding-up order was made, the result would be that those to whom the shares had been so issued would be placed on the list of contributories and made to pay up the difference, and thus a fund would be created which would be available, in the first place for the creditors, and secondly for the shareholders, in case of there being a surplus. And it was contended that the petitioner had an interest in that contemplated surplus, and, therefore, an interest justifying the presentation of his petition to have the company wound up as the only means by which he could obtain payment. In my judgment he has no such right. His right is the same in relation to the matter as that of the company; and though it is true that he might have an interest in the surplus, that is a right which only arises when a fund has been created really for the benefit, in the first instance, of the creditors, and secondly, to the extent of the surplus, for the benefit of the shareholders. The contrast drawn by Lord Herschell in *Ooregum Gold Mining Co. of India* v. *Roper*, is not a contrast between a company which is now a going concern and a company in liquidation. The contrast which he draws is a contrast between the rights of a company and the rights of the creditors of a company. Lord Herschell is there really saying that the company has no right to enforce payment of the difference between the amount paid and the full amount of the shares, but that its creditors have such a right. That being so, and there being no right of creditors in question at all in the present case, the only rights are those of the shareholders, and, resting the case on Lord Herschell's judgment, a shareholder has no more right to come and enforce by petition this liability of the shareholder to whom shares have been issued at a discount than he had in that case to enforce it by an action. The petition must be dismissed, with costs.

Solicitors, *B. F. Linnett; Munk & Adie.*

Q. B. Div.
(Wills and Charles, JJ.) April 24.

FIRTH & SONS *v.* PALMER AND DE LAS RIVAS. (*a.*)

Practice—Writ—Foreign defendant—Service of notice of writ out of the jurisdiction—Appearance under protest.

A foreign defendant resident out of the jurisdiction was served with notice of a writ of summons. He appeared to the writ under protest, the appearance containing on the margin a memorandum that it was entered under protest, in order to preserve the defendant's right to object to the jurisdiction.

Held, that the defendant could properly enter an appearance under protest without losing his right to object to the jurisdiction.

Motion of the defendant Martinez de las Rivas to set aside an order of Kennedy, J., in chambers (whereby it was ordered that the plaintiffs be at liberty to issue a concurrent writ of summons against de las Rivas, and to serve notice of the writ at Bilbao or elsewhere in Spain), and to set aside service of notice of the writ which the plaintiffs had issued in pursuance of the liberty given by the said order.

The action was brought against the defendants, Martinez de las Rivas and Sir Charles Mark Palmer, to recover a sum of money alleged to be due upon a contract for the supply by the plaintiffs to the defendants of steel tubes and other material for the manufacture of cannon, the defendants being parties to a contract for the supply of cannon by them to the Spanish Government. The defendant de las Rivas was a Spanish subject and had no place of business within the jurisdiction, but carried on business in partnership with Palmer, the other defendant, at Bilbao, in Spain. Palmer was a British subject, and, in addition to the partnership with de las Rivas, carried on business within the jurisdiction.

The contract was in French, and was entered into by the parties to it at Bilbao. The defendants had an option under the contract of taking delivery of the goods at Jarrow or Bilbao and of making payment in London or Paris, and they had elected to take delivery at Bilbao and to make payment at Paris.

The plaintiffs obtained leave on the 25th of February, 1893, upon an *ex parte* application at chambers to issue a concurrent writ of summons against the defendant de las Rivas, and to serve notice of the concurrent writ upon him at Bilbao. The defendant Palmer appeared to the writ on the 1st of March, and notice of the concurrent writ was served upon de las Rivas on the 3rd of March. Appearance under protest was entered for him, the following note being written on the margin of the appearance: "N.B.—This appearance is entered under protest in order to preserve the defendant Martinez de las Rivas' right to object to the jurisdiction."

In addition to the question as to the effect of an appearance under protest, it was also contended on behalf of the defendant that the facts of the case did not bring it within the provisions of ord. 11, r. 1 (*e*) (*g*), which deal with the cases in which service out of the jurisdiction is permitted. The court decided in favour of the defendant on this point, but as their lordships were of opinion that this portion of the case was covered by authority, it is only necessary for the purposes of this report to deal with the question of the validity of an appearance under protest.

Lawson Walton, Q.C., and *Scott Fox*, for the defendant.

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Danckwerts, for the plaintiffs.—The defendant had no power to appear under protest, and the protest must be disregarded. His proper course was to move to set aside the writ before appearing, under ord. 12, r. 30. In *Mayer* v. *Claretie*, 7 Times L. R. 40, the court set aside a writ after appearance had been entered under protest; but ord. 12, r. 30, was not called to the attention of the court in that case. The only case in which an appearance under protest is permitted by the rules is under ord. 48*a*, r. 7, where a person is served as a partner.

He also referred to *Davis* v. *André*, 38 W. R. 437, 24 Q. B. D. 598; *Western National Bank of New York* v. *Perez, Triana, & Co.*, 39 W. R. 245, [1891] 1 Q. B. 304; *Heinemann* v. *Hale*, 39 W. R. 485, [1891] 2 Q. B. 83.

WILLS, J.—It has been argued on behalf of the plaintiff that the appearance of the defendant "under protest" is an appearance for all purposes. It is obvious that the appearance is either bad or good, and either way the defendant's rights are not affected, for if the appearance is bad, then there has been no appearance at all, and the defendant can apply to set aside the service. On the other hand, if the appearance is good, the case falls within the principle laid down by Mathew, J., in *Mayer* v. *Claretie*, that an appearance unqualified by protest does not take away the defendant's right to object to the jurisdiction if he gives notice of his objection at the time he enters his appearance. This case is different from *Davis* v. *André* and other cases in which it has been held that a conditional appearance is bad. I agree with the decision of the court in *Mayer* v. *Claretie*. When an appearance under protest is entered it is a question for the court to decide afterwards whether the appearance or the protest is to prevail; and in the present case I am of opinion that the defendant's contention, that the judge in chambers had no jurisdiction to make this order, is correct, and this appeal must therefore be allowed.

CHARLES, J.—I agree. I think the case is covered by the decision in *Mayer* v. *Claretie*. In that case there was an unconditional appearance accompanied by a notification on a separate piece of paper that the defendant would object to the jurisdiction. In the present case the appearance states on its face that the reason for appearing under protest is to preserve the defendant's right to object to the jurisdiction. The notification is none the worse for being on the same paper as the appearance, and the judgment of Mathew, J., in *Mayer* v. *Claretie* is applicable to this case. On the other hand, if this is a bad appearance, it is obvious that it is open to the defendant to make this application.

Appeal allowed.

Solicitor for the plaintiffs, *Baillie*.

Solicitors for the defendants, *Maples, Teesdale, & Co.*, for *Leitch, Dodd, Bramwell, & Bell*, Newcastle-on-Tyne.

Q. B. Div.
(Wills and Charles, JJ.) April 21.

ROBERTS *v.* HOLLAND AND OTHERS. (*a*.)

Practice—Parties—Non-joinder of plaintiffs—Action by one tenant in common for injury to reversion—Action for breach of covenant—Severance of reversion after demise.

One tenant in common of a reversion is entitled to maintain an action for injury to the reversion without joining his co-tenants as plaintiffs.

Pleas in abatement being abolished, it can only be a question for the discretion of the judge at chambers whether the non-joinder of such co-tenants ought to be a ground for staying the action until they are joined.—Per curiam.

An action may be maintained by one tenant in common of a reversion for breach of a covenant running with the land, without joinder of his co-tenants in common as plaintiffs, where the severance of the reversion takes place after the demise.

Argument on points of law stated for the opinion of the court.

The action was brought to recover damages (1) for trespass and wrongful acts causing injury to the plaintiff's reversion, and (2) for breach of a covenant in a lease, under the following circumstances:—

One Ellis Humphreys demised a certain farm on lease to Holland and another.

Humphreys, by will, devised the reversion to his wife for life, and after her death to his six daughters as tenants in common.

Humphreys and his wife died, and the interest of one of the daughters became vested in the plaintiff Roberts.

The wrongful acts complained of were the tipping, by the defendants, of large quantities of mining refuse upon the farm. It was also alleged that this constituted a breach of a covenant in the lease.

The defendants applied at chambers to stay the action until the remaining tenants in common were joined as plaintiffs, whereupon it was agreed that the following points of law, raised by the defendants, should be stated for the decision of the court:—

(1) That the plaintiff, being one of several tenants in common, could not maintain the action without joining his co-tenants as plaintiffs.

(2) That the covenant in the lease being with the deceased Ellis Humphreys, and not with the plaintiff, his title was as tenant in common with other persons, and that he could not maintain the action in respect of breaches of the covenant except jointly with such other persons.

Gore, for the defendants.—One of several tenants in common cannot maintain an action for tort: *Pilley* v. *Robinson*, 36 W. R. 269, 20 Q. B. D. 155. The rule is still the same, although pleas in abatement, the mode by which it would have been applied, are abolished. In *Wilson, Sons, & Co.* v. *Balcarres Brook Steamship Co.*, [1893] 1 Q. B. 423, Lord Esher, M.R. (at p. 427), said:—"Under the Judicature Act pleas in abatement are abolished, and therefore the provisions of the Act of William the 4th can no longer have any direct application. But it was not intended by the Judicature Act to alter people's substantive rights. A larger power was given to the court by the new procedure as to joinder of parties; but that procedure ought, as it seems to me, to be administered with regard to the principles of the old law upon the subject. Therefore, where there are two joint contractors, both resident within the jurisdiction, I think that, *prima facie*, if one of them is sued on a contract he would have a right to have the other made a co-defendant." The effect of the Judicature Act, therefore, was to alter the form rather than the substance of the law. On the second point, the principle is the same in contract; joint covenantees cannot sue independently. The plaintiff's right here under the covenant, which was a single covenant made with

(*a*.) Reported by JOHN P. MELLOR, Esq., Barrister-at-Law.

Humphreys, is at most a right jointly with the co-covenantees. The covenant being originally an entire covenant, the cause of action under it to the present covenantees must be joint, and, as was laid down in *Foley* v. *Addenbrooke*, 4 Q. B. 197, by Lord Denman at p. 207, they must all sue. The defendants here, therefore, took the right course in applying to have the action stayed until joinder of the other necessary parties, the proper way of proceeding after the abolition of pleas in abatement.

S. T. Evans, for the plaintiff, was requested by the court to direct his argument to the second point. —Here the entire reversion is divided amongst several persons, each possessing a distinct interest in his particular portion. Each of them has, therefore, a separate right of action for any breach of a covenant running with the land which affects the value of the entire reversion. In *Martin* v. *Crompe*, 1 Lord Raym. 340, Holt, C.J., at p. 341, said that if there were two tenants in common of a reversion expectant on a lease for years on which a rent is reserved, they may join in debt for the rent, or sever, and the one may have an action for the moiety of £20 rent, but not for £10, and so it has been adjudged." That *dictum* was quoted with approval in the judgment of Tindal, C.J., in *Simpson* v. *Clayton*, 4 Bing. N. C. 758, at p. 781, in which it was said that the utmost that had been established was not that tenants in common must join, but that they might, in an action of covenant. That was the decision *Kitchen and Knight* v. *Buckly*, 1 Lev. 109, the effect of which was, as was pointed out in the judgments in *Thompson* v. *Hakewill*, 14 W. R. 11, that tenants in common might join or sever at their election when the severance of the reversion is after the demise. That affords the distinction between the present case and one where all the tenants in common join in a demise; in the latter case, in an action on a covenant to repair, they must all join. [He also cited *Ackroyd* v. *Briggs*, 14 W. R. 25.] By the Judicature Act a plaintiff to be joined must have given his consent in writing, and the effect of the defendants' contention would be that a single one of several co-tenants might arbitrarily refuse to join, and so prevent the action.

He also cited *Jackson* v. *Kruger*, 52 L. T. N. S. 962, 33 W. R. Dig. 160.

Gore, in reply.

WILLS, J.—The first question which we have to decide in this case is whether one tenant in common can sue for a tort without joining his co-tenants as plaintiffs. Now the authorities establish that such an action can be maintained; the only objection which could be taken to it formerly was by a plea in abatement, a course which is not now allowed, the only thing dealing with the matter now being the order of court which regulates the staying of actions. But it cannot be that where one tenant in common refuses to be joined as plaintiff in such an action that that can be a fatal objection; it may possibly be a ground for staying the action, but that is a question for the discretion of the judge at chambers.

Then we have to consider whether one tenant in common can maintain an action of covenant without joining his co-tenants as plaintiffs. On that point I have been convinced by the able argument of Mr. Evans. The real question is not, as he points out, whether several joint covenantees can sue independently; it is quite clear that they cannot maintain such an action. The question here, which is quite distinct, is whether, where an owner demises, and—the covenant running with the land—afterwards parts with the demise to six co-tenants, one of those co-tenants can sue alone; whether, in fact, it is still one joint covenant, or whether there are six different covenants. Now I think each of them, holding a separate interest and having an undivided sixth part, they become six several co-covenantees, and may maintain six separate actions. In Platt on Covenants, p. 130, it is stated that "where the contract is entered into with the covenantees jointly, and the estate taken by them is several, they may at their option sue jointly or severally: jointly in respect of the joint contract, severally in respect of the interest. And if there are three covenantees taking distinct interests, two of them may support an action without joining the third, though living."

Now that shows that where by any circumstances there are separate interests there are separate covenants. No question of joint covenant arises in this case, and I need not go through the cases cited by Mr. Evans, but I will refer to one or two which Mr. Gore cited as making the other way. The case of *Foley* v. *Addenbrooke* seems to me to decide that when the original covenant was joint nothing can make that a separate covenant with A. and B., or their executors or representatives. I do not see anything in the judgment of the court in that case to indicate that where there are assignees in common of property originally held by one, a covenant which enures to their benefit does not become a bundle of separate covenants.

The same observation applies to the case of *Thompson* v. *Hakewill*, the covenant there, being always joint, remained joint. Under these circumstances, therefore, I think that the plaintiff is entitled to our judgment, and to maintain his action.

CHARLES, J.—I am of the same opinion. I have had some doubt on the last point, but in the result I have arrived at the same conclusion as my brother Wills.

In the first place, I think it is clear that one tenant in common can maintain an action in tort. It was said in argument that although the old plea in abatement was abolished, nevertheless the cases of *Pilley* v. *Robinson* and *Wilson, Sons, & Co.* v. *Balcarres Brook Steamship Co.* established that the judge at chambers ought to stay the action upon the same grounds as would have supported that plea. I cannot agree. I think that is an entire misconception of what the effect of those cases was. We merely decided in the case of *Pilley* v. *Robinson* that in an application under ord. 16, r. 11, where an action was brought against one only of several joint contractors, he was entitled as of right to have his co-contractors joined as defendants, and the subsequent case of *Wilson* v. *Balcarres Brook Steamship Co.* carried the principle no further. The Court of Appeal then decided that as a rule the court in its discretion would apply the same principle as would have supported, or otherwise, a plea in abatement before the Judicature Act, when it was sought to join a defendant. Now the case is quite a different one here, where it is sought to join six plaintiffs, the consent of every one of whom must first be obtained. Whether that ought or ought not to be done must in every similar case be entirely a question of discretion.

On the other point the argument of Mr. Evans has removed my doubts. It is true that where there are six joint contractors they must all sue, and if they do not there would be a nonsuit, because the proof would show a variance with the writ. But that does not apply here, because the covenant was with Humphreys, who is dead, and under his will six persons became entitled to the benefit of it. They each have a separate title and separate interests, and I am therefore of opinion that each of them is entitled to maintain an action alone under the

covenant, and that our judgment on these points must be in favour of the plaintiff.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Lloyd George & George.*

Solicitors for the defendants, *Saffery, Huntley, & Son*, for *Breese, Jones, & Cusson.*

Q. B. Div.
(Lord Coleridge, C.J., and Cave, J.) Feb. 2.

ELLIS *v.* PLUMSTEAD BOARD OF WORKS. (*a.*)

Metropolis—Metropolis Local Management Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 75—"*Building, structure, or erection*"—*Boundary wall or fence—Forecourts or spaces.*

Section 75 *of the Metropolis Management Act*, 1862, *is not intended, under the conditions specified in the section, to prevent an owner from erecting such a wall or fence as would be a reasonable ascertainment of, and protection to, his property; and it must be left to the good sense and discretion of the magistrate to say in each case whether a wall or fence is so, or whether, by not being* bonâ fide *confined to that object, it becomes a "building, structure, or erection" within the meaning of the section.*

Appeal by way of special case from an order of a metropolitan police magistrate directing the demolition of a wall on the ground that it was an infringement of section 75 of the Metropolis Local Management Act (25 & 26 Vict. c. 102).

The appellant owned certain land fronting a street within the district of the respondent board, upon which he had erected a house which was in line with the general building line of the street, and was distant 50 feet from the highway. Between the house and the street there was a vacant space of ground which belonged to the appellant. Between this space and an adjoining vacant plot the appellant erected a wall 13 feet high, projecting 20 feet towards the roadway, and attached to the house at one end.

An order was made by a magistrate for the demolition of this wall on the ground that, being attached to the house, it was part of a "building," and therefore an infringement of the 75th section of the Act above mentioned.

The order, being confirmed on appeal by a divisional court, was carried out.

The appellant thereupon erected a second wall upon the same footings, and projecting the same distance, but not more than 7 feet 8 inches in height, and separated from the wall of the house by a gap of 7 inches in width.

A further summons was taken out against the appellant, and the magistrate, being of opinion that the wall was a "building, structure, or erection," within the meaning of the above section, which projected beyond the general line of buildings, made an order for demolition, subject to a case stated for the opinion of the court, which now came on to be argued.

Section 75 of the Metropolis Local Management Act (25 & 26 Vict. c. 102), after repealing section 143 of 18 & 19 Vict. c. 120 and section 140 of 7 Geo. 4, c. 142, enacts that in lieu thereof "no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate in case the distance of such line of buildings from the highway does not exceed 50 feet, or within 50 feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds 50 feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway, such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being, and in case any building, structure, or erection be erected, or be begun to be erected or raised, without such consent or contrary to the terms and conditions on which the same may have been granted, it shall be lawful for the vestry of the parish or the board of works for the district in which such building or erection is situate to cause to be made complaint thereof before a justice of the peace, who shall thereupon issue a summons, &c."; and the section further provides that an order may be made by such justice of the peace upon the owner, or occupier, or builder, &c., directing the demolition of any such building or erection, or so much of it as is beyond the general line so fixed as aforesaid, &c.

Section 98 of the same Act, after providing in effect that no existing road shall be hereafter laid out for building as a street unless widened to the full width of forty feet, and for the mode in which such width is to be measured, continues: "But where forecourts or other spaces are intended to be left in front of the houses or buildings, then the width shall be measured up to the fence or boundary dividing, or intended to divide such forecourts or spaces from the public way," &c.

R. Cunningham Glen, for the appellant.—It was not contemplated by the Legislature that a mere boundary wall should be a building, structure, or erection within the meaning of section 75. That section itself refers to "gardens," and the clear inference, therefore, is that it contemplated their being enclosed, and not left unprotected. Section 98 of the same Act, moreover, expressly recognizes the existence of such boundary fences, as does also the amending Act of 1878 (41 & 42 Vict. c. 32), s. 6. Several of the properties in this road are divided by walls seven feet high, and if this wall be held to be a "building," then it follows that a merely divisional wall will be equally a "building." In *Clark* v. *Vestry of St. Pancras*, 34 J. P. 181, it was decided that there was no power to order the reduction of the height of a wall. The result, therefore, is that no divisional wall could be erected beyond the building line, and the property of owners in front of their houses would be unprotected from the public. This case is not precluded by the decision as to the former wall, as there is now no finding that the wall is part of a building, which was the case there.

Forman, for the respondents.—This wall is practically identical with that ordered to be demolished in the previous case, which should cover the present one. The Acts providing that no "building" should be erected beyond the building line were repealed; the new Act, therefore, must have been intended to embrace something more than that. "Erection" is a very broad term, and in *Adams* v. *Bromley Local Board*, 37 J. P. 662, a wooden fence three feet six inches high was held to be an "erection" within a bye-law. In *Clark* v. *Vestry of St. Pancras*, whatever the *dictum* of the Lord Chief Justice, the order was nevertheless allowed to stand. The right of the appellant to erect a fence on his boundary is not disputed, but it must not be one in the nature of a "building, structure, or erection."

Lord COLERIDGE, C.J.—This is an embarrassing

(*a.*) Reported by JOHN P. MELLOR, Esq., Barrister-at-Law.

case, because we have to decide the meaning of a wide term in the Act of Parliament. It is exceedingly difficult to say that anything built between two adjoining properties is not a "building, structure, or erection." But I think that this wall, as ascertained by the magistrate, by the photographs, and by the plans, is within the section, and, therefore, that the magistrate was right in saying what I am not prepared to say, that every possible structure by which a man marks off his property from his neighbours', and which simply ascertains his own property, having that and that only for its object, would be a "building, structure, or erection" within the meaning of that section. I have shown and I feel a comparative absence of tenderness for private property in relation to streets, for a man who has such property has it immensely improved in value, and all sorts of conveniences given to him. That fact justifies Parliament and courts of law, in my opinion, in being less scrupulously tender towards it. But that must not, on the other hand, be pushed too far, and, therefore, I shrink from saying just how far it is within the intention of the Act to interfere in regard to this matter. It must, in each case, be left to the good sense of the magistrate to say whether such a structure is a reasonable ascertainment of the owner's property.

Now, I cannot see that this is a structure simply and solely for that purpose, and I am of opinion therefore that the magistrate's decision was right, and must be affirmed.

CAVE, J.—I am of the same opinion. I cannot think that section 75 is intended to prevent a man putting up a reasonable garden wall to protect his property. The object of it is to preserve the uniformity of a line of houses; for in a new street people often desire to have their houses set back to escape annoyance from passengers and other things.

If, therefore, the intention of the section were to prevent such reasonable walls, just see what the consequences would be. A man who had deprived himself of the advantages of part of his land, and set his house back to the fifty feet, would, if no wall were allowed, be liable to having people coming all over his ground and right up to his windows.

It seems to me, therefore, that to say that for fifty feet a man cannot protect himself in a reasonable way is quite unwarranted by the Act, but what a man does to reasonably prevent the public walking over his property is not forbidden; the object, as I have said, of the section is to prevent people destroying the line of uniformity. When we get to the case of this boundary wall, however, the matter is different. Here the magistrate has found that this thing in question is a "building, structure, or erection," and I agree, and I think it quite clear that the reasonable protection of his property was not the object of the owner in putting it up. He seems first to have tried to see how high and mighty a thing he could erect, and I cannot say that I think that the present one is a *bonâ fide* boundary wall or fence. This appeal must, therefore, be dismissed, with costs.

Appeal dismissed; leave to appeal refused.

Solicitors for the appellants, *Giraud & Shoppee.*

Solicitors for the respondents, *G. Whale.*

Court of Appeal.

From Q. B. Div.
(Lord Esher, M.R., and Lopes and A. L. Smith, L.JJ.)
[and Q. B. Div.]
(Hawkins and Cave, JJ.)
April 24; May 16.

SHAW v. RECKITT.
(PONTEFRACT ELECTION PETITION.) (a.)

Parliament—Election petition—Amendment—Jurisdiction to grant leave to amend—Judge not upon the rota—Rules of Court—Corrupt and Illegal Practices Act, 1883 (46 & 47 *Vict. c.* 51), *ss.* 40, 56—*Parliamentary Elections Act,* 1868 (31 & 32 *Vict. c.* 125), *s.* 25—*Parliamentary Election Petition Rules,* 1868, *r.* 44—*Practice—Appeal—Judicature Act,* 1881 (44 & 45 *Vict. c.* 68), *s.* 14.

Section 40, *sub-section* 2, *of the Corrupt and Illegal Practices Prevention Act,* 1883, *provides that an election petition may be amended with the leave of the High Court; and, by section* 56, *sub-section* 1, "*Subject to any rules of court, any jurisdiction vested by this Act in the High Court may,*" *except as to criminal matters,* "*be exercised by one of the judges for the time being on the rota for the trial of election petitions,*" *or by a master,* "*in manner directed by and subject to an appeal to the said judges.*" *Rule* 44 *of the rules made under the Parliamentary Elections Act,* 1868, *provides for the hearing of interlocutory matters by a judge on the rota* "*if practicable, and if not, then by any judge at chambers.*"

Held, by the Queen's Bench Division, *that the rules made under the Act of* 1868 *do not apply to section* 56 *of the Act of* 1883, *and that a judge who is not on the rota for the trial of election petitions has no jurisdiction to make an order giving leave to amend an election petition.*

Held, also, that such an order ought not to be made ex parte.

Held, upon appeal, that the decision of the Divisional Court *was a decision upon a question of law within section* 14 *of the Judicature Act,* 1881—*which provides that the jurisdiction of the High Court to decide questions of law, upon appeal or otherwise, under the Parliamentary Elections Act,* 1868, *or any Act amending it, shall be final and conclusive, unless special leave to appeal be given by the High Court—and that, therefore, no appeal lay without leave.*

Application to rescind an order made by Grantham, J., in chambers, giving leave to the petitioner to amend his petition against the return of the respondent as member of Parliament for the borough of Pontefract, upon the grounds that the order was made without jurisdiction, Grantham, J., not being upon the rota of election judges, and that it was made *ex parte.*

On the 20th of March the statutory return of the respondent's election expenses was made.

On the 21st of March the petitioner bespoke a copy of the return, and this was furnished to him on the 25th of March. There was evidence that upon the 24th of March, the day upon which the order giving leave to amend was made, none of the judges upon the rota of election judges were at the Royal Courts of Justice. The 29th of March was the last day of the Hilary Sittings of the court.

The Corrupt and Illegal Practices Prevention Act, 1883, provides as follows:—

Section 40, sub-section 1.—"Where an election

(a.) Reported by T. R. COLQUHOUN DILL and W. F. BARRY, Esqs., Barristers-at-Law.

petition questions the return or the election upon an allegation of an illegal practice, then notwithstanding anything in the Parliamentary Elections Act, 1868, such petition may be presented before the expiration of fourteen days from the date of the return and declarations respecting the election expenses by the member to whose election the petition relates and his election agent."

Sub-section 2.—"Any election petition presented within the time limited by the Parliamentary Elections Act, 1868, may, for the purpose of questioning the return or the election upon an allegation of an illegal practice, be amended with the leave of the High Court within the time within which a petition questioning the return upon the allegation of that illegal practice can under this section be presented."

Section 56, sub-section 1.—"Subject to any rules of court any jurisdiction vested by this Act in the High Court may, so far as it relates to indictments or other criminal proceedings, be exercised by any judge of the Queen's Bench Division, and in other respects may either be exercised by one of the judges for the time being on the rota for the trial of election petitions sitting either in court or at chambers, or may be exercised by a master of the Supreme Court of Judicature in manner directed and subject to an appeal to the said judges."

Sub-section 2.—"Rules of court may from time to time be made, revoked, and altered for the purposes of this Act and of the Parliamentary Elections Act, 1868, and the Acts amending the same by the same authority by whom rules of court for procedure and practice in the Supreme Court of Judicature can for the time being be made."

Pope, Q.C., and *S. H. Day*, for the respondent.—This order was made without jurisdiction. The power to amend an election petition was given for the first time by section 40, sub-section (2), of the Corrupt and Illegal Practices Act, 1883, and section 56 of that Act shows how the power is to be exercised. According to that section, it is only an election judge who has power to give leave to amend, but that provision is to be "subject to any rules." No rules have been made under the Act of 1883, and the only election rules in existence are those of 1868, made under the Parliamentary Elections Act of that year. Under that Act there was no power to amend a petition, so the reference in section 56 must be to rules to be made under that section. But if that section refers to the rules of 1868, the petitioner must still, under rule 44, apply in a matter of this kind to an election judge, or show that it is impracticable to do so. This order, even if the judge had power to make it, ought not to have been made *ex parte: Buckrose Election Petition*, 4 O'Mal. & H., p. 116.

Bigham, Q.C., and *W. Graham*, for the petitioner.—The learned judge had jurisdiction to make this order. The only rules as to election petitions which are in existence are the Parliamentary Election Petition Rules made under section 25 of the Parliamentary Elections Act, 1868, and they apply to the Act of 1883. Rule 44 regulates the procedure upon interlocutory matters; such matters are to be disposed of by one of the judges upon the rota "if practicable, and if not, then by any judge at chambers." In the present case, owing to the absence of judges on other duties and the near approach of the Vacation, it was not practicable to make the application to an election judge within the time prescribed—fourteen days from the date of the return of the election expenses. Therefore, any judge at chambers had jurisdiction in the matter. [CAVE, J.—Is not section 25 of the Act of 1868, from which the existing rules derive their force, impliedly repealed by section 56, sub-section (2), of the Act of 1883?] The existing rules remain in force until superseded by new rules made under section 56, sub-section (2). The rules referred to in sub-section (1) of that section, subject to which the provisions of that section as to jurisdiction are expressed to apply, must be the rules of 1868—the only rules in existence. If the procedure laid down by section 56 is in force, and is not affected by any rules, we should have been absolutely debarred in the present case from amending our petition; under that section only a judge upon the rota can give leave to amend, and it was impossible to make the application to such a judge with the prescribed time. To prevent such an unjust result it is necessary to have rules modifying section 56, sub-section (1), and that is effected at present by rule 44 of the Rules of 1868. There is no authority showing that leave to amend a petition cannot be made *ex parte*.

HAWKINS, J.—I am of opinion that the order of Grantham, J., must be rescinded. In this case a petition was presented and an application was made for leave to amend it under section 40, sub-section (2), of the Corrupt and Illegal Practices Prevention Act, 1883. [His lordship read the sub-section, and continued:—] In order to ascertain how the jurisdiction to allow an amendment is to be exercised we must look at section 56, and it is, I think, agreed that the word "may" in sub-section (1) of that section is to be read as "must." In my judgment the jurisdiction to grant leave to applicants to amend their petitions and to insert new charges must be exercised by one of the judges upon the rota for the trial of election petitions or by a master in the manner directed by a judge upon the rota, and if it is exercised by a master there may be an appeal to a judge upon the rota. I do not think that the rules made under section 25 of the Parliamentary Elections Act, 1868, apply to the Act of 1883. I am clear that the rules alluded to in section 56 are those to be made under that section by the Rule Committee. It follows that Grantham, J., not being a judge upon the rota for the trial of election petitions, had no jurisdiction to make this order. But that is not all. In making an order of this kind there ought, in my opinion, to be an exercise of discretion. Here there has been no exercise of discretion whatever. The other side was not even represented before the judge at chambers, and the order was made *ex parte*. For these reasons I think that the order of Grantham, J. must be rescinded.

CAVE, J.—I am of the same opinion. Section 40, sub-section (2), confers a jurisdiction which does not exist under the Parliamentary Elections Act, 1868, and section 56 provides for the manner in which that perfectly new jurisdiction is to be exercised. To my mind it is quite clear that the "rules of court" referred to in sub-section (1) of section 56 must mean such rules as may be made under sub-section (2) of that section by the Rule Committee. No such rules have been made by the Rule Committee, and therefore section 56, sub-section (1), is not subject to any rules at all. The jurisdiction to allow amendments to a petition can only be exercised by one of the judges upon the rota for election petitions.

I am inclined to agree with my brother Hawkins that the judge has no power to make such an order *ex parte*; but even if such a power exists it is, in my opinion, monstrous to make such an order without hearing the other side. The attention of Grantham, J., was evidently not directed to the provisions of the statute; had his attention been properly called to those provisions he would have seen at once that i

is contrary to the intention of the Act that such orders should be made *ex parte*.

Order rescinded; leave to appeal refused.

The petitioner appealed.

Pope, Q.C. (*S. H. Day* with him), took the preliminary objection that no appeal lay.—Section 14 of the Judicature Act, 1881*, makes the decision of the High Court upon a question of law arising under the Parliamentary Elections Act, 1868, or any Act amending it, final unless leave to appeal be given. This was a decision upon a question of law—namely, whether a judge not on the rota has jurisdiction to amend a petition under the Corrupt and Illegal Practices Prevention Act, 1883, which is an Act amending the Parliamentary Elections Act, 1868—and no appeal lies without leave.

Bigham, Q.C. (*W. Graham* and *Coward* with him), for the petitioner.—The "questions of law" referred to in section 14 of the Judicature Act, 1881, are those questions of law dealt with in the Parliamentary Elections Act, 1868—namely, a special case stated before the trial under section 11, sub-section 16, and a question of law reserved at the trial under section 12. This interlocutory question is not a "question of law" contemplated by the Act of 1881. The Corrupt Practices Act, 1883, was not then in force. *Harmon* v. *Park*, 29 W. R. 750, 6 Q. B. D. 323, though decided before the Judicature Act, 1881, bears out this view.

Pope, Q.C., in reply.—Section 14 of the Judicature Act, 1881, is not limited to questions of law dealt with by the Parliamentary Elections Act, 1868. It is unlimited, and extends to any Act amending the Act of 1868, and therefore includes the Corrupt Practices Act, 1883.

He referred to *Line* v. *Warren*, 14 Q. B. D. 548, 33 W. R. Dig. 81; *Unwin* v. *McMullen*, 39 W. R. 712, [1891] 1 Q. B. 694.

Cur. adv. vult.

May 16.—Lord ESHER, M.R.—This is an appeal from a decision of two judges, who are on the rota for the trial of election petitions, on the question whether an order with regard to an election petition made by Grantham, J., who is not on the rota for the trial of election petitions, was right. One objection to the order was that the learned judge, not being on the rota, had no jurisdiction to make such an order. Another objection was that it was made *ex parte*; but it appears to me that that does not become material here, because it is clear that the two judges had jurisdiction to determine whether anything which had been done with regard to the conduct of an election petition was right or wrong. They have come to a decision on that matter, and the question is whether there is an appeal to this court. Section 14 of the Judicature Act, 1881, says that there shall be no appeal without leave from a decision of the High Court of Justice on a question of law arising under the Parliamentary Elections Act, 1868, or any Act amending the same; and in this case no leave was given. It is admitted that if the words of this section are read in their ordinary sense, they are large enough to include this case. But it has been argued that, looking at certain provisions of the Parliamentary Elections Act, 1868, we ought to put a limited meaning on the words of this section. I think that the argument which has thus been addressed to us is not enough to induce us to construe the section otherwise than in accordance with the ordinary use of language. Therefore the section includes this case, and there is no appeal.

LOPES, L.J., read the following judgment:—This is an appeal from the order of the Divisional Court rescinding an order made by Grantham, J., at chambers, which gave leave to amend the petition presented against the successful candidate at the last election for the borough of Pontefract. Since the filing of the petition the respondent and his agent had made a return of election expenses, and the petitioner applied *ex parte* to Grantham, J. (who was not on the rota of the judges for the trial of election petitions), at chambers for leave to amend the petition under section 40, sub-section 2, of the Corrupt and Illegal Practices Prevention Act, 1883, by adding charges founded upon that return, and Grantham, J., gave leave. The Divisional Court (consisting of Hawkins, J., and Cave, J., both judges on the rota for the trial of election petitions) rescinded this order, upon the ground that a judge not on the rota had no jurisdiction to make the order, and also upon the ground that the order ought not to have been made *ex parte*. The petitioner appealed to this court, and a preliminary objection was taken that no appeal lay, upon the ground that section 14 of the Judicature Act, 1881, prevented an appeal. That section provides that the jurisdiction of the High Court of Justice to decide questions of law upon appeal or otherwise under the Parliamentary Elections Act, 1868, or any Act amending the same, shall be final and conclusive unless the High Court gives leave to appeal to the Court of Appeal. Leave to appeal in this case was refused.

Was the point decided by the High Court a question of law? The High Court decided that Grantham, J., not being a judge on the rota for the trial of election petitions, had no jurisdiction to give leave to amend the petition. This depended on the construction of certain Acts of Parliament, and was, in my opinion, a question of law. But it was urged it was not a question of law within the meaning of section 14 of the Judicature Act, 1881. It was said that the "questions of law" referred to in that section were questions of law dealt with in the Parliamentary Elections Act, 1868, such as a special case stated before the trial, or a question of law reserved at the trial, and that this interlocutory question of law as to the power to amend a petition was not a question contemplated by section 14 of the Judicature Act, 1881. But the words of section 14 are—after enumerating certain Acts, including the Parliamentary Elections Act, 1868—"or any of the said Acts or any Act amending the same respectively." The Corrupt Practices Act, 1883, was an Act amending the Act of 1868, and the power of a judge to give leave to amend under section 40 of the Act of 1883 is a question of law. The preliminary objection therefore succeeds, and the appeal must be dismissed.

A. L. SMITH, L.J., read the following judgment:—In this case Grantham, J., sitting at chambers, he not at the time being on the rota of election judges, made an order amending an election petition filed against the sitting member for the borough of Pontefract, and in so doing acted under section 40 of the Corrupt and Illegal Practices Act, 1883. This order was taken by way of appeal to the Divisional

* Section 14 of the Judicature Act, 1881:—"The jurisdiction of the High Court of Justice to decide questions of law upon appeal or otherwise, under . . . . the Parliamentary Elections Act, 1868, ... or any Act amending the same, shall henceforth be final and conclusive unless in any case it shall seem fit to her Majesty's High Court to give special leave to appeal therefrom to her Majesty's Court of Appeal, whose decision in such case shall be final and conclusive."

Court, consisting of two judges upon the rota, where it was argued that Grantham, J., had no jurisdiction to make the order. The Divisional Court held this to be so, and against this judgment the present appeal is brought. That this was a question of law I cannot doubt. It was attempted to be argued before us that amending a petition is merely a matter of discretion and not of law, but the point argued in the Divisional Court was not whether the judge had properly exercised his discretion, but whether he had any jurisdiction to exercise any discretion at all, or, in other words, whether he was the right judge to make the order; and the court held that he was not. This being so, the point now to be determined is whether this is a question of law within the meaning of section 14 of the Judicature Act, 1881; for, if it is, there is no appeal to this court except by leave. Section 14 reads as follows: — [The Lord Justice read the section, and proceeded:—] It was argued by Mr. Bigham, for the respondent, that the questions of law mentioned in section 14 of the Judicature Act, 1881, were limited to those which were specifically mentioned in the Parliamentary Elections Act, 1868, such as in section 11, sub-section 16, and in section 12; but it must be remarked that section 14 of the Judicature Act, 1881, embraces questions of law arising not only under the Parliamentary Elections Act, 1868, but any Act amending the same. No one can say that the Act of 1883 does not amend the Act of 1868: for instance, I may take section 43 of the Act of 1868, whereby a candidate found by the report of a judge upon an election petition guilty of bribery shall be incapable of sitting in the House of Commons during the seven years next after the date of his being found guilty, whereas, by section 4 of the Act of 1883, he is incapacitated for ever from being elected for the county or borough in which he has been found guilty. It will be seen that it is upon a question of law arising under the Act of 1883, which amends the Act of 1868, that the present point now arises, and consequently, in my judgment, there is no appeal except upon special leave. The case of *Harmon* v. *Park*, in the year 1880, was decided upon an Act which enacted that the decision of the Court of Common Pleas should be final when it gave its decision upon a special case; and it was there held that there was an appeal upon a decision on an interlocutory matter not raised by special case; but this decision was before the Act of 1881, which makes the decision of the Divisional Court final upon questions of law, no matter how raised, except special leave be given to appeal. The cases of *Line* v. *Warren* and *Unwin* v. *M'Mullen*, cited in argument, do not apply to the present point. For these reasons, in my judgment, the question decided by the Divisional Court was a question of law within section 14 of the Judicature Act, 1881, and consequently there is no appeal to this court, no special leave in that behalf having been granted.

Appeal dismissed.

Solicitor for the petitioner, *H. W. Chatterton.*

Solicitor for the respondent, *Day, Russell, & Co.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and A. L. Smith, L.JJ.) May 9

HILL v. COOPER. (a.)

Married woman—Protection order—Separate estate—Restraint on anticipation—Power to contract—Judgment against married woman—Equitable execution—Receiver—Divorce and Matrimonial Causes Act, 18[illegible] (20 & 21 *Vict. c.* 85), *ss.* 21, 25, 26.

A married woman, who was possessed of a life inter[illegible] *in leasehold property for her separate estate, with*[illegible] *power of anticipation, obtained a protection order un*[illegible] *section* 21 *of the Divorce and Matrimonial Causes A*[illegible] 1857. *She subsequently mortgaged her life interest, a*[illegible] *the mortgagee obtained judgment against her in an ac*[illegible] *on her covenant to pay the mortgage debt.*

Held, that, notwithstanding sections 21 *and* 26 *of* [illegible] *Divorce and Matrimonial Causes Act, the restraint* [illegible] *anticipation still attached, and therefore a receiver of* [illegible] *rents and profits of the leasehold property could n*[illegible] *appointed by way of equitable execution.*

Appeal from an order of a divisional court (W[illegible] and Charles, JJ.) dismissing an application to app[illegible] a receiver of the rents and profits of certain leas[illegible] premises.

In 1869 the father of the defendant, who was [illegible] an unmarried woman, died, having by his will [illegible] queathed certain leasehold property to trustees [illegible] trust to pay the rents and profits thereof to [illegible] daughter, the defendant, for life, for her separate [illegible] without power of anticipation, with trusts over. [illegible] defendant subsequently married, but in 1878 [illegible] husband deserted her. In consequence thereof [illegible] obtained from a metropolitan police magistrate a [illegible] tection order under section 21 of the Divorce [illegible] Matrimonial Causes Act, 1857. In 1889 the def[illegible] ant executed a mortgage of her life interest in [illegible] leasehold property, which mortgage was in [illegible] transferred to the plaintiff.

The defendant having made default in payme[illegible] interest on the mortgage debt, the plaintiff c[illegible] menced an action against her as against a *feme* [illegible] on her covenant to pay, and on the 3rd of Febr[illegible] 1893, obtained judgment against her in that a[illegible] The plaintiff then applied for the appointment [illegible] receiver of the rents and profits of the propert[illegible] way of equitable execution. This application [illegible] refused by the judge at chambers and also by [illegible] Divisional Court, on the ground that the property [illegible] not been acquired by the defendant since the dea[illegible] of her by her husband, and that the restraint ag[illegible] anticipation still continued to operate.

The plaintiff appealed.

Cozens-Hardy, Q.C., and *Butcher* (*Phillpotts* [illegible] them), for the plaintiff.—The effect of sections 2[illegible] 26 of the Divorce and Matrimonial Causes Act, [illegible] is that the defendant has, for the purposes of [illegible] tracting and suing and being sued, lost her stat[illegible] married woman, and is for such purposes to be t[illegible] as a *feme sole*. By section 21 a magistrate, if sa[illegible] of the fact that a wife has been deserted by her [illegible] band, "and that the same was without reas[illegible] cause, and that the wife is maintaining herself b[illegible] own industry or property, may make and give [illegible] wife an order protecting her earnings and pro[illegible] acquired since the commencement of such des[illegible] from her husband and all creditors and p[illegible] claiming under him, and such earnings and pro[illegible] shall belong to the wife as if she were a *feme* [illegible]

(a.) Reported by F. G. RUCKER, Esq., Barrister [illegible] Law.

. . . if any such order of protection be made, the wife shall, during the continuance thereof, be and be deemed to have been during such desertion of her in the like position in all respects, with regard to property and contracts and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation." By section 25, "In every case of a judicial separation the wife shall, from the date of the sentence, and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a *feme sole*." By section 26, "In every case of a judicial separation the wife shall, while so separated, be considered as a *feme sole* for the purposes of contract and wrongs and injuries, and suing and being sued in any civil proceeding." The defendant being liable to be sued as a *feme sole*, it follows that the restraint on anticipation has gone, and there is no objection to the appointment of a receiver. The plaintiff is suing the defendant on her contract to pay, and the power to contract given by section 26 is a general power; there is no reason why a woman should not enter into a contract, after the making of a protection order, with regard to property which belonged to her before the protection order. The case of *Waite* v. *Morland*, 36 W. R. 484, 38 Ch. D. 135, was a decision on section 25, the court there holding that that section did not apply to property to which the wife was at the time of the decree entitled in possession. But there is a difference between the language of section 21 and that of section 25. Section 21 includes all property "acquired since the commencement of such desertion." The rents in question have been acquired by the defendant since the desertion, though she became entitled to them before.

They also cited *Ramsden* v. *Brearley*, 23 W. R. 294, L. R. 10 Q. B. 147, and *Stogdon* v. *Lee*, 39 W. R. 467, [1891] 1 Q. B. 661.

C. C. Scott, for the defendant.

Lord ESHER, M.R.—I am of opinion that the judgment of the Divisional Court must be affirmed. As to what has been said with regard to the status of a married woman, it is clear that a married woman remains a married woman till her husband is dead or she is divorced. This Act of Parliament deals with circumstances which may arise while she is a married woman; it does not deal with circumstances which exist before she is married or after she has ceased to be a married woman. It treats her as a married woman, and says that with regard to certain circumstances certain consequences are to follow. The object of section 21 is to enable a married woman, who has been deserted by her husband, to obtain an order protecting her property against her husband. It says that although she is a married woman, yet, if she gets such an order, her property shall be protected against her husband. But the Legislature thought it would not interfere with property which she had before her desertion; it, therefore, enacted that the order should only apply to property which she might acquire after such desertion. Then at the end of the section come these words: "If any such order of protection be made, the wife"—the statute by calling her the wife expressly leaves her still a married woman—"shall, during the continuance thereof, be and be deemed to have been during such desertion of her in the like position in all respects, with regard to property and contracts and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation." This refers us on to sections 25 and 26, which deal with the case of judicial separation, and which take separately the things which are taken jointly in section 21. Section 25 says that in every case of a judicial separation the wife shall be considered as a *feme sole* with respect to property of every description which she may acquire, or which may come to or devolve upon her. A question arose whether this section applied to property to which the wife was entitled in possession at the date of the decree for judicial separation. But this was settled in *Waite* v. *Morland*. I think that the effect of the decision in that case is that the section only applies to property which the wife may acquire or which may come to or devolve upon her after the governing date—*i.e.*, either the decree for judicial separation or the desertion. Then we come to section 26, which says nothing about property at all, but enacts that the wife, while separated, shall be considered as a *feme sole* for the purposes of contract and suing and being sued in any civil proceeding. It also adds something not mentioned in section 21—viz, "wrongs and injuries"; but it does not deal with property. Now, in the present case an attempt is made to deal with property—viz., the property of a married woman which was hers before she was deserted by her husband. Such property does not come within section 25, which, as we have seen, is limited to after-acquired property; and no property at all is dealt with by section 26. With regard to this property, then, the defendant remains in the position of a married woman; and her father's will, under which she acquired the property, says that so long as she is a married woman she is to be restrained from anticipating the rents and profits. It is clear that that makes it impossible to appoint a receiver. I am therefore of opinion that the appeal must be dismissed.

LOPES and A. L. SMITH, L.JJ., concurred.

Appeal dismissed.

Solicitor for the plaintiff, *E. H. Goddard.*

Solicitor for the defendant, *E. B. Lawes.*

From Chan. Div. (Lord Esher, M.R., and Lindley and Bowen, L.JJ.) — March 1.

NORTH AUSTRALIAN TERRITORY CO. *v.* GOLDSBOROUGH, MORT, & CO. (*a.*)

Company—Winding up—Practice—Discovery—Production of documents—Examination of witness—Depositions—Companies Act, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 115.

The liquidator of a joint-stock company, which had been ordered to be wound up, commenced an action in the name of the company to set aside a contract for the purchase of lands. The liquidator then obtained an order under section 115 *of the Companies Act,* 1862, *for the examination of certain persons. Subsequently to their examinations being taken, a commission was issued in the action to take evidence abroad, and one of the witnesses who had been examined under section* 115 *was examined under the commission on behalf of the defendants, and, upon his cross-examination, certain of his answers were read to him from the depositions taken under section* 115, *and he was asked whether the statements therein contained were correct, and he said that they were. Certain questions were also put to him from the depositions with regard to the answers given by other witnesses. The defendants applied for inspection of those*

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

parts of the depositions which had been referred to on the cross-examination.

Held (affirming the decision of Kekewich, J.), *that the defendants were not entitled to the inspection claimed.*

Appeal from an order of Kekewich, J., dismissing an application by the defendants for leave to inspect and take copies of certain depositions taken under section 115 of the Companies Act, 1862.

The plaintiffs, an English company registered under the Companies Acts, was formed for the purpose of purchasing certain land in Australia from one Fisher and his mortgagees the present defendants, and a contract for the purchase was entered into. In August, 1889, the plaintiff company was ordered to be wound up.

In November, 1889, the present action was commenced by the liquidator in the name of the company to set aside the contract for purchase upon the ground of misrepresentation. Subsequently, the liquidator obtained an order under section 115 of the Companies Act, 1862, for the examination of certain persons, among others, Mr. Murray Smith, Mr. Vicary Gibbs, Mr. Charles Parbury, and Mr. T. Archer, who were in this country, and their examinations were accordingly taken. Afterwards an order was made in the action for a commission to issue to take the evidence of certain witnesses in Melbourne, and among other witnesses Mr. Murray Smith, who had then returned to Melbourne, was examined on behalf of the defendants. In cross-examination on behalf of the plaintiff company, the witness was asked whether he did not make certain statements in his examination under section 115 of the Companies Act, 1862, and the witness replied that he could not say unless the answers were read to him. Thereupon certain of his answers were read to him from a copy of the depositions, and he was asked whether the statements contained in those answers were not correct, and he stated that they were. Certain answers given by Mr. Vicary Gibbs, Mr. Charles Parbury, and Mr. T. Archer were also read to the witness, and questions were put to him upon those answers. The depositions themselves were not put in, nor did the defendants or the witnesses see them or have copies of them. The defendants took out a summons before Kekewich, J., for liberty to inspect and take copies of the depositions taken on the examinations of Messrs. Vicary Gibbs, Charles Parbury, and T. Archer by the liquidator of the plaintiff company under section 115 of the Companies Act, 1862.

Kekewich, J., dismissed the application.

The defendants appealed.

Latham, Q.C., and *Pollard*, for the defendants.—The plaintiffs having used the depositions for the purposes of cross-examination, and having read extracts from them, the defendants are entitled to see them. The plaintiffs ought to have disclosed them in their affidavit of documents, when the defendants could have got inspection of them, and the plaintiffs cannot be in any better position by having omitted to do so. [They referred to *In re Grey's Brewery Co.*, 32 W. R. 381, at p. 384, 25 Ch. D. 400, at p. 408.] Secondly, the learned judge in his discretion ought to have allowed inspection, as it would be unfair to the defendants that they should go to trial in ignorance of the contents of the depositions to which the plaintiffs have access.

Warmington, Q.C., and *C. E. E. Jenkins*, for the plaintiffs, were not called upon.

Lord ESHER, M.R.—In this case the plaintiff company brought an action against the defendants to rescind a contract for the purchase of certain lands in Australia. The plaintiff company is in liquidation, and after the action had been commenced the liquidator obtained an order under section 115 of the Companies Act, 1862, to examine certain persons, among them Mr. Murray Smith. It was suggested, though the suggestion was not pressed, that this examination under section 115 could not properly be taken after the litigation had commenced. I can see no such limitation in the section. If the examination takes place before the commencement of the action, it enables the company or the liquidator to consider and decide whether he will initiate the litigation. If it takes place after the action has been commenced, it enables the company or the liquidator to decide whether it is worth while to proceed with the litigation. There is nothing in the section to show that there is any distinction between those two reasons for bringing the section into operation. Now after the examinations under section 115 had been taken, a commission in the action was issued to examine witnesses in Melbourne. That examination ought to be conducted in the same way as if those witnesses were being examined before the court at the trial of the action. Among other witnesses who were examined under that commission was Mr. Murray Smith. Upon his cross-examination he was asked whether, in his examination under section 115 of the Companies Act, 1862, he did not make certain statements. He admitted that he did. Therefore there was no occasion to contradict him. But if there were occasion to contradict him, let me consider what would be the proper course. He is asked, "Did not you say so and so, and was it not taken down in writing?" He says, "Yes, it was taken down and reduced into writing." "But did you say it?" He says, "I do not wish to answer that question until I have heard what was said." He has no right to say so. He is bound to say whether he denies it or not. If he denies what the previous examination is supposed to prove that he did say, he can be contradicted, if it is considered desirable to contradict him, by reading what he did say before. But if that is done the document which contains what he did say before is put in; it is put in by those who are cross-examining the witness for the purpose of contradicting him; and then, if that be so, part of it being put in, the whole is put in. Therefore, it is only after he is asked the question that it can be read to him; otherwise it cannot be used to contradict him. But if it is used for the purpose of contradicting him, it all goes in.

Now in the examination under the commission the witness was asked questions as to what other persons had said in their depositions under section 115—that is to say, he was hardly asked whether they said so and so, but he was told that they had said certain things, and he was then asked whether he would contradict them. Those questions ought never to have been put. They were objected to, and the commissioner took down the objection. If at the trial the questions and answers are attempted to be read the court will decline to admit them. The answers to those questions will never be given in evidence. The result, therefore, is this, that what is said upon an examination under section 115 never can be used as evidence, or as proof, except for the purpose of contradicting a witness. The examinations are not taken as was suggested, as proofs. They are taken for the purpose of obtaining knowledge. That is all. They are not proofs, and never can be used as proofs. They were not taken as evidence or as proofs; they were taken merely as information. No doubt it is a severe method of procedure, but the Legislature has given the right to have this information obtained in this way. I have stated that what the witness said could only be used by way of contradiction. That is a new law. It is laid down in section 1,446 in Taylor

on Evidence. That section puts the case exactly as I have put it. The witness is bound to answer the question. He cannot insist upon seeing what he has written, or what has been taken down in writing as to what he said, before he answers. If he does not contradict what he has said before, there is no use in going further as to what he has said before. He says so at the time, and that is his evidence. If he denies it, he can be contradicted by showing what he said before. It goes to his credit, that is all; it proves nothing. What he has said before does not prove the fact. But to show that he is not the witness of truth, that is, to contradict him, and to get rid of the evidence which he is giving before the court, it must be read to him before it can be read as contradiction against him, in order to give him an opportunity of explaining what he said. That being so, it seems to me quite clear that a party cannot have a right to see the depositions of the witness for the purpose of enabling that party to see the information which the liquidator has been enabled to get under section 115.

But it is then said that Kekewich, J., ought, in the exercise of his discretion, to have allowed the defendants to see this information now, on the ground that it would be unjust that the one side should have the information and the other side should not. The answer to that contention is that it cannot be unjust when the object of section 115 is to give one side certain information and there is no provision that that information shall be disclosed. It is merely information. It is not unjust that the person who is conducting the litigation should have information which the other side has not got. It may be that, as a matter of discretion, Kekewich, J., might have made an order allowing this information to be seen now. But he has refused to allow it to be seen at this stage. He has not said that he will not allow it to be seen at the trial. How can we overrule that exercise of his discretion? How can we say that it was so manifestly a wrong exercise of his discretion that this court can overrule it? So far from saying that it was a wrong exercise of discretion, I entirely agree with the learned judge. There is nothing to show that the defendants ought to have the information now, and, indeed, I should be more inclined to say that the learned judge would have been wrong if he had allowed them to see the document now. It seems to me, therefore, that the learned judge was right, and that the appeal should be dismissed. I merely desire to add that the decision of Chitty, J., in *In re Grey's Brewery Co.* does not touch this case at all.

LINDLEY, L.J.—I am of the same opinion. Upon the commission certain witnesses were called by the defendants and were cross-examined on behalf of the plaintiff company, and the counsel engaged in that cross-examination was supplied, for the purpose of cross-examination, with copies of the depositions which had been taken under section 115. The counsel made certain use, which has been detailed by the Master of the Rolls, of those depositions, and it is contended that on account of the use which he made of them the defendants are entitled to see them. Upon what ground can that contention be put? It was argued that the defendants were entitled to see them because they ought to have been scheduled by the plaintiff company in the affidavit of documents as being documents in their possession relating to the matter in question in the suit. If they had been scheduled, privilege would have been claimed for them, and the defendants would not have had inspection of them. Whether the depositions were or were not in their possession I do not pause to consider, because it would not be fair to the plaintiff company to treat the depositions as admitted by them to be in their possession without giving them credit for claiming privilege for them. It is obvious that the defendants never could have got these depositions under any machinery of inspection under the affidavit of documents, if the affidavit had been drawn with reasonable care.

Then it was said that there is something unfair in not letting the defendants know the contents of the depositions. I do not see that at all. It appears to me to be merely an attempt on the part of one litigant to find out how the other litigant is going to make out his case. I see nothing unfair in any use that has been made of these depositions, whatever may be done at the trial. Kekewich, J., has the control of these documents, and he can make any order for the production or otherwise at the trial that he thinks proper. The appeal must therefore be dismissed.

BOWEN, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the plaintiff, *Saunders, Hawksford, Bennett, & Co.*

Solicitors for the defendants, *Freshfield & Williams.*

From Chan. Div. (Lindley, Lopes, and Kay, L.JJ.) — Dec. 14.

POULETT v. HILL. (*a.*)

Mortgage—Foreclosure—Personal judgment on the covenant—Second action for interest—Vexatious action—Practice—Receiver—Interest claimed as liquidated sum—R. S. C., 1883, *ord.* 3, *r.* 6; *ord.* 14.

While an action by mortgagee for foreclosure and for personal judgment against the mortgagor on the covenant was pending, the mortgagee brought a second action against the mortgagor for payment of the interest on the mortgage down to the date of the second action.

Held (*reversing* Kekewich, J.), *that the second action should be stayed as vexatious, because the interest claimed in the second action was recoverable in the first action according to the form of order settled by the Court of Appeal in* Farrer *v.* Lacy, Hartland, & Co., 33 *W. R.* 265, 28 *Ch. D.* 482.

Where there is a receiver of mortgage hereditaments, although the rents be insufficient to keep down the interest on the mortgage debt, no liquidated sum can be claimed in respect of the interest, and therefore the mortgagee cannot issue a specially-indorsed writ claiming payment of a specific sum in respect of the interest.

Appeal from Kekewich, J.

On the 26th of May, 1891, the same persons as were plaintiffs in the present action brought an action against the same person as was the defendant in the present action, in which they claimed an order for personal judgment against the defendant in respect of the principal and interest of a mortgage debt; an account of what was due thereon; in default of payment, foreclosure; and a receiver.

On the 15th of June, 1891, an order was made in that action appointing the equitable tenant for life of the mortgage debt, receiver of the rents and profits of the mortgage hereditaments, and the receiver was ordered to retain the arrears of interest and the current interest out of the rents and profits (from time to time), and to keep down the interest. The pleadings in that action had closed, but notice of trial had not,

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

up to the 20th of September, 1892, been given. The rents proved insufficient to keep down the interest.

On the 20th of September, 1892, the writ in the present action was issued; the writ was specially indorsed for £1,106 18s. 3d., and the particulars were as follows: two years' interest (less income tax) on the mortgage, from the 24th of August, 1890, £2,699 14s. 8d., less £1,592 16s. 5d., the amount of rents in the hands of the receiver, together with a small sum of purchase-money received from sale of a portion of the mortgaged property, leaving a balance of £1,106 18s. 3d. The plaintiffs in the present action took out a summons for immediate judgment under order 14 for that sum. The defendant thereupon took out a summons to have the present action stayed as vexatious. Both summonses were heard together, and Kekewich, J., made an order directing the defendant to pay the sum of £1,106 18s. 3d., and that the present action be stayed. The defendant moved to discharge the order, and on the 2nd of December, 1892, Kekewich, J., dismissed the motion.

The defendant appealed.

Warrington, for the appellant, the defendant.—The judge has made an order under R. S. C., order 14, for payment by the defendant of £1,106 18s. 3d. But the defendant does not admit that that exact sum is due by him, and the writ ought not to have been specially indorsed, as the interest due is a fluctuating sum, as rents are being received by the receiver which reduce the sum due for interest. The present action is vexatious, because the plaintiffs could recover, in the first action, the whole of the interest which they claim in this action: *Farrer* v. *Lacy, Hartland, & Co.*, 33 W. R. 265, 28 Ch. D. 482.

Carson, for the plaintiffs.—The only order the plaintiffs would have got in the first action would, in the first instance, have been an order for an account; but the plaintiffs wanted to have immediate payment of the arrears of interest, which are in fact due; the plaintiffs did not want personal judgment against the defendant for the principal, but only payment of the interest. The rents are insufficient to pay the interest. The present action is, therefore, not vexatious, and it cannot be stayed unless it be vexatious.

LINDLEY, L.J.—In this case the learned judge has made a mistake, which is attributable to a wish to save costs. On the 26th of May, 1891, the plaintiffs commenced an action against the defendant for foreclosure, and by the writ they claimed not only foreclosure, but also, as the practice has been since the passing of the Judicature Acts, a personal order for payment. Under that writ an account of what is due would be directed—an account which, being taken on the footing on which such accounts were always taken in chancery, would include interest down to the date of the certificate, and an order would be made for personal payment of the amount found due. Before the Judicature Acts a personal order for payment could only be obtained by bringing a common law action, in which interest could only be recovered down to the date of the writ, and a personal order for payment of the subsequent interest could only be obtained by a fresh action. But now that a personal order can be obtained for payment of what is found due on taking the account, such second action is not necessary.

In *Farrer* v. *Lacy, Hartland, & Co.* the form of judgment was settled by the Court of Appeal. Whether this particular point was present to the mind of the court is not quite clear; but a general form was settled, giving a personal order for payment of what was found due for principal and interest on taking an account, so that the necessity for a subsequent action for interest is taken away. The plaintiffs, then, could in the first action have obtained a personal order for payment of all that was due to them for principal and interest, and the present action is unnecessary. If we were to affirm the order under appeal our decision would lead to the bringing of improper and vexatious actions, and, though I believe that the attempt to recover in the present action was well meant, it was a mistake.

I am, further, of opinion that this is not a case for the application of order 14, for, having regard to the receipt of rents by the receiver, the amount claimed was not a liquidated sum within the meaning of ord. 3, r. 6. The order must be discharged, with costs.

LOPES, L.J.—A fusion of law and equity has taken place, and according to *Farrer* v. *Lacy, Hartland, & Co.* it is clear that the plaintiffs can obtain in the first action everything to which they are entitled, yet they bring a second action. This second action is unnecessary. Under the old practice a plea of abatement of a pending action would have been a perfectly good plea to the present action, all the relief sought in the second action being covered by the first. The order must be discharged.

KAY, L.J.—I am of the same opinion. The form in *Farrer* v. *Lacy, Hartland, & Co.* runs thus:—"The court doth order and adjudge that the following account be taken: (1) An account of what is due to the plaintiff for principal and interest under the defendant's covenant to pay contained in the indenture of mortgage dated. . . . And it is ordered that the plaintiff do recover against the defendant the amount which shall be certified to be due to him on taking the said account, and also so much of his costs of this action as would have been incurred if it had been brought for payment only, such costs to be taxed by the taxing master." The reason is obvious: the court, now having jurisdiction to make a personal order for payment, wished to make the different parts of the order consistent by giving the same amount of principal and interest under the covenant as would be found due on taking the account for ascertaining what must be paid to avoid foreclosure, thus making it unnecessary to bring a second action for arrears of interest when no second action is wanted to obtain foreclosure. The object was to make successive actions unnecessary. I think that it was quite within the power of the court to adopt this form of order, for it is a mere matter of procedure. The strong ground for making orders in this form being to prevent multiplicity of actions, it is most improper, after a foreclosure action has been commenced, to bring a second action for arrears of interest, and if we sanctioned the order now under appeal we should be sanctioning a revival of that practice. When an action has been brought by which the plaintiff can recover everything to which he is entitled, he ought not to bring another. Moreover, this second action includes some interest which had become due before the issue of the writ in the first action. The second action is wrong in every way. The plaintiffs, too, were wrong in supposing that order 14 could be resorted to. A receiver being in receipt of the rents, the writ could not under ord. 3, r. 6, be specially indorsed for a liquidated sum.

Appeal allowed.

Solicitors, *Stibbard, Gibson, & Co.*, for *Rowlands & Co.*, Birmingham; *Hulberts & Hussey.*

High Court of Justice.

Chan. Div. North, J. April 12.

In re AMES.
AMES *v.* AMES. (*a.*)

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 37, 51 —*Sanction of court to sale of heirlooms—Proviso in restraint of sale of land.*

A testator by his will settled real estate and bequeathed chattels as heirlooms. He directed his trustees to hold a sum of £4,000 on trust to keep up part of the estate, and to pay the surplus income to the person for the time being entitled to possession, with a proviso that, if such person alienated the property, the £4,000 was to fall into the residue. The tenant for life, under the provisions of the Settled Land Act, sold the estate. He also sold some of the heirlooms. On summons to obtain the sanction of the court to the sale of the heirlooms, and declare the rights of the parties in the £4,000,

Held, that the court could not, ex post facto, *sanction the sale of the heirlooms already sold, under section 37 of the Settled Land Act; and that the provision in the will directing the £4,000 to fall into the residue on alienation was void under section* 51.

Summons.

John Ames, who died in 1867, by his will, with codicils thereto, devised a mansion-house and lands in Devonshire to trustees on trusts for persons successively in strict settlement, and bequeathed furniture and chattels to be held with the mansion-house by way of heirlooms. And the testator gave to his trustees a sum of £4,000 Consols upon trust to apply the dividends thereof during certain named lives, of which the plaintiff's was one, to the maintenance and repair of a sea wall upon the property, and subject thereto to preserving in good repair walks and drives therein, any surplus to be paid to the person for the time being entitled to the possession of the property, and after the death of the survivor of the named lives to hold the capital for the person entitled to possession absolutely. And the testator further directed that if at any time during the continuance of the trusts of the £4,000 the person for the time being entitled under his will to the possession or to the receipt of the rents and profits of the property should by alienation or other act of his cease to be entitled to such possession or receipt, then the trusts declared of the £4,000 were to cease, and the same was to fall into his residuary personal estate.

In October, 1892, the plaintiff, H. St. Vincent Ames, the present tenant for life, under the testator's will, with the consent of trustees appointed for the purposes of the Settled Land Act, sold the property settled by the will, together with some of the heirlooms.

This was an originating summons by the plaintiff, to which the trustees of the will, the trustees for the purposes of the Settled Land Act, and the residuary legatee were defendants, (1) to obtain the sanction of the court to the sale of the heirlooms already sold, and to authorize the sale of the remainder; and (2) that the rights of the parties in the £4,000 might be declared.

Cozens-Hardy, Q.C., and *Vernon Smith*, for the plaintiff.—The proviso that the £4,000 is to fall into the residue on alienation is void under the Settled Land Act, 1882, s. 51, sub-section 1, which provides that "if in a settlement . . . a provision is inserted . . . attempting or tending . . . by a disposition . . . of any personal property, or . . . by forfeiture, or in any other manner whatsoever, to prohibit or prevent a tenant for life from exercising, or to induce him to abstain from exercising, . . . any power under this Act, that provision . . . shall be deemed to be void."

Everett, Q.C., and *Stewart-Smith*, for the residuary legatee.

H. Towry Law, for the trustees.

NORTH, J., said that he could not, under section 37 of the Settled Land Act, sanction *ex post facto* the sale of the heirlooms already sold, but that the summons might be amended by the insertion of a question as to whether the trustees ought to take steps to recover the heirlooms which had been sold without the sanction of the court, when a declaration would be made that the trustees need take no such steps. [His lordship sanctioned the sale of the remainder of the heirlooms, and continued:—] With regard to the proviso in the will that the £4,000 is to fall into the residue on alienation, I think section 51 of the Settled Land Act applies. [His lordship then read the will above set out, and continued:—] Therefore the plaintiff, the tenant for life, is entitled to have the income of this £4,000 applied in keeping up the sea-wall and drives, &c., on the estate, and if it is so applied he is in a better position with regard to the property than he would be if he possessed it *minus* the amenities produced by that income. To that extent, therefore, the property is increased in value for him. Now if he parts with the property he will lose that benefit, for he cannot sell that. So that if he refrains from selling he has the benefit of the extra expenditure upon it of the income of the £4,000, an expenditure which would otherwise have to come out of his own pocket, and although possibly there might be no surplus to go into his pocket, still he has an estate which, while it remains in his possession, is worth more to him by the income of the £4,000 than it would be if he parted with it, when, by the proviso in the will, it is to cease to come to him, as it is given to the person entitled to the residue. I think that is a state of affairs against which the words of section 51 are directed. [His lordship read section 51, and continued:—] In my opinion, therefore, the plaintiff is still entitled to the receipt of the income of the £4,000, and I must make a declaration that, notwithstanding the sale, no change is to be made as to the payments of the income of the £4,000 to the plaintiff.

Solicitors for the plaintiff and trustees, *Burch, Whitehead, & Davidsons.*

Solicitors for the residuary legatee, *Guscotte, Wadham, & Co.*

Chan. Div. North, J. March 4.

In re TUCKER.
TUCKER *v.* TUCKER. (*a.*)

Annuity charge by codicil on estate—Devise of estate in settlement subject to charge—Charge on corpus *or income—Annuity in arrear—Mortgage or sale of settled estate to meet annuity.*

The testator, by a codicil to his will, devised certain yearly rent-charges to his trustees to be paid to certain

(*a.*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

persons, and subject to and charged therewith he devised an estate to certain persons for life, with remainders over. The annuities having fallen into arrears, and the rents of the estate being insufficient to meet them,

Held, that they must be paid by a sale or mortgage of the settled estate.

Henry Tucker by his will, dated the 27th of August, 1873, appointed the defendant William Tucker, James Kayess, and Eli H. Mead executors and trustees thereof.

By clause 3 of his will the testator devised to his trustees a yearly rent-charge of £300 during the joint lives of the testator's wife, Elizabeth Tucker, and the plaintiff upon the trusts thereinafter declared concerning the same, and by clause 7 testator directed his trustees to pay the said rent-charge to the plaintiff, subject to certain conditions as to bankruptcy or attempted alienation on his part.

By a codicil to his will, dated the 4th of April, 1874, testator revoked, *inter alia*, clauses 3 and 7 of his will, and in lieu thereof devised to his trustees the five yearly rent-charges following, namely, one of £40 during the life of Ann Hill, one of £50 during the life of Annie Parris, one of £50 during the life of Elizabeth P. Gillmore, one of £50 during the life of Jane Mead, and one of £300 during the life of the plaintiff, and directed that the rent-charge of £300 should be held upon the trusts by clause 7 in the testator's said will declared respecting the rent-charge by clause 3 in his said will devised. Clause 7 in the said codicil was as follows:—"I direct that the five several yearly rent-charges hereinbefore devised shall respectively be charged upon and issuing out of my said Hinton estate exclusively, and shall respectively be paid quarterly, the first payment in respect of each yearly rent-charge to be made on the expiration of three calendar months after my decease if the person during whose life the rent-charge is given shall then be living. And I empower my trustees by distress, and also by entry upon and by perception of the rents and profits of my said Hinton estate, or any part thereof, to recover payment of all or any of the said rent-charges when in arrear for twenty-eight days." By clause 5 the testator (subject to and charged with the five several rent-charges thereinbefore devised and the remedies for recovering payment thereof) devised his said Hinton estate to the use of his said wife and her assigns during her life, with remainder to the use of the defendant Henry Emilius Tucker and his assigns during his life, with remainder to the use of his child if only one, or all his children if more than one, who either in his lifetime or after his decease being a son or sons attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, and his, her, or their respective heirs and assigns, if more than one, in equal shares as tenants in common, with remainders over, but in the event of there being no child who should attain a vested interest under the above provision, the testator devised his said Hinton estate upon the trusts declared in his will concerning his estates in the counties of Berks and Wilts; "but not so as to increase or multiply charges or powers of charging." The testator died on the 17th of January, 1875, and his will and codicil were proved by his executors on the 14th of April, 1875. On the testator's death his widow entered into possession of the Hinton estate, and down to the 17th of July, 1891, the charges were duly paid to the persons entitled.

After her death, on the 26th of July, 1891, no payments were made, and the rental of the estate had been so reduced by agricultural depression and other causes that the gross rents received were less than the sums charged.

Proceedings were then commenced in the Chancery Division by the plaintiff, on behalf of himself and certain other annuitants, to obtain payment of the sums so charged by a sale or mortgage of the said estates, and for a declaration that the persons entitled to the charges were entitled to have the deficiency made good out of the said estates, and for administration of the estate.

The writ was issued on the 12th of February, 1892, and on the 2nd of April, 1892, the plaintiff was appointed by North, J., receiver of the rents and profits of the Hinton estate. On the 25th of June North, J., gave judgment in favour of the plaintiff, without making any declaration as to whether or not the rent-charges were charged on the *corpus* of the estate. An inquiry, as sought in the statement of claim, was also directed to ascertain the persons then entitled to the several rent-charges, and the amounts due. On the 29th of November, 1892, the chief clerk filed his certificate as to these facts, and on the 6th of December the plaintiff took out a summons that he might be permitted to raise the arrears of the rent-charges by a mortgage of a competent part of the estate. On the adjournment of the summons into court,

S. Hall, Q.C., and *H. Terrell*, for the plaintiff.—These annuities are charged on the estate, and in spite of the settlement they ought to be raised by mortgage: *Cupit* v. *Jackson*, 13 Price, 721. [NORTH, J.—There it was taken for granted that the annuities were a charge on the *corpus*.] *Cupit* v. *Jackson* was followed in *White* v. *James*, 7 W. R. 35, 26 Beav. 191, against *Graves* v. *Hicks*, 11 Sim., p. 551. [They also referred to *Pettinger* v. *Ambler*, 34 Beav. 542, 14 W. R. Ch. Dig. 146; *Todd* v. *Bielby*, 27 Beav. 353, 354 n; and *Birch* v. *Sherratt*, 16 W. R. 30, L. R. 2 Ch. App. 644.] *Horton* v. *Hall*, 22 W. R. 391, L. R. 17 Eq. 437, a decision of Hall, V.C., is also in our favour. We admit, however, that that case cannot be reconciled with the decision of the same judge in *Taylor* v. *Taylor*, 22 W. R. 349, L. R. 17 Eq. 324, unless the Vice-Chancellor meant that where an estate is in strict settlement an annuity cannot be charged on the *corpus*, but we say that, in case of a settled estate, it is impossible to make a charge on the *corpus* except by using the words used by this testator and by the testator in *In re Taylor*.

They referred also to *Pearson* v. *Helliwell*, 22 W. R. 839, L. R. 18 Eq. 411.

W. C. Fooks, for the trustees and the two other annuitants.

C. Herbert Brown, for the parties interested in the estate.—There is grave doubt if the words are sufficient to constitute a charge on the *corpus*. In the case of a settled estate, to take annuities out of the *corpus* produces great confusion, and in any case the court must exercise a discretion: *Graves* v. *Hicks*; *Picard* v. *Mitchell*, 14 Beav. 103; *Taylor* v. *Taylor*. This is a case of strict settlement as defined by Hall, V.C., in *Taylor* v. *Taylor*: there is an estate to one person for life with remainders over. As the court clearly has a discretion whether or not these annuities should be raised from the *corpus*, this is a case in which it should be loth to exercise such discretion.

NORTH, J.—The question turns on the construction of the codicil. Should these annuities be charged on the income or on the *corpus*? Now in the codicil the testator devises to his trustees five several rent-charges, amounting altogether to £490, in trust for certain annuitants. In the next clause of the codicil (clause 3) he says: "I direct that the five several yearly rent-charges shall be respectively charged

upon and issuing out of my said Hinton estate exclusively." Pausing there, there is no reference whatever to income. [His lordship then read clause 4 of the codicil, and continued:—] Then he gives his trustees power to recover payment by distress or entry. But these are not the only remedies, and he does not by these words cut down the effect of the prior charge. By the 5th clause, "subject to and charged with the five several rent-charges," he devises his estate, and here follow the limitations. I cannot doubt that this is a charge on the *corpus* of the estate as distinguished from the income.

In taking this view I follow *Cupit* v. *Jackson* and *Picard* v. *Mitchell*, in which latter case neither *Cupit* v. *Jackson* nor *Graves* v. *Hicks* were cited, but Lord Romilly, M.R., was of opinion that the estate was liable to be sold to satisfy the annuities. *Birch* v. *Sherratt* and *Mason* v. *Robinson*, 26 W. R. 734, 8 Ch. D. 411, are authorities that such annuities are charged on capital; and independent of authority I should have taken the view that these annuities should be raised by mortgage. This view is not consistent with the reported decision of Hall, V.C., in *Taylor* v. *Taylor*. But *Taylor* v. *Taylor*, as reported, is an unsatisfactory case. In the later case of *Horton* v. *Hall*, which was heard before the same judge about a fortnight after his decision in *Taylor* v. *Taylor*, he gives a different reason for his decision in that case to that which is given in the report. I am therefore of opinion that the annuities are charged on the *corpus*. Still, even when annuities are charged on the *corpus*, the court has still a discretion whether or not it will order them to be raised by mortgage or sale. The income of the estate, through agricultural depression, has been greatly reduced, so that there is not a sufficient sum left to meet the annuities, and there has been no evidence that the depression has arisen from causes which are likely to cease at an early date, and it therefore seems a case in which, if I have power to assist them, I ought to direct that the annuitants should no longer be kept out. It was not decided in *Graves* v. *Hicks* that under no circumstances can the arrears of an annuity be raised by the sale or mortgage of a settled estate. In that case it was recognized that the annuity was charged on the *corpus*; but if you cannot raise the money for the payment of the annuity, what is the meaning of a charge on the *corpus*? There are a large number of authorities in which *Graves* v. *Hicks* has not been followed: in *Picard* v. *Mitchell*; *White* v. *James*, in which case the Master of the Rolls expressed himself bound by *Cupit* v. *Jackson*; *Todd* v. *Bielby*, 27 Beav. 353; *Pettinger* v. *Ambler*; *Hall* v. *Hurt*, 2 J. & H. 76, 10 W. R. Ch. Dig. 5, which was decided by Lord Hatherley. Looking at the authorities, the decision in *Taylor* v. *Taylor* appears unsatisfactory, without even taking into consideration the contrary judgment of Hall, V.C., in *Horton* v. *Hall*, and I cannot treat it as an authority for doubting that the amount due under these annuities can be raised by sale or mortgage. I am accordingly of the opinion that the annuities are charged on the *corpus* of the settled estate, and the arrears must be raised by a sale or mortgage of the estate so charged.

All parties concurring that the arrears should be raised by mortgage, his lordship directed a reference to chambers for the purpose.

Solicitors, *Rooke & Son*; *Hughes & Sons*.

Chan. Div. Kekewich, J. — Jan. 24, 25.

In re KIDD AND GIBBON'S CONTRACT. (*a*.)

Vendor and purchaser—Succession duty—Sale subject to leases, but free from incumbrances—Leases at ground-rents—Duty payable in respect of increased value on determination of leases—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 20.

Land subject to leases at ground-rents was sold subject to leases, but free from incumbrances, the contract making no provision as to the payment of succession duty.

Held, that the succession duty payable in respect of the increased value of the property on the determination of the leases, payment of which had been postponed in accordance with section 20 *of the Succession Duty Act*, 1853, *must be borne by the vendors.*

Adjourned summons.

This was a summons under the Vendor and Purchaser Act, 1874, by a purchaser of real estate, asking for a declaration that the vendors were liable for the succession duty in respect of the whole of their interest in the property contracted to be sold.

The contract was dated the 31st of March, 1892, and contained (*inter alia*) the following clauses:—

"1. The vendors are to sell and the purchaser is to purchase at the price of £41,000 the freehold property described in the schedule hereto, subject to the leases affecting the same, but free from incumbrances."

"4. The abstract of title is to commence with certain indentures of lease and release, dated respectively the 1st and 2nd of July, 1818. Part of the property was demised by lease (still subsisting) dated in 1813, and the remaining portion was demised by lease (still subsisting) dated in 1814. Counterparts or copies of the said two leases have been produced to the purchaser, and he shall be deemed to purchase with notice of all the contents thereof."

"6. The property is sold subject to all quit, chief, and other rents, rights of way and other easements (if any) affecting the same, and to any subsisting liability, under enclosure award, covenant, or otherwise, to repair the fences, roads, or streets, and to the rights of the tenants to fixtures (if any), or to their statutory rights."

"7. The vendors are the only children of Robert Charles Kidd, deceased, named in the will of Fanny Kidd, dated the 28th of December, 1862. The purchaser shall not require any evidence of this fact, or of the deaths of the said Robert Charles Kidd and his wife, Mary Jane Kidd, other than a statutory declaration of those facts."

The contract contained no provision for the payment of succession duty.

The title of the vendors was derived from the will of Fanny Kidd, who devised the property to her son, Robert Charles Kidd for life, with remainder to his wife, Mary Jane Kidd, for life, with remainder to their children, the vendors.

Upon the death of Mary Jane Kidd, who survived her husband, succession duty on the value of the ground-rents was paid, payment of the duty in respect of the increased value of the property upon the determination of the leases being postponed until such determination, in accordance with section 20 of the Succession Duty Act, 1853. The leases were to expire in 1897. The ground-rents payable under the leases amounted to £67 10s. per annum, while the annual rack rental of the property was estimated at between £3,000 and £4,000.

(*a*.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

The question raised by this summons was whether the duty, which would become payable upon the determination of the leases in 1897, ought to be paid by the vendors or the purchaser.

Colt, for the purchaser.—The succession took place before the contract, and the duty is therefore payable by the vendors. The contract disclosed the leases, but not the fact that there was undischarged succession duty. Although payment of the duty may be postponed by virtue of section 20 of the Act, the duty is a present charge.

He referred to Dart's Vendors and Purchasers, 6th ed., p. 667, and *In re Cooper and Allen's Contract*, 25 W. R. 301, 4 Ch. D. 802.

Davenport, for the vendors.—This is the ordinary case of a purchaser buying a remainder expectant on the determination of a prior estate. The duty is therefore payable by him: *Cooper* v. *Trewby*, 8 W. R. 299, 28 Beav. 194; *In re Langham*, 39 W. R. 156. The principle is the same whether the remainder is expectant on a life estate or on a term of years.

KEKEWICH, J.—It is well settled that the purchaser of a reversion bears the payment of succession duty, payable when, by death or otherwise, the reversion is converted into an estate in possession. On the other hand, it is equally well settled that where a purchaser buys an estate in possession, notwithstanding that he buys it in part from owners in remainder—where, for instance, he buys from owners of prior estates with the concurrence of the remaindermen in fee—he is entitled to have the estate in fee in possession cleared from the burden of the succession duty which will become payable on the determination of the prior estates. In the present case I am dealing, not with an estate in one for life with remainder over, but with an estate in fee simple subject to a lease. No doubt, strictly speaking, that is a reversion. The purchaser does not buy a vacant possession. He takes a reversion expectant on the lease, but not a reversion in respect of which succession duty is to become payable when it becomes an estate in possession. What he takes is for all purposes an estate in possession. Now, under which of the above-stated rules does the present case fall?

Assuming for the moment that there is nothing in the contract to show that the purchaser took anything less than an estate in fee simple, subject only to the leases, it seems to me that he is entitled to have the property clear of all burdens, including this liability in respect of the duty which will be payable out of the property by-and-bye, but which does not really arise by the determination of the leases, but on an entirely different event. I do not think the Act of Parliament can govern the conclusion of the court in a case of this kind, where the question is between vendor and purchaser. The rights of the Crown are, of course, quite clear, however I decide the case. The succession of the vendors to the estate occurred long ago, but the payment of succession duty in respect of the reversionary value was postponed until, by the determination of the leases, the vendors should become entitled to the enjoyment in possession, and there is consequently now a charge on the property for some amount or other. To my mind, therefore, it is reasonably clear that the purchaser, taking an estate in possession subject to the leases, is entitled to demand from the vendors such an estate as he would enjoy if it were discharged from this burden.

But it is said that the only way to give him that is to compound the duty, and that cannot be done without the authority of the Crown, with whom it is a discretionary thing, and that a difficulty arises inasmuch as no one knows what will be the value of the property upon the determination of the leases. A complete answer to that is, that if the vendors have sold the property charged with a burden which they are unable to ascertain, then they fail to make a good title, and the purchaser cannot be compelled to complete.

Then the vendors say that the purchaser really knew that he was buying this property subject to the charge. It is not pretended that it is expressly mentioned upon the face of the contract, or that it is directly disclosed by its terms; but it is said that, under clause 4, he had notice of the contents of the leases, and that clause 7 shows that the vendors were claiming as successors in title to someone who was dead; but though that might afford some indication of the nature of the title, there is nothing on the contract sufficient to support the vendors' contention. I hold that a purchaser buying an estate in possession subject to a lease is entitled to have that estate free from succession duty. In order to get rid of that obligation the vendor must set out on the face of the contract the existence of the burden, and must even, I am inclined to think, go further, and expressly relieve himself from the obligation of discharging that burden. The purchaser's objection is a good one, and the vendors must pay the costs of the proceedings.

Solicitors, *Langley, Gibbon, & Moore; Pickering & Neilson.*

Chan. Div. } Jan. 11, 19.
Romer, J. }

SCHOLEY v. PECK. (a.)

Solicitor—Solicitors Act, 1860, *s.* 28—*Action on behalf of mortgagor—Charging order taking priority over interest of mortgagee.*

An action was commenced by the solicitors for the purchaser of a leasehold house for specific performance of the agreement for sale. In the course of the proceedings it transpired that the purchaser had mortgaged his interest in the agreement; but the mortgagee declined to release her interest, or to concur in the proceedings. Judgment was obtained in the action, ordering the defendants to assign the lease of the house to the plaintiff or his mortgagee. Plaintiff's solicitors applied by petition for a charging order on the leasehold house for their taxed costs, charges, and expenses as solicitors for the plaintiff in the action.

Held, that they were entitled to a charging order as prayed, and that it must not only bind the plaintiff's interest in the house, but take priority over the mortgage.

Petition under Solicitors Act, 1860.

In the year 1868 three leasehold houses at Kilburn, in the county of Middlesex, were assigned to three persons, the trustees of the marriage settlement of one Maynard, by way of mortgage for securing the repayment of a sum of £800 and interest as in the said mortgage mentioned. In the year 1877 Maynard agreed in writing with Scholey for the sale of the property to him for £800 payable by instalments. This agreement was stated by Maynard to have been entered into by him without the concurrence of his trustees, and contained a proviso that if it should be determined by Maynard, under certain powers in that behalf contained in it, in consequence of any default on Scholey's part, Scholey should be entitled

(a.) Reported by C. HERBERT BROWN, Esq., Barrister-at-Law.

to an assignment for the whole term of one of the three houses for each principal sum of £266 13s. 4d. which should have been paid by him, being one-third of the purchase-money of £800.

In the year 1891 the trustees advertised the mortgaged property for sale by auction, under a power in that behalf contained in the mortgage deed. Scholey had then paid instalments under his agreement amounting to about £276, and on ascertaining that the property was advertised for sale, brought this action against the trustees and Maynard for specific performance of the agreement so far as subsisting, and for an injunction restraining the trustees from selling one of the houses. The trustees thereupon withdrew that house from the sale and undertook not to offer it for sale till after the trial of the action. By the statement of defence it was stated, as the fact was, that Scholey had in 1881 executed a mortgage charging his interest under the agreement in favour of a Miss Cardale. In the course of subsequent correspondence between Scholey's solicitors and Miss Cardale's solicitors the latter refused to release her charge on one of the houses or to join with Scholey in the action. On the hearing of the action the defendants were directed to assign the lease of the house in question to Scholey or his mortgagee, and the costs payable by the defendants to the plaintiff were ordered to be set off against the costs of a counter-claim by the defendants and certain other costs payable by the plaintiff to the defendants.

This was an application by the plaintiff's solicitors for a charging order on the house in question for their costs and expenses as solicitors for the plaintiff in the action.

Jackson, for the applicants.—By the action the house in question has been recovered and preserved not only for the plaintiff but also for his mortgagee. A charging order under the Solicitors Act, 1860, takes precedence over the interests of all parties in the property recovered or preserved: *Faithfull* v. *Ewen*, 26 W. R. 270, 7 Ch. D. 495; *Charlton* v. *Charlton*, 32 W. R. 90; *Greer* v. *Young*, 31 W. R. 930, 24 Ch. D. 545.

Borthwick, for the mortgagee.—The mortgage was made before the action was commenced, and cannot be affected by the charging order. An implied authority or request is the foundation of the doctrine of salvage: *Falcke* v. *Scottish Imperial Insurance Co.*, 35 W. R. 143, 34 Ch. D. 234. In this case there was no authority or request, either express or implied.

ROMER, J.—The authorities bearing on charging orders obtained under the Solicitors Act, 1860, show that what is recovered by the action of the solicitor is to be treated as if he had earned salvage, and that he is to be paid for his services on the theory that salvage services have been rendered. The 28th section of the Act is very general in its terms, and authorizes a charge, not on the interest of the plaintiff merely, but on all property recovered in the action, whether for the plaintiff only or for him in connection with others. It is not necessary that the property charged should belong to the person who employed the solicitor, but it must be by reason of the employment that the property is preserved. Here undoubtedly the property was preserved by the action brought by these solicitors on behalf of the plaintiff, and but for the proceedings taken by them the mortgagee would have lost her security. In my judgment the case is governed by the principle of *Greer* v. *Young*, and I hold, therefore, that the solicitors are entitled to the charge for which they ask, not only against the plaintiff, but also in priority to the charge of the mortgagee, who is taking the benefit of the action. Their charge will include their taxed costs, charges, and expenses properly incurred by them in preserving the property.

The petitioner's costs of this petition must be taxed as between solicitor and client, and added to the charge; and the mortgagee can have her costs and may add the same to her security. There will be liberty to apply for the purpose of enforcing the charge.

Solicitors, *Metcalfe & Sharpe; Iliffe & Co.*

Q. B. Div.
(Wills and Lawrance, JJ.) May 2.

HENDERSON v. THORN. (a.)

Landlord and tenant—Lease—Breach of covenants to keep premises in repair and to deliver up in repair—Actions by landlord during continuance of term and at end of term—Method of assessing damages in second action.

Two years before the determination of a lease a landlord brought an action against his tenant for breach of covenant to keep the premises in repair. The tenant denied liability, but paid a sum into court, which the landlord accepted in satisfaction of his claim, and the action was stayed. After the determination of the lease the landlord brought another action for breach of covenant to keep the premises in repair and for breach of covenant to deliver up in repair. No repairs were done to the premises between the date of the first action and the end of the lease, and the particulars in the second action included all matters which had been claimed for in the first action as well as some additional items of non-repair. The official referee, in assessing the damages, ascertained what sum was required to put the premises into repair, from which he deducted the sum paid into court and accepted in the first action, and gave judgment for the plaintiff for the balance.

Held, that the official referee had assessed the damages in the right manner.

Motion on behalf of the defendant to set aside the findings and judgment of the official referee in an action brought to recover damages for breach of covenant to repair.

By a lease dated the 1st of March, 1871, the plaintiff demised to the defendant certain premises consisting of a house and garden for a term of twenty-one years from the 25th of December, 1870. The lease contained the usual covenants on the part of the defendant to keep the premises in repair during the continuance of the term, and to deliver up the premises in repair at the end thereof. In January, 1888, the plaintiff delivered to the defendant a notice requiring the defendant to execute the repairs specified in the notice. These repairs were not executed, and on the 11th of February, 1890, the plaintiff commenced an action against the defendant in which he claimed £425 15s. damages for breach of the covenant to keep in repair. The defendant denied amy liability for the breach, but paid £235 into court. The plaintiff accepted that sum in satisfaction of the claim in respect of which it was paid into court, and the action was discontinued.

The lease expired by effluxion of time on the 25th of December, 1891. On the 6th of April, 1892, the plaintiff commenced a second action against the defendant, alleging in his statement of claim that since the date of the former action and during the continuance of the term there had been a further

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

breach of the covenant to keep in repair, and also alleging a breach of the covenant to deliver up the premises in repair at the end of the term. In respect of these two breaches the plaintiff claimed £1,324 7s. 8d. The £235 which had been paid into court in the first action had not been expended in executing the repairs to the premises, and no repairs were in fact done between the date of that action and the determination of the lease. The particulars of repairs required which were delivered in the second action showed that the plaintiff was claiming in respect of all repairs required to be done, including both those which had been specified in the particulars in the first action and also some further repairs, such as painting, which the defendant was not bound to do until the end of the lease. The defendant pleaded that the plaintiff could not recover damages for any breaches in respect of which the £235 paid into court in the first action had been accepted; in the alternative the defendant paid £238 8s. 8d. into court.

The action was referred to the official referee, who found that £571 5s. was necessary to put the premises into repair; from this sum he deducted the £235 paid into court and accepted by the plaintiff in the first action, and also a percentage for depreciation and gave judgment for the plaintiff for £74 16s. 4d. in addition to the £238 8s. 8d. paid into court.

Witt, Q.C., and *F. O. Robinson* (*W. E. Ball* with them), for the defendant.—The method by which the official referee assessed the damages was wrong. The proper course would have been to have awarded damages for only such items of non-repair as had accrued since the date of the first action, and not to have allowed anything for matters which were included in the particulars in that action. It is admitted that the measure of damages would not be the same in the first as in the second action (*Joyner* v. *Weeks*, 39 W. R. 583, [1891] 2 Q. B. 31), but as the plaintiff accepted the sum paid into court in the first action in satisfaction of the claim in respect of which it was paid, the referee was wrong in treating that sum as if it represented the measure of the plaintiff's legal right. No doubt that would have been the case if that action had gone for trial and the plaintiff had recovered judgment for that amount; but the acceptance by the plaintiff of the sum paid into court was in effect an acceptance of a sum by way of compromise in respect of everything which the plaintiff claimed, and the plaintiff's claim in the first action, as shown by the particulars, was a claim not for damages for injury to the reversion, but for such a sum as was necessary to put the premises into repair at that time.

Jelf, Q.C., and *Martelli*, for the plaintiff, were not called upon.

WILLS, J.—I am of opinion that this appeal must be dismissed. I think that after the decision of the Court of Appeal in *Joyner* v. *Weeks* there is very little to be said in favour of the defendant's contention. It may be that when the defendant paid £235 into court in the first action he acted under a misapprehension as to his legal position; he may have thought that the measure of damages was the sum necessary to put the premises into repair, but on the other hand it is equally possible that he was aware that the true measure of damages when the action for breach of covenant to repair is brought during the currency of the tenancy is the loss to the landlord measured by the depreciation in the saleable value of the reversion. It must be taken, therefore, that the sum paid into court in the first action did not represent the sum necessary to put the premises into repair, or if it did it was merely a coincidence. The defendant cannot, therefore, treat that payment into court as made upon the footing that it was the amount required to put the premises into repair. If he were entitled to do so I should accept the proposition that the defendant is only liable for breaches of covenant committed since the date of the first action, but, the measure of damages being different in the two actions, I am unable to accept that view of what took place, and in my judgment the only way of dealing with the question of damages is that which was adopted by the official referee. No doubt it does sometimes happen that, when an action is brought at the end of a term for breach of covenants to repair and to leave in repair, the result of the rule of law as to the measure of damages is that the sum paid by the tenant represents more than the actual damage suffered by the landlord, but, on the other hand, a tenant who has broken his repairing covenants often has to pay a smaller sum than he would have done if he had observed the covenants. Of these two principles the Court of Appeal has adopted that which was thought to be the most workable—that is, that at the end of the term the landlord is entitled to recover the amount necessary to put the premises into repair, even though as a matter of fact the landlord suffers no loss at all through the non-repair. In this case we cannot treat the first set of damages as the equivalent of the cost of putting the premises into repair at the date of the first action; we can only say that at the end of the term the landlord is not entitled to have the money twice over, but must subtract what was previously paid to him from the amount which he recovers at the end of the term. In my opinion the case is perfectly clear when once the rule as to the measure of damages laid down in *Joyner* v. *Weeks* is clearly appreciated.

LAWRANCE, J., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Jull & Godfray.*

Solicitors for the defendant, *Saunders, Hawksford, & Bennett.*

Q. B. Div. (Pollock, B., and Kennedy, J.) April 13.

CARTER v. THOMAS. (*a.*)

Local government — Local authority — Fire brigade— Right to control of premises on fire—Exclusion of public—Justices—Jurisdiction—Towns Police Clauses Act, 1847 (10 & 11 *Vict. c.* 89), *s.* 32—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 171.

The effect of section 171 *of the Public Health Act*, 1875, *incorporating the provisions of the Towns Police Clauses Act*, 1847, *which, by section* 32, *provides that the urban authority "may employ a proper number of persons to act as firemen, and may make such rules for their regulation as they think proper," is to give the brigade provided by such local authority a right to do all necessary acts to maintain control over premises upon which they are lawfully engaged in extinguishing a fire.*

The appellant, a member of a volunteer brigade in uniform attempted to enter premises upon which the brigade provided by the local board were engaged in putting out a fire. Being refused admission by the respondent, a member of the local board brigade,

(*a.*) Reported by JOHN P. MELLOR, Esq., Barrister-at-Law.

who was in uniform and was directed by his foreman to exclude people from the premises, the appellant attempted to force his way in, but used no unnecessary violence; the appellant was convicted by the justices of an assault upon the respondent.

Held, that the respondent was justified in excluding the appellant, who could not justify his attempt to force an entrance, and that the conviction was right.

This was a case stated by justices.

The appellant was convicted of an assault upon the respondent, and the facts appearing by the case were as follows:—

Upon the hearing of the information it was admitted and found as a fact that the respondent was a member and in the uniform of the fire brigade provided by the Heston and Isleworth Local Board under the provisions of the Public Health Act, 1871, incorporating the provisions of the Towns Police Clauses Act, 1847, and that the appellant was in the uniform of, and was a member of, a fire brigade called the Hounslow Original Fire Brigade, formed in the district and supported by voluntary subscriptions and payments and donations from various insurance companies.

It was also admitted and found as a fact that the respondent, when the alleged assault was committed, was at a fire which occurred in a house in the Inwood-road, Hounslow, in pursuance of his duty as a member of the local board fire brigade, and that Frank Marcham, the foreman, was also present in charge of such brigade, and that the respondent received instructions from his foreman not to allow anyone to pass in at the gate of the house where the fire occurred.

It was also admitted that the foreman of the Hounslow Original Fire Brigade, to which the appellant belonged, was in the house at the time the appellant presented himself for admission; that the appellant was at the time in uniform, and when he arrived at the gate he asked the respondent to allow him to pass; that the respondent thereupon told him the orders he had received from his foreman, and refused to allow him to do so, whereupon the appellant stated that the respondent should not stop him, and pushed the gate, and struggled with the respondent to get in, and tried to throw him over. This was the assault that was complained of.

It was admitted that no more force was used by the appellant than was necessary to enable him to pass the respondent and enter the premises.

It was contended on behalf of the appellant that he had a right, as against the respondent, to go into the house, and that the justices had no jurisdiction to try what, it was contended, was a *bonâ fide* question of right.

It was further contended on behalf of the appellant that the respondent had no legal right to prevent him entering the house, and that he was justified in pushing him and using sufficient force to enter the premises.

The justices being of opinion that the respondent, acting under the orders of his foreman, who at the time was the officer in charge of the brigade of the properly constituted local authority—namely, the Heston and Isleworth Local Board—who by statute were authorized to provide and keep engines and firemen, and which brigade the justices considered was the proper one to take charge of any fire that should occur in its district, had full authority to prevent any person from entering the premises in question without the sanction of the officer in charge of the brigade at the time, which in this case was Foreman Marcham.

The questions for the opinion of the court were:—

(1) Whether the justices had jurisdiction to try the case, the appellant having set up an alleged *bonâ fide* claim of right.

(2) Whether any member of the fire brigade provided by the local board had any authority, by statute or otherwise, to prevent a member of any other fire brigade from entering premises at which there was a fire for the purposes of assisting in extinguishing the same.

By 38 & 39 Vict. c. 55, s. 171, it is provided that "the provisions of the Towns Police Clauses Act, 1847, with respect to the following matters—namely, . . . with respect to fires . . . shall, for the purpose of regulating such matters in urban districts, be incorporated with this Act."

10 & 11 Vict. c. 89, s. 32, provides that the commissioners may provide fire engines, &c., "and may employ a proper number of persons to act as firemen, and may make such rules for their regulation as they think proper."

A. Lyttelton (*G. J. Talbot* with him), for the appellant.—The effect of the statutes is simply to give power to the local authority to provide engines and to employ firemen, and does not extend to give such firemen control over premises on fire, to the exclusion of other persons. That proposition is borne out by contrasting the Public Health Act, 1875, with the Metropolitan Fire Brigade Act, 28 & 29 Vict. c. 90; which in section 12 provided a code of powers and duties for firemen. The Public Health Act, therefore, deliberately reverted to the Towns Police Act, as opposed to the London legislation. Here the appellant had a right to go on to the premises to help for the common weal: *Maleverer* v. *Spinke*, Dyer 35 b; at all events his own foreman was already on the premises, and it must be assumed that he, as well as the respondent, was on the premises by leave of the owner. If that was so, what right could one licensee have to exclude or control another? Further, to constitute a criminal assault, it is essential that there should be a *mens rea*, and it is a contradiction in terms to say that a man who *bonâ fide* acts under a claim of right is guilty of an assault in reasonably endeavouring to exercise his right. When that is the case the jurisdiction of the magistrates is ousted: *Watkins* v. *Major*, 24 W. R. 164, L. R. 10 C. P. 662; *White* v. *Feast*, 20 W. R. 382, L. R. 7 Q. B. 353.

Craies, for the respondent.—The conviction was clearly right. The provision in the statutes—and in particular section 32 of the Towns Police Clauses Act, 1847—impart power to the local board brigade to do all such necessary acts to put out fire. The words are that men may be employed to "act as firemen," which clearly involves the power to carry out the necessary duties of firemen, although words expressly authorizing them to take charge may not be inserted: *In re Corporation of Dudley*, 8 Q. B. D. 86, 30 W. R. Dig. 120. It is obviously a necessary act upon the part of firemen to maintain order and control upon premises that are on fire, or their operations may be rendered impossible. The ratepayers are chargeable under the Act for the cost of putting out fires, and that is a statutory invitation to their brigade to be on the premises. The appellant was a mere volunteer, and it lay upon him to justify the assault. [On the question of jurisdiction he was stopped by the court.]

Talbot in reply.

POLLOCK, B.—This case from some aspects raises questions of importance, and I regret that the occasion for those questions should have arisen through the virtuous overzeal of the volunteer fireman. It seems that, when the facts are looked at, the case presents no great difficulty. A house at Hounslow

was on fire. A local fire brigade, established under statute, come and are engaged in putting out the fire, and then the circumstances of the case arise. The first question is, by what right did they come; and the second, what was their position when they were there. The answers to these questions depend (1) upon the interpretation of the statutes, and (2) upon the necessary inference to be reasonably drawn from the facts by the justices.

In the first place, I think that it must be reasonably inferred from the facts that the local board brigade were on the premises with the consent of the owner. Now the Public Health Act, 1875, by reference to the Towns Police Act of 1847, enables a fire brigade to be established, and provides that the commissioners may employ a proper number of persons as firemen, and may make rules for their regulation as may be necessary.

In the present case no rules were made, and the question is, What may be inferred from the provision, "may employ a proper number of persons to act as firemen"? I think it would include the doing of such acts as are reasonably necessary to put out the fire, and to exclude persons whose presence would inconveniently interfere with their operations. The local board brigade, therefore, being properly on the premises, one of their men was stationed at the door with instructions not to allow anyone to pass in. The appellant, a member of another fire brigade and being in uniform, attempted to pass in, and being told he would not be allowed to do so, endeavoured to force his way, in which endeavour he was resisted by the other. The question therefore arises as to what right he had to go in to put out the fire. It is not here a question of *mens rea*, because it is for him, in order to justify the assault, to show that he was prevented from doing some act which he had a legal right to do. Mr. Lyttelton argued that because his foreman was on the premises he had as much right as the local board brigade had to be there also. I cannot draw such an inference, nor, in fact, have the justices done so. As I said, I think that power is impliedly given to the local board brigade by statute to keep people in order on the premises, and to exclude persons whose presence would be inconvenient to them. And further, I agree with what my brother Kennedy has said, that if the first brigade were on the premises with the owner's permission, but the second comers had no such permission, the same consequences would follow, because they would have had no right to enter. But the first reason I have given seems to me to be in accordance with law and with the fitness of the case. The general question of the right of persons to come in and put out the fire on the ground of public safety or that of neighbouring property does not seem to me to arise in the present case, and I do not express any opinion upon it. I am of opinion, therefore, that this appeal must fail, and the conviction be affirmed.

KENNEDY, J.—The appellant in this case assaulted a fireman employed by a local authority. The appellant had no public position, nor does it appear that he had any permission from the owner. It is true that he was in the uniform of his brigade, and that he *bonâ fide* wished to assist in putting out the fire; but so might any one in Hounslow, and the contention put forward in support of his appeal comes to this, that any zealous person might go in, and those actually on the premises by leave of the owner would have no right to resist them. We must assume in the present case that the local board brigade were on the premises with the consent of the owner. Now what right or title to force an entrance had this volunteer? I am not going to say that there are not circumstances under which anyone might not have a right to assault people standing in the way when, for instance, it was a case of saving life or when there was obviously an insufficient force on the premises to cope with the fire. But it is not necessary to consider that here, because there is no evidence or finding that such was the state of things. The appellant has, in my judgment, failed to prove that he had a right to go in, and I think, therefore, that this appeal must be dismissed, with costs.

Solicitors for the appellant, *Charles Robinson & Co.*

Solicitor for the respondent, *Hugh R. Peake.*

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams and Bruce, JJ.) — April 17.

In re HARRISON.

Ex parte SHERIFF OF ESSEX. (*a.*)

Bankruptcy—Execution—Interpleader order—Receiving order—Costs of execution—Possession money—Notice of receiving order—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 11.

After seizure by the sheriff under a writ of fi. fa. *the goods of the debtor were claimed under a bill of sale, and an interpleader order was made, but, a receiving order having been made against the debtor, notice was given to the sheriff requiring him to hand over the goods to the official receiver. The sheriff declined to hand over the goods pending the interpleader order, and in the bill of costs subsequently brought in by him under section* 11 *of the Bankruptcy Act,* 1890, *he claimed possession money down to the date when such order was discharged.*

Held, that the sheriff was not entitled to claim under section 11 *any costs of execution subsequent to the time when he received the notice mentioned in the section, and that the taxing officer was right in disallowing all possession money after that date.*

Appeal from an order of His Honour Judge Abdy, in the County Court at Chelmsford, by which he disallowed to the sheriff certain possession money.

The case raised an important question as to the right of the sheriff to possession money out of the bankrupt's estate where possession had been retained, after notice of the receiving order had been given, owing to the fact that interpleader proceedings were then pending.

On the 24th of August, 1891, a writ of *fi. fa.* was issued against the debter, under which possession was taken by the sheriff on the 28th of August, 1891. On the 4th of September, 1891, a claim was made to the goods under a bill of sale, and on the 14th of September, 1891, an interpleader order was made directing the sheriff to sell, unless within a certain time the money was brought into court by the claimant.

On the 16th of September, 1891, the sheriff received notice that a receiving order had been made against the debtor, and on the 17th of September, 1891, the official receiver called on the sheriff to hand over the goods.

The sheriff declined to hand over the goods pending the interpleader order, but on the 24th of September he received notice that the bill of sale holder withdrew his claim. On the 26th of September, 1891, the sheriff took out a summons to have the interpleader

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

order dismissed, and on the 2nd of October, 1891, he was ordered to withdraw.

The sheriff thereupon on the 2nd of October, 1891, handed over the goods to the official receiver, and subsequently brought in his bill of costs under section 11 of the Bankruptcy Act, 1890, and rule 118 of the Bankruptcy Rules, 1886, by which he claimed possession money down to the 2nd of October, 1891.

The county court registrar on taxation disallowed all possession money subsequent to the 17th of September, 1891, on which date the sheriff was called upon by the official receiver to hand over the goods, and this decision having been affirmed by the county court judge, the sheriff now appealed.

Wightman Wood, for the sheriff.—The ground of the decision in the county court appears to have been that it was the duty of the sheriff to deliver the goods to the official receiver on the 17th of September, and that he had no right to continue in possession after notice of the receiving order and demand by the official receiver. But the fact that the interpleader order intervened compelled the sheriff to hold the goods until the order was discharged, or, at any rate, until he had notice that the claim was withdrawn. The sheriff was really holding as a stakeholder. The words of section 11 of the Bankruptcy Act, 1890, are where any "goods of a debtor" are taken in execution, and those words do not apply in this case. It is not clear that the goods here were the goods of the debtor, because they were goods which were claimed by a third party as being his goods. It was the duty of the sheriff to obey the interpleader order which had been made. These costs were clearly costs of the execution.

He referred to *Bird* v. *Mathews*, 46 L. T. N. S. 512, 30 W. R. Dig. 158; *In re Levy, Ex parte the Sheriff of Essex*, 38 W. R. 784 7 Morrell's Bankruptcy Cases, 125; *Ex parte Browning, In re Cracraft*, 26 W. R. 559, 8 Ch. D. 596; *Child* v. *Mann*, L. R. 3 Eq. 806, 15 W. R. Ch. Dig. 52; *Smith* v. *Darlow*, 32 W. R. 665, 26 Ch. D. 605; *Ex parte Lithgow, In re Fenton*, 26 W. R. 834, 10 Ch. D. 169.

Muir Mackenzie, for the official receiver.—The only question is whether under the section the possession money comes within the words "costs of execution," and whether the estate is to pay these costs or the party really at fault for them. The matter depends entirely on section 11 of the Bankruptcy Act, 1890, and the cases decided under the Act of 1869 have really no application.

VAUGHAN WILLIAMS, J.—I am of opinion that the decision of the county court was right. I do not think that the sheriff can claim under section 11 of the Bankruptcy Act, 1890, any costs of execution whatever subsequent to the time when he receives the notice mentioned in the section. It cannot be argued that the sheriff has any claim except by virtue of the provisions of section 11. That section provides that "where any goods of a debtor are taken in execution, and before the sale thereof or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver, but the costs of the execution shall be a first charge on the goods or money so delivered, and the official receiver or trustee may sell the goods, or an adequate part thereof, for the purpose of satisfying the charge." In my opinion it is plain that that means the costs of the execution up to the time when the notice is given. To read the section in the way in which we have been invited to read it would involve adding to the section some such words as "unless interpleader proceedings are pending," and a proviso that if interpleader proceedings are pending the costs of execution shall include all costs down to the discharge of the interpleader. It is said that the goods were not the goods of the debtor. All I can say is that if the goods were not the goods of the debtor the sheriff has no claim under the section. But if they were the goods of the debtor, then the sheriff on delivering over the goods is entitled to his costs down to that time. I agree with the county court judge that the only duty of the sheriff is to obey the provisions of the section, and on getting the notice his duty is to hand over the goods, and on handing them over he will get the costs of execution down to that time.

BRUCE, J.—I am of the same opinion. It was clearly not intended that the sheriff should have costs for remaining in possession after he has received notice of the receiving order. I will go further, and will say that I do not think it was the duty of the sheriff to remain in possession after he had received notice of the receiving order.

Appeal dismissed, and leave to appeal refused.

Solicitors for the sheriff, *Gepp & Sons.*

Solicitor for the official receiver, *Solicitor to the Board of Trade.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Bowen and Kay, L.JJ.) [and Q. B. Div.] (Wills and Charles, JJ.) — April 19; May 30.

In re AN ARBITRATION BETWEEN BATER AND ANOTHER AND THE MAYOR, &C., OF BIRKENHEAD. (*a*.)

Local government—Unsound meat—Seizure—Refusal of magistrate to condemn — Compensation to owner—Measure of damages — Costs of attendance before magistrate on application to condemn — Power of magistrate to hear owner—Right of owner to refuse tender of the meat—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117, 308.

Where meat has been seized by the officer of a local authority under section 116 *of the Public Health Act,* 1875, *as being unwholesome, and taken before a magistrate for the purpose of being condemned, the attendance of the owner, though he has not been summoned, with his witnesses before the magistrate to give evidence as to the condition of the meat, is a natural consequence of the seizure; and, therefore, where the power of seizure has been wrongly exercised, and the magistrate refuses to condemn the meat, the owner is entitled to include in the amount of "full compensation" recoverable by him from the local authority under section* 308 *of the Act the costs incurred through his attendance before the magistrate.*

So held by the Court of Appeal, *affirming the decision of the* Queen's Bench Division.

Held, also, by the Queen's Bench Division, *that, when the meat which has been seized, and which the magistrate has refused to condemn, has been tendered by the local authority to the owner, he is not entitled to decline to receive it back, and the value of the meat at the time when it was tendered must be taken into consideration in*

(*a*.) Reported by T. R. COLQUHOUN DILL and W. F. BARRY, Esqs., Barristers-at-Law.

assessing the amount of the compensation payable to the owner.

Special case stated for the opinion of the court under section 7 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49).

The applicants, Bater & Williamson, were importers and vendors of meat at Birkenhead. On the 23rd of August, 1892, the inspector of nuisances appointed by the corporation as urban sanitary authority seized the carcase of a bullock belonging to the applicants under section 116 of the Public Health Act, 1875, as being unfit for human food. On the 24th of August the carcase was taken by the inspector before a magistrate to be dealt with by him under section 117 of the same Act; the applicants, though not summoned, attended and gave evidence as to the condition of the meat, and the magistrate refused to condemn it or to make any order in respect of it. On the same day, and after the decision of the magistrate, the inspector tendered the carcase to the applicants, who refused to accept it.

The applicants and the corporation then appointed arbitrators to determine the fact of damage in relation to these matters, and the amount of compensation (if any) to be paid to the applicants by the corporation in respect thereof. The corporation denied all liability, and appointed their arbitrator under protest. Questions arose during the arbitration (1) as to whether the applicants were in law entitled to refuse to receive back the carcase, and to claim compensation on the footing that it had been permanently detained by the corporation, and (2) as to whether, in estimating the amount of compensation (if any) to be paid to the applicants, they were entitled to claim as part thereof the costs incurred in opposing the application for the condemnation of the meat.

The arbitrators found as a fact that the applicants had suffered damage, and awarded to them a sum of £11 if the first question should be answered in the affirmative, and £4 2s. 6d. if it should be answered in the negative, and an additional sum of £29 18s. 6d. for the costs of the appearance of the applicants before the magistrate in case the second question should be answered in the affirmative.

The opinion of the court was requested upon these questions.

Provision is made by section 116 of the Public Health Act, 1875, for the seizure by a medical officer of health or inspector of nuisances of any carcase or meat exposed for sale and intended for the food of man which appears to him diseased, or unsound, or unwholesome, or unfit for the food of man, in order to have the same dealt with by a justice. And section 117 provides that if it appears to the justice that any carcase so seized is diseased, &c., he shall condemn the same and order it to be destroyed or otherwise disposed of; and that the person to whom it belongs, or did belong, at the time of exposure for sale shall be liable to a penalty. Section 308 provides as follows:—"Where any person sustains any damage by reason of the exercise of any powers of this Act in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers; and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by the Act." Section 179 provides for the mode of reference to arbitration.

Poland, Q.C., and *Macmorran*, for the applicants.—It must be assumed, for the purposes of this case, that the claimants are entitled to some compensation; the corporation dispute their liability, but that question is not now before the court. The compensation payable under section 308 is "full compensation." The applicants could not have sold the meat after these proceedings had been taken in respect of it: they were, therefore, entitled to refuse to take it back, and they ought to be paid its full value: *White* v. *Redfern*, 28 W. R. 168, 5 Q. B. D. 15. The costs of the appearance before the magistrate were expenses properly incurred by the applicants for the protection of their property which had been seized by a wrongful exercise of the powers of the corporation.

Joseph Walton, Q.C., and *W. F. Taylor*, for the corporation of Birkenhead, were only called upon to argue the question of the inclusion in the compensation of the applicants' costs of appearance before the magistrate.—The object of the provisions of the Act is to give facilities for the rapid seizure and destruction of meat which is unfit for human food; and to make the sanitary authority liable for costs where a *bonâ fide* error has been made would be to put a serious obstacle in the way of the exercise by their officers of their powers. There are two processes which may be pursued: the one, which was adopted here, for the condemnation of the meat; the other for the punishment of the owner of the meat personally. In the latter case the owner is summoned and is entitled to appear and be heard in his defence. But upon an application to condemn the meat he has no such right. Some of the cases go so far as to say that the action of the magistrate in condemning the meat is merely executive, that he is bound to act upon the evidence brought before him by the sanitary authority, and that he has no power to hear the owner: *Vinter* v. *Hind*, 31 W. R. 198, 10 Q. B. D. 63; *Waye* v. *Thompson*, 33 W. R. 733, 15 Q. B. D. 342. At all events, the owner was in no way bound to appear, and he cannot recover his costs of so doing as part of the compensation to be paid to him.

Poland, Q.C., replied.

WILLS, J.—The difficulty which arises in this case is one which commonly occurs where legislation is imperfect and judicial interpretation is necessary to give meaning to a section. It was pointed out by Field, J., in *Vinter* v. *Hind* that section 117 of the Public Health Act, 1875, is inartificially drawn, and in that view most of those who have to deal with that section agree. The questions here are whether, when proceedings have been taken under sections 116 and 117 of the Public Health Act, 1875, and a man's meat has been wrongfully seized, he is entitled to recover as compensation under section 308 of that Act the full value of the meat seized and the costs of his appearance before the magistrate who was asked to condemn the meat. On the first point our judgment is for the corporation; we think it is impossible to say that when meat is seized and its condemnation does not follow, the owner has a right to refuse to take it back for what it was worth. The meat remains the property of the owner, and a person who is seeking to recover damages from another must show that he has acted reasonably, and done his best to prevent the damage which he has suffered becoming larger than was necessary. It appears that in this case each party was afraid to touch this property for fear of putting himself in the wrong, but I think that the applicants ought not to have refused to accept the meat when it was tendered to them, and that they are not entitled to damages representing the full value of the carcase.

Then there is the serious question as to the applicants' costs of their appearance before the magistrate. The proceedings under which the meat may be condemned is anomalous. It may take place quite behind the back of the owner, and in one of the decisions, *Waye* v. *Thompson*, I am reported to have said that it had already been decided that the owner

"cannot" be heard on the application to condemn. I think that that statement is incorrect; if the expression had been "is not entitled to be heard," I think it would have been correct, but I do not think that any decision has gone beyond that. It is, however, clear that the magistrate could refuse to hear the owner and his witnesses, and that the condemnation of the meat might yet be good. But Mr. Walton argues that since the owner had no right to be heard he has no right to recover the costs of his appearance as compensation. I cannot agree with that argument. The appearance seems to me to be the natural consequence of the seizure of the meat. The Act says that the compensation recoverable is to be "full compensation," and I think that common sense and justice require that the costs of any steps which a right-minded man, who thought that he had a good cause, would naturally take under the circumstances are recoverable as compensation when the exercise of the powers given by the Act has been erroneous. It is said that this decision will make it very difficult for sanitary inspectors to act in these cases; but every such officer must act in the performance of his duty upon his own judgment without having a certainty as to which way the decision will go. I feel the less pressed by that argument because I feel certain that if we decided that these costs are not recoverable this legislation could not stand where it does. The result would be terribly unjust to an honest man whose meat had been erroneously seized; he might be prevented from coming forward to defend himself and his property, if he knew that he could not recover any of the costs which he might legitimately incur in the defence. It often happens that in cases of nuisance, where far greater amounts than those now in question are incurred for costs, a local board is compelled to run the risk of incurring them, and there is no hardship in holding that they run the same risk here. This seems to me to be the natural construction of this Act of Parliament.

The result is that the applicants are entitled to recover the smaller amount mentioned by the arbitrator as damages for the seizure of the meat, and to recover also the costs of their appearance before the magistrate.

CHARLES, J.—I am of the same opinion. The question arises on section 308 of the Public Health Act, 1875. For the purposes of this case we must assume that the applicants are persons who have sustained damage by reason of the exercise of the powers of the Act in relation to a matter as to which they are not in default. The compensation is to be "full compensation," and the questions are, whether the applicants were entitled to refuse acceptance of this carcase when it was offered to them, and to recover its full value as compensation, and, secondly, whether they are entitled to recover their costs of attending before the magistrate when he heard the application for the destruction of the meat. As to the value of the meat, I have nothing to add to what my learned brother has said. I think that the smaller sum named by the arbitrators is all that the applicants are entitled to receive in respect of the detention of the meat. They had no right to throw it upon the hands of the corporation.

The second question is much more important, Are the applicants entitled to recover the costs of their appearance before the magistrate? It is said that their appearance was not the natural consequence of the action of the corporation in seizing the meat. But I think it is natural and proper for a man who has had notice of proceedings such as these to appear and defend himself and his meat. It is said, again, that it was useless for the applicants to appear, for the magistrate had no power to hear them upon the question of the condemnation of the meat; but, as my brother Wills has pointed out, no case has gone so far as to decide that. There are expressions in the cases of *Waye* v. *Thompson* and *Vinter* v. *Hind* which point in that direction, but neither of those cases decides that the magistrate has no power to hear the owner of the meat upon these proceedings. It appears to me that, although the owner is not entitled to be heard, the magistrate is permitted to hear him. If he goes before the magistrate to put his case, the charge against him personally under section 117 may be heard, and in that case the magistrate might give him costs if he were successful. That was not done here, but the magistrate did hear the owners and their witnesses upon the application to condemn the carcase, and he declined to condemn it. I think that their attendance before the magistrate was the natural consequence of the act of the officer of the corporation, and that the costs so incurred ought to be included in the "full compensation" which is to be allowed under section 308.

The corporation appealed.

May 30.—*J. Walton, Q.C.*, and *W. F. Taylor*, for the appellants, contended that the costs of appearing before the magistrate and opposing the application for the condemnation of the meat could not be recovered under section 308.

Poland, Q.C., and *Macmorran*, for the respondents, were not called upon.

The same authorities were referred to as in the court below.

Lord ESHER, M.R.—In my opinion this appeal must be dismissed. It seems to me that section 308 must be read in its ordinary and grammatical sense. It provides that, where any person sustains any damage by reason of the exercise of any of the powers of the Act, where he is not in default, full compensation shall be made to such person. What is the ordinary meaning of those phrases? The words must include anything which the person suffers by reason of the exercise of the powers of the Act, and for the damage so sustained he is to receive full compensation. It seems to me to be natural and reasonable for a person whose property has been attacked to defend it, and for that purpose to appear before the magistrate and to call witnesses to show that he is not in the wrong. If that is so, how can it be said that the expense of so doing is not part of the damage he has suffered? It appears to me that these expenses are part of the ordinary damage sustained by reason of the exercise of the powers of the Act. It was sought to call them costs in the strict sense of that term, and to insist, upon that ground, that they could not be recovered as costs. The answer to that is, that they are not costs in the strict sense of the term—namely, costs such as can be taxed. They are expenses in the ordinary sense, and the claimants are entitled to be paid back the expenses to which they have been put by the act of the corporation. They are, therefore, entitled to this head of compensation.

BOWEN and KAY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the applicants, *Hamlin, Grammer, & Hamlin*, for *R. B. Moore & Son*, Birkenhead.

Solicitors for the corporation, *Venn & Co.*, for *A. Gill*, Town Clerk, Birkenhead.

From Chan. Div. (Lindley, Bowen, and Lopes, L.JJ.) Jan. 25; Feb. 14; April 24.

HAMPDEN AND ANOTHER v. EARL OF BUCKINGHAMSHIRE. (a.)

Settled Land—Power to mortgage settled land to pay off incumbrances—Interest of parties entitled under the settlement—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 53—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 11.

Under the Settled Land Act, 1882, *ss.* 2 (1) (3) (4), 20, 21, *and the Settled Land Act*, 1890, *ss.* 2, 3, 11, *the tenant for life of a settled estate has power to mortgage the whole of the settled estate to pay off an incumbrance upon part of it.*

Held, further, that, upon the facts of the case, the tenant for life could not properly exercise the power, having regard to section 53 *of the Settled Land Act*, 1882, *at least until it had been ascertained that no sale at a proper price could be effected; and that the court ought to restrain him from exercising the power, upon the ground that its exercise would be a breach of trust, although he was acting* bonâ fide.

Decision of Kekewich, J., *reversed.*

Appeal by annuitants (whose annuities were, under the will of the late Earl of Buckinghamshire, charged on the whole of the estate settled by his will) from the refusal of Kekewich, J., to restrain the present Earl of Buckinghamshire, the tenant for life of the settled estates, from mortgaging a portion thereof called The Beechwoods otherwise than subject to the rights of the annuitants. The questions raised by the appeal were, first, whether the tenant for life of a settled estate has, under sections 2, 3, and 11 of the Settled Land Act, 1890, and sections 2 (1) (3) (4), 20, and 21 of the Settled Land Act, 1882, power to mortgage the whole of the settled estate to pay off an incumbrance upon part of it. Secondly, if he has such power, ought the court, having regard to the facts of the case, to restrain him from exercising it when the tenant for life is acting *bonâ fide*, upon the ground that its exercise would be a breach of trust?

The facts were as follows:—The late Earl of Buckinghamshire was entitled to estates in Ireland and also to estates in Buckinghamshire. He had mortgaged his Irish estates for £28,000, but this mortgage had been paid off. He had mortgaged the bulk, but not the whole, of his Buckinghamshire estates for £39,000. Part of his Buckinghamshire estates called Beechwoods was not mortgaged, and this part, equally with all the rest of his estates, he by his will charged with annuities. The testator's personal estate and the property comprised in the mortgage were insufficient to pay the mortgagees. By his will he declared that all charges and incumbrances which should affect his Irish or Buckinghamshire estates (which expression includes The Beechwoods) respectively, should be primarily charged on and paid out of such estates respectively, in exoneration of his general estate and effects. He then devised his Irish estates and his Buckinghamshire estates in strict settlement in the usual way. He devised and bequeathed his residuary estate to trustees upon trust for his younger children. He gave his trustees power to sell his Irish estates for the purpose of paying off any incumbrances on his Buckinghamshire estates. By his codicil he bequeathed pecuniary legacies to a considerable amount. On his death his personal estate amounted to £28,000.

(a.) Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

In an action for the administration of his estate the mortgagees both of the Irish and of the Buckinghamshire estates proved their debts. The mortgagees of the Irish estates proved for the whole amount due to them—*i.e.*, £15,000 and interest—and the mortgagees of the Buckinghamshire estates proved for £28,000 and interest, part only of their debt. By these proofs the whole of the personal estate was exhausted. The mortgage on the Irish estates was paid off in full, but £15,000 and interest still remained due to the mortgagees of the Buckinghamshire estates. Attempts had been made to sell the Irish estates so as to relieve the Buckinghamshire estates, but these attempts had not yet proved successful. In November, 1891, an order was made by consent to raise £40,000 by mortgage of the Buckinghamshire estates, but as to The Beechwoods, subject to the annuities charged upon it; but attempts to raise money on these terms had failed, and on the 2nd of November, 1892, an order was made for the sale of the Buckinghamshire estates, but the order was not to be drawn up for a month. It had, however, since been drawn up, but a sale under it had been postponed, as the present earl, the tenant for life, proposed to raise £40,000 by mortgage of the Buckinghamshire estates including Beechwoods, but so as to override and not be subject to the charge on them in favour of the annuitants. Out of the mortgage money he proposed to pay what was still due to the mortgagees, and also the pecuniary legatees. This proposed mortgage the annuitants sought to restrain. A sale of the mortgaged estates apart from The Beechwoods could not be effected, and if it could, it would not yield enough to pay off the mortgagees and the pecuniary legatees. The value of the Buckinghamshire estates was put at £80,000. No purchaser at that or any other price had yet come forward, but a sale at that price would be much more beneficial to the annuitants than a mortgage for £40,000 which should override these annuities.

Section 11 of the Settled Land Act, 1890, provides that "where any money is required for the purpose of discharging an incumbrance on the settled land or any part thereof, the tenant for life may raise the money so required . . . on mortgage of the settled land or any part thereof." Section 53 of the Settled Land Act, 1882, provides that "a tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position, and to have the duties and liabilities, of a trustee for those parties."

Kekewich, J., refused to restrain the tenant for life from mortgaging The Beechwoods otherwise than subject to the rights of the annuitants.

The annuitants appealed.

Warmington, Q.C., and *Birrell*, for the appellants.—The proposed mortgage would not be a proper exercise by the tenant for life of his powers, under the 53rd section of the Settled Land Act, 1882. If the mortgage would keep the property in the family and enable the will to be carried out we should not oppose. But it merely postpones the collapse of the settled estates. It does not regard the interests of the annuitants. It postpones them indefinitely. The settlement will be overridden by the mortgage.

They referred to *In re the Earl of Radnor's Will Trusts*, 45 Ch. D. 402, 39 W. R. Dig. 202. [LOPES, L.J., referred to the *Duke of Marlborough's Settlement*, 34 W. R. 377, 32 Ch. D. 1].

Sir H. Davey, Q.C., and *Macnaghten*, for the respondent, the Earl of Buckinghamshire.—The tenant for life has exercised his discretion. No *mala fides* is alleged. It is merely said that it would be more

advantageous to the annuitants that he should exercise his discretion in another way. If this motion is well founded anyone who thought his interests not properly considered could come forward for an injunction: *In re Lord Stamford's Estate*, 56 L. T. N. S. 484. The tenant for life is master of the settlement. The court has no jurisdiction unless *mala fides* (*i.e.*, including an arbitrary exercise of his powers) is shown.

Cur. adv. vult.

April 24.—LINDLEY, L.J., read the following written judgment, with which BOWEN and LOPES, L.JJ., concurred:—This is an appeal from the refusal of Kekewich, J., to restrain the tenant for life of some settled estates from exercising his alleged power of mortgaging them under the authority said to be conferred upon him by section 11 of the Settled Land Act, 1890. The appellants are annuitants whose annuities are charged on the whole of the settled estates, and they contend that their interests are in danger of being sacrificed in order that the settled estates may be preserved for the benefit of other persons. The appellants urge that by virtue of section 53 of the Settled Land Act, 1882, the tenant for life is a trustee for them as well as for the other persons claiming under the settlement, and that the proposed mortgage will be a breach of trust on the part of the tenant for life, and ought to be restrained accordingly. In order to decide the question thus raised it is necessary first of all to ascertain the exact position of affairs and the rights of the several persons interested in the property proposed to be mortgaged. The late Earl of Buckingham was entitled to estates in Ireland and also to estates in Buckinghamshire. He had mortgaged his Irish estates for £28,000 and the bulk, but not the whole, of his Buckinghamshire estates for £39,000. Part of his Buckinghamshire estates called Beechwoods was not mortgaged, and this part, equally with all the rest of his estates, he charged with annuities when he made his will. But although The Beechwoods were not comprised in any mortgage, the mortgagees, as specialty creditors of the testator, could have recourse to these lands for payment of their debts if the testator's personal estate and the property comprised in their mortgage were insufficient to pay them, as I understand they were. It must, therefore, be borne in mind that, although the mortgages did not comprise Beechwoods, yet the payment of the annuities charged, *inter alia*, on The Beechwoods was liable to be defeated, or at least delayed, by the mortgagees. By the will to which I have referred the testator bequeathed certain annuities to his younger children, and charged them both on his Irish estates and on his Buckinghamshire estates, which expression includes The Beechwoods, and he gave the annuitants powers of distress and entry. He bequeathed part of his personal estate to trustees to go as heirlooms with his Buckinghamshire estates. He declared that all charges and incumbrances which should affect his Irish or Buckinghamshire estates respectively should be primarily charged on and paid out of such estates respectively in exoneration of his general estate and effects. He then devised his Irish estates and his Buckinghamshire estates in strict settlement in the usual way. He devised and bequeathed his residuary estate to trustees upon trusts for his younger children. He gave his trustees power to sell his Irish estates for the purpose of paying off any incumbrances on his Buckinghamshire estates. Such is a general outline of the will. The testator does not mention The Beechwoods in his will. He treats them as part of his Buckinghamshire estates. As regards his mortgage debts his general idea is that the Irish estates shall, or at least may, be sold for the preservation of the Buckinghamshire estates, and that these shall indemnify the general personal estate from all mortgages on them. The will contains various other provisions which, however, are not material for the present purpose. By his codicil he bequeathed pecuniary legacies to a considerable amount. On his death his personal estate amounted to £28,000. In an action for the administration of his estate the mortgagees, both of the Irish and of the Buckinghamshire estates, proved their debts. The mortgagees of the Irish estates proved for the whole amount due to them—*i.e.*, £15,000 and interest—and the mortgagees of the Buckinghamshire estates proved for £28,000 and interest, part only of their debt. By these proofs the whole of the personal estate was exhausted. The mortgage on the Irish estates was, if I understand rightly, paid off in full. £15,000 and interest still remains due to the mortgagees of the Buckinghamshire estates, and they can require the whole of those estates, including The Beechwoods if necessary, to be sold for their payment; and if The Beechwoods are sold these mortgagees, as between themselves and the annuitants, will be entitled to be paid out of the proceeds of sale in priority to any claims of the annuitants. The tenant for life proposes to mortgage all the Buckinghamshire estates, including The Beechwoods, for £40,000, and to pay off not only what is still due to the mortgagees, but also to pay the pecuniary legatees, who have been deprived by the mortgagees of the personal estate, out of which alone the legacies were payable. As between the mortgagees and the legatees and as between the legatees and the devisees of the mortgaged estate in Buckinghamshire the legatees are entitled to stand in the place of the mortgagees to the extent to which they have been paid out of the personal estate. This is so by virtue of Locke King's Act independently of the will. But the will itself directs that the Buckinghamshire estates shall bear the mortgages upon them in exoneration of the testator's general estate. This direction is ambiguous, but is very important in the present case. Does it mean that all the Buckinghamshire estates, including the unmortgaged Beechwoods, are to exonerate the testator's general estate, or does it mean no more than that the mortgaged estates in Buckinghamshire shall bear their own mortgage debts in exoneration of the general estate? If construed in the latter sense the direction would be unnecessary by reason of Locke King's Act. I am of opinion that the testator meant much more than to express what would be implied in the absence of the clause in question. Having regard to the definition of Buckinghamshire estates in the will and to the general scope of the will, to which I have already alluded, I am of opinion that this direction charges the mortgages on The Beechwoods for the purpose of exonerating the general estate, by which is obviously meant the real and personal estate not specifically disposed of by the will.

This clause therefore entitles the pecuniary legatees to stand in the place of the mortgagees, not only as against the mortgaged property, but as against The Beechwoods also. But I agree with Mr. Warmington's contention, that the charge on the Buckinghamshire estates, including The Beechwoods, is only for the purpose of exonerating the general estate, and does not affect the right of the annuitants as between themselves and the devisees of the mortgaged estates to have the mortgage debts paid out of those estates in priority to The Beechwoods. Attempts have been made to sell the Irish estates so as to relieve the Buckinghamshire estates, but these attempts have not yet proved successful. The legatees have the conduct of those proceedings.

In November, 1891, an order was made by consent to raise £40,000 by mortgage of the Buckinghamshire estates, but, as to The Beechwoods, subject to the annuities charged upon it. But attempts to raise money on these terms have failed, and on the 2nd of November, 1892, an order was made for the sale of the Buckinghamshire estates, but the order was not to be drawn up for a month. It has, however, since been drawn up, but a sale under it has been postponed, as the present earl, the tenant for life, proposes to raise £40,000 by mortgage of the Buckinghamshire estates, including Beechwoods, but so as to override and not be subject to the charge on them in favour of the annuitants. This mortgage they seek to restrain.

A sale of the mortgaged estates apart from the The Beechwoods cannot be effected, and if it could it would not yield enough to pay off the mortgagees and the pecuniary legatees. Since the case was argued the court has been furnished with evidence of the saleable value of the Buckinghamshire estates. That value is put at £80,000. No purchaser at that or any other price has yet come forward; but a sale at that price would be much more beneficial to the annuitants than a mortgage for £40,000 which should override these annuities.

Such being the rights of the parties and the position of affairs, it becomes necessary to consider, first, whether the tenant for life has any power to make the proposed mortgage apart from the question whether to make it would be a breach of trust; secondly, if he has such a power, ought this court to restrain him from exercising it upon the ground that its exercise would be a breach of trust?

The first question turns on the true construction of sections 2, 3, and 11 of the Settled Land Act, 1890, and of section 2, sub-sections (1) (3) and (4), and sections 20 and 21 of the Settled Land Act, 1882.

It was contended by counsel for the appellants that the tenant for life had no power to mortgage the whole property to pay off an incumbrance upon part of it. This contention cannot, however, be supported. The settlement in this case is the will of the late Earl of Buckinghamshire dated the 31st of October, 1877. The testator and settlor died in October, 1885, and by section 2, sub-section (1), of the Settled Land Act, 1882, the will, although made before the Act came into operation, is a settlement within the meaning of the Act. The settled land is all the land settled by that will, including The Beechwoods, on which the appellants' annuities are charged: section 2, sub-section (3). The tenant for life under that settlement is the present Earl of Buckinghamshire: section 2, sub-section (5). He is the tenant for life of the whole of the property comprised in the will, although the annuities of the appellants are a first charge under the settlement on part of the land of which the earl is tenant for life. The proposed mortgage is for the purpose of raising money in order to pay off an incumbrance on part of the settled land, and is warranted by section 11 of the Settled Land Act, 1890. The incumbrance consists of the mortgage debt on the mortgaged Buckinghamshire estates, including so much of it as has been paid off at the expense of the pecuniary legatees. Even if the will had not charged this mortgage debt on The Beechwoods, the 11th section expressly authorizes a mortgage of the whole of a settled estate in order to pay off an incumbrance on part of it only.

The money raised will be capital money for the purpose of paying off the incumbrance, and by sections 20 and 21 of the Settled Land Act, 1882, the mortgage when executed will take priority over the annuities and over all other charges and estates created by the settlement — *i.e.*, the late earl's will. Apart, therefore, from the question whether to create the mortgage will be to create a breach of trust, it is, in my opinion, clear that the tenant for life can exercise the power to mortgage. The order for sale already made having been suspended does not, in my opinion, deprive him of this power. It was decided in *Cardigan* v. *Curzon-Howe*, 33 W. R. 836, 30 Ch. D. 531, that a tenant for life could sell notwithstanding a decree for the execution of the trusts of the settlement, and this goes far to show that a suspended order for sale ought not to deprive the tenant for life of the power to mortgage conferred upon him by the statute.

It remains to consider whether the tenant for life can properly exercise this power having regard to section 53 of the Settled Land Act, 1882. Upon this point I felt considerable doubt until the evidence as to the value of the Buckinghamshire estates was furnished to the court. But this evidence satisfies me that the proposed mortgage will be unjust to the annuitants; and that justice to them requires that no such mortgage shall be made at least until it has been ascertained that no sale at a proper price can be effected. It was forcibly contended by Sir Horace Davey that it was for the tenant for life and not for this court to determine what ought to be done, and that so long as the tenant for life was acting *bonâ fide* the court could not properly interfere with him.

Speaking generally I think this is true. But assuming a tenant for life to be acting *bonâ fide* and with a view to preserve the estates for those intended by the settlor to enjoy them, still an honest trustee may fail to see that he is acting unjustly towards those whose interests he is bound to consider and to protect, and if he is so acting and the court can see it although he cannot, it is, in my opinion, the duty of the court to interfere. It must be borne in mind that the effect of a sale under the Settled Land Act is merely to substitute money for land, and that whatever rights persons had in the land, are preserved to them in the money produced by its sale. But a mortgage which overrides an incumbrance has a very different effect. The incumbrancer's rights are *pro tanto* destroyed, not preserved, unless he is paid off out of the money raised by the overriding mortgage. In this case it is not proposed to pay off the annuitants out of the money to be raised by the mortgage, nor could the annuitants be so paid off even if the tenant for life desired it (see section 11, clause 2, of the Settled Land Act, 1890).

In my opinion a tenant for life is not justified in trying to preserve a heavily incumbered estate by mortgaging it if he thereby sacrifices the interests of existing incumbrancers upon it. The appeal, therefore, must be allowed. The order appealed from must be discharged and an injunction be granted restraining the Earl of Buckinghamshire from mortgaging The Beechwoods otherwise than subject to the right of the persons entitled to the annuities charged thereon by the will of the settlor.

Appeal allowed.

Solicitors for the appellants, *Stevens, Bawtree, & Stevens.*

Solicitors for the respondent, *Cookson, Wainewright, & Pennington.*

From Chan. Div. (Lindley, Bowen, and Kay, L.JJ.) April 17, 24.

In re HUMPHRYS.
HUMPHRYS *v.* LEVETT. (*a.*)

Will—Infant—Maintenance—Accumulations—Vested gift to infant for life—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.

Property comprising, in part, a share of residue, was devised and bequeathed to trustees in trust to pay the income to an infant for life, remainder to such of her children as should attain twenty-one, and in default of such issue, then over. There was no express maintenance or accumulation clause.

The trustees, until the marriage of the infant, made an annual allowance out of the income of the said property for the infant's maintenance and education, and accumulated the balance.

Held, that the infant took a vested interest in the property; and as the income of the property had been expressly given to the infant by the instrument under which the infant's interest arose, that the infant was entitled to the accumulations of income accrued prior to her marriage; and that the case came under sub-section 3 *of section* 43 *of the Conveyancing Act,* 1881, *by which the section is only to apply if and as far as a contrary intention is not expressed in the instrument under which the infant's interest arises.*

By his will, dated the 5th of February, 1878, the testator, Wm. Chas. Humphrys, after various specific and pecuniary bequests, devised and bequeathed all his real and personal estate to trustees upon trust to sell and convert for certain purposes, and to hold the residue in trust for all or any of his three daughters and his granddaughter, Angela Humphrys Drummond (now Mrs. Levett), who should be living at his death and attain the age of twenty-one years, or marry under that age with the consent of their guardians, with directions as to the settlement of such shares.

By a codicil dated the 27th of April, 1882, the testator directed as follows:—"I declare that the trustees or trustee for the time being of my will shall stand seised of my messuage and hereditaments at Bursledon, known as 'Highfield,' now in lease to Mrs. Beale Browne, upon trust during the lifetime of my granddaughter, Angela Humphrys Drummond, either to permit her to occupy the same or to pay to her the annual income thereof for her separate use, and so that she shall have no power to anticipate the growing payments thereof; and after her death then in trust for such of her children as, whether in her lifetime or after her decease, shall attain the age of twenty-one years, equally between them, and in default of such issue then in trust for my three daughters, Beatrice Caroline Letitia, and Ada Mabel, and Julia Wiggett, and their issue respectively, as a part of their respective shares of my residuary estate under my said will with the like powers in all respects; I empower my trustees or trustee, but without responsibility for any omission so to do, to repair and insure against loss by fire my said messuage and hereditaments at Bursledon aforesaid out of the rents or *corpus* thereof, or the income or *corpus* of the share of my said granddaughter under my will. . . . revoke the trusts of the share in my residuary estate effected by my will to be held in trust for my said granddaughter and her issue, and I declare that such share shall be held upon the trusts and subject to the powers and provisions hereinbefore declared concerning my said messuage and hereditaments at Bursledon, known as 'Highfield.'"

Neither the will nor the codicil contained any maintenance or accumulation clause applicable to residue.

The testator died on the 17th of October, 1883. His three daughters attained the age of twenty-one years during his lifetime. His granddaughter, Mrs. Levett, was married on the 27th of April, 1887, with the consent of her guardian, being still an infant. From the testator's death down to the date of Mrs. Levett's marriage the trustees allowed an annual sum out of the net income of the Highfield estate and out of her share of the residuary estate for her maintenance and education, and accumulated the balance. An originating summons was taken out before North, J., for the determination of the question whether Mrs. Levett was entitled to payment to her of the accumulations of income of her share in the residuary estate of the testator accrued prior to her marriage, or whether such accumulations should be retained by the trustees as capital or *corpus*, or whether they should be paid to the testator's three daughters. North, J., held that the accumulations of income belonged to Mrs. Levett, and that she took a vested interest for life in the fourth share of the residue. The testator's three daughters appealed as to the residue, and the infant child of Mrs. Levett appealed as to the accumulations.

Charles Brown, for the testator's daughters, argued that Mrs. Levett took a contingent interest only.

Jessel, for the infant, contended that the accumulations of income should be capitalized, and, subject to Mrs. Levett's life interest, go to her children.—The accumulation clause was inserted by virtue of section 43 of the Conveyancing Act, 1881, and the result was, that the accumulations ought to be capitalized. North, J., was bound to follow his own decision in *In re Wells*, 38 W. R. 327, 43 Ch. D. 281. He asked the court to overrule that decision. "Property," in section 43, meant capital from which the income had arisen, and not the income from which the accumulations had arisen. The tenant for life was not entitled to the "property": Key & Elphinstone, 3rd ed., vol. 2, p. 465 (note).

He referred to *In re Buckley's Trusts*, 31 W. R. 376, 22 Ch. D. 583.

Cozens-Hardy, Q.C., and *Leverson*, for Mrs. Levett.—Mrs. Levett took a vested interest from the death of the testator. The object of section 43 was to benefit the person entitled to the income, and not to alter the devolution of property: *In re Dickson*, 33 W. R. 511, 29 Ch. D. 331.

They also referred to Davidson's Common Forms, p. 186.

Dare, for the trustees.

Jessel, in reply, referred to Davidson's Precedents, 3rd ed., vol. 4, p. 456; *In re Thatcher's Trusts*, 32 W. R. 679, 26 Ch. D. 426; and *In re Buckley's Trusts*.

Cur. adv. vult.

LINDLEY, L.J.—This is an appeal from an order made by North, J., declaring that the accumulations of the income arising from certain property given to Mrs. Levett by her grandfather, William Charles Humphrys, were payable to her as tenant for life. Two points were discussed on the appeal: (1) It was contended on behalf of her three aunts that part of the accumulations in question ought to be paid to them. (2) It was contended on behalf of her own children that the accumulations claimed by the aunts ought to be treated not as income payable to Mrs.

(a) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

Levett, but as capital to be invested for the benefit of herself for life and afterwards for her children. Both points turn on the true construction of the testator's will and codicil; but on the second point reliance was mainly placed on the Conveyancing Act, 1881, s. 43. I will take the first point first. [His lordship stated the facts, and continued:—] It was contended for the appellants, the three daughters of the testator, (1) that under the will the gift of the residue was so worded as to entitle them to the income of the granddaughter's contingent share, and that the codicil did not revoke or affect the trusts of the residue, but was confined in its operation to the trusts afterwards declared by the provision in the will for the settlement of the granddaughter's share, if any, when ascertained and vested. I am myself quite unable so to read the codicil. Bearing in mind that when the will was made the testator's daughters as well as his granddaughter were under age, but that when his codicil was made all his daughters had attained twenty-one, it is plain to my mind that his object in making his codicil was to revoke the provision he had made for his granddaughter and to make an entirely new disposition in her favour. With this object in view he gives her the house called Highfield for life, whether she attains twenty-one or not; and after her death to her children. He then, as I read the codicil, revokes the trusts of the residue of his estate, so far as they relate to the share contingently given to her, and gives her the same proportion of another and different residue as before, but on totally different trusts, viz., on the trusts declared of Highfield. He gave her by his codicil an immediate vested life interest in her share of residue instead of a contingent interest. I cannot read the codicil as confined to the trusts contained in the proviso in the will relating to her share when ascertained and vested. That proviso does not refer to her share only, but to the shares of the daughters also. The trusts revoked are "the trusts of her share in the residue directed by the will to be held in trust for her and her issue." I read this as a revocation of all the trusts of her share, and not as a revocation of some of them only.

This was the construction put on the codicil by North, J., and is certainly strengthened by the clause as to repairs and insurance. Although I see the possibility of adopting the rival construction contended for by the appellants, I am myself convinced that that construction would defeat and not give effect to the intention of the testator. Under these circumstances it is unnecessary to consider to whom the accumulations in question would have belonged if the gift of the residue had been unaltered by the codicil.

I pass now to the second point. This, in my opinion, turns also upon the true construction of the codicil. If we look at that it is plain that the income of the granddaughter's share of the residue is given to her from the death of the testator. The whole income is given to her; any of it not required to be expended on her whilst she is under age and unmarried does not cease to be hers: it remains hers, and hers as income. There is nothing in the codicil which gives it to anyone else, or which qualifies the gift of it to her.

The 43rd section of the Conveyancing Act has, no doubt, to be applied; but the 2nd sub-section of that section is in this case excluded by the 3rd. The true construction of the section was pointed out by Fry, L.J., in *In re Dickson, Hill* v. *Grant*. [His lordship read the passage, and continued:—] The codicil in this case is inconsistent with any accumulation of income for the benefit of the children of the granddaughter. The codicil gives the whole income to her. This brings the case within sub-section 3, and excludes sub-section 2. With respect to the case of *In re Wells, Wells* v. *Wells*, which we were asked to overrule, I am of opinion that the decision in that was correct having regard to the terms of the will and to sub-section 3 of section 43 of the Conveyancing Act, 1881, which in that case, as well as in this, excluded sub-section 2. It may be that the result which I think it safer to arrive at by aid of sub-section 3 can be reached without the aid of that sub-section by construing sub-section 2 as suggested by North, J., when that sub-section has to be applied to the case of a tenant for life becoming absolutely entitled to the income in possession. I have some doubt about this, but I desire to leave the point open until the necessity for deciding it arises.

Both appeals must be dismissed.

BOWEN, L.J., concurred.

KAY, L.J.—The important fact in this case, in my opinion, is that at the time when the codicil was made the testator's three daughters had all attained twenty-one, and would therefore be entitled on the testator's death to vested interests in at least one-fourth share each of his residuary estate. The only contingency remaining was as to the share intended for his granddaughter. She was still an infant, and unless she attained twenty-one or married with consent she would take no share, but the whole residue would be divisible among the three daughters of the testator and their issue, as it was settled. In these circumstances the codicil was made. By it the testator revokes "the trusts of my shares in my residuary estate directed by my will to be held in trust for my granddaughter and her issue." The argument is that this left the question what that share might be, or, rather, whether the granddaughter would ever become entitled to a share, to be determined by the will, and that the succeeding words in the codicil, only declare new and different trusts of that share, if she did become entitled to any. On the other hand, it may be urged the only gift by the will in favour of the granddaughter and her issue of a share in the testator's residuary estate was by a trust in her favour, and, taking the words of the codicil literally, that that is revoked. The codicil, it may be said, makes a new gift to her by the declaration that the share, the trusts of which are revoked, shall be held upon the trusts declared of the Highfield property. These trusts gave to the granddaughter a vested interest in the Highfield property. The meaning, therefore, may be that the granddaughter is to take a vested instead of a contingent interest in the share of residue directed by the will to be held in trust for her. That may compel the court to come to the conclusion that by the word "share" is meant the share to which this granddaughter was by the will contingently entitled under the circumstances existing at the date of the codicil, the object being to give a vested instead of a contingent interest in such share. The language of the codicil is imperfect whichever view is adopted; on the former of these two constructions the codicil should have been worded "the share, if any, directed by my will to be held in trust," &c. But the codicil certainly treats the share to which it refers as a subject in which a vested interest may be given, and this can only be done by reading "share" as the share to which, under existing circumstances, the granddaughter would be contingently entitled, and this shows that the actual words do not properly express the second construction contended for; but, upon the whole, I agree with North, J., that this is the better construction of the codicil.

As to the question who is entitled to the interest, there can be no doubt if the granddaughter, as I

hold, became entitled on the testator's death to a vested interest for life in one-fourth share of the residue, she must be entitled to the income of that fourth, notwithstanding her infancy. It is argued that section 43 of the Conveyancing Act, 1881, must be read as though it were part of the codicil, and that it directs an accumulation of all the income not actually applied for the benefit of the granddaughter during her minority, and that such accumulations shall be held "for the benefit of the person who ultimately becomes entitled to the property from which the same arose." This form is borrowed from the usual form, which applied generally when the infant's estate was not for life, but absolute. It is made, by section 43, sub-sections (1) and (2), to apply where the infant's estate is for life as well as where it is absolute. But I think that the 3rd sub-section of the section removes the difficulty. It provides, in effect, that section 43 is to apply only if and so far as a contrary intention is not expressed in the instrument under which the interest of the infant arises. I agree that the object of this statutory provision was not to alter the rights of the infant. It was not intended to take away from the infant the income of a vested life estate which had actually accrued, and I am of opinion that when the instrument confers such a vested life interest an intention not to convert the income of that life estate into capital does sufficiently appear, and that, notwithstanding the language of section 43 sub-sections (1) and (2), the arrears of income still belong to the infant.

Solicitors for the three daughters, *Clowes, Hickley, & Seward.*

Solicitors for the infant, *Upton, Atkey, & Upton.*

Solicitor for Mrs. Levett, *J. A. Levett.*

Solicitor for the trustees, *G. Rastrick.*

High Court of Justice.

Chan. Div. } March 8, 9, 24.
Chitty, J. }

In re ENGLISH BANK OF THE RIVER PLATE (LIMITED). *Ex parte* BANCO DE BRAZIL. (*a.*)

Bill of exchange—Foreign bill—Protest for non-payment—Protest for better security—Acceptance suprà *protest for honour of drawer—Commission—Measure of damages—Bills of Exchange Act,* 1882 (45 & 46 *Vict. c.* 61), *ss.* 51 (2) (5), 57 (1), 65-68, 97 (2).

The drawer who has been compelled to pay a bill may recover from the acceptor the expenses of a necessary protest under the Bills of Exchange Act, 1882.

Secus, *with the expenses of an unnecessary protest.*

The B. Bank claimed to prove against the E. Bank, in liquidation, for the expenses of protest for non-payment of bills drawn by B. in Brazil and accepted by E. in England, and also for the expenses of protest for better security in the case of bills that had been so protested, and for the amount of a commission paid by the B. Bank to their bankers in London for the acceptance of the bills for honour, and for providing the money required to meet that acceptance.

Held, that the B. Bank might prove for the expenses of protest for non-payment, but not for the expenses of protest for better security or the amount of the commission.

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

Ex parte Robarts, In re Gillespie, 34 *W. R.* 258, 35 Ibid. 128, 16 *Q. B. D.* 702, 18 Ibid. 286, *and* Prehn *v.* Royal Bank of Liverpool, 18 *W. R.* 463, *L. R.* 5 *Ex.* 92, *explained and distinguished.*

Summons.

The English Bank of the River Plate were acceptors of bills of exchange for a large amount drawn by the applicants, the Banco de Brazil, in Brazil, but stopped payment before the bills matured. The holders of some of these bills thereupon caused the bills to be protested for better security against the drawers. The bankers of the drawers in London then intervened and accepted the bills *suprà* protest for the honour of the drawers; and, on the bills having matured and being protested for non-payment by the same acceptors, the bankers, as acceptors for honour, paid to the holders the amount of the bills and also the expenses of both the protests, which had been paid by the holders. The bankers charged, and were paid by, the applicants, in addition to the amount of the bills and the expenses of the protests, commission at the rate of ¼ per cent. for the acceptance of the bills for honour and for providing the money required to meet that acceptance. The applicants having only been admitted to prove for the amount of the bills in the liquidation of the English Bank of the River Plate, this summons was taken out by the Banco de Brazil for the allowance of the notarial charges in respect of the protests and this commission by the liquidator.

Whitehorne, Q.C., and *Beven*, for the applicants.—First, protest for non-payment was necessary (Bills of Exchange Act, 1882, s. 51 (2)), and we are therefore entitled by the Act to recover the expenses of such protest: section 57 (1) (*c*). Secondly, protest for better security being specially allowed by the Act (section 51 (5)), the expenses are given by section 57. They are at any rate not excluded by the Act; so that we should be entitled to recover these expenses as damages under the common law doctrine of re-exchange under section 97 (2): see *Ex parte Robarts, In re Gillespie*, 34 W. R. 258, 16 Q. B. D. 702, and, on appeal, 35 W. R. 128, 18 Q. B. D. 286. Thirdly, the drawer may recover from the acceptor all expenses properly and reasonably flowing from the breach of contract, and the commission is of this nature: see *Prehn* v. *Royal Bank of Liverpool*, 18 W. R. 463, L. R. 5 Ex. 92.

They also referred to *Walker* v. *Hamilton*, 1 De G. F. & J. 602, 10 W. R. Ch. Dig. 10; *In re General South American Co.*, 26 W. R. 232, 7 Ch. D. 637; Byles on Bills, 14th ed., p. 444, p. 3; and Daniel (U.S.A.) on Negotiable Instruments, 4th ed., vol. 2, p. 468.

Latham, Q.C., and *R. M. Bray*, for the respondents.—Section 51 (5), unlike section 51 (2), is permissive only. Section 57 shows the measure of damages, which are to be deemed liquidated damages, and are the only damages given. This is the first time expenses of protest for better security have been asked, and being expenses incurred before any breach of the contract they ought not, apart from authority for allowing them, to be allowed, and there is no such authority. The applicants cannot use the cases on re-exchange to assist them here. The principle of *In re Gillespie* ought to be strictly confined to similar circumstances after *Bank of England* v. *Vagliano Brothers*, 39 W. R. 657, [1891] A. C. 107, at p. 144. This case is clearly included in section 57, and section 97 does not apply. Then as to the commission, that was not paid to the holders of the bills at all. *Prehn's case* was a case of a special contract, but for which the payment there would not have been made, and has no application here.

They also referred to section 68 (5), (6) of the Act of 1882; Byles on Bills, 14th ed., p. 448, p. 214; Chitty on Bills, 10th ed., p. 337; and Maine on Damages, 4th ed., p. 9.

Whitehorne, Q.C., in reply, referred to Chalmers on Bills of Exchange, 4th ed., p. 194.

Cur. adv. vult.

March 24.—CHITTY, J.—The applicants, the Banco de Brazil, who are the drawers of bills of exchange for upwards of £218,000, have been admitted to prove for the amount of the bills against the estate of the acceptors, the English Bank of the River Plate, a company now in liquidation. The bills were drawn in Brazil and accepted payable in London. The applicants seek to prove also for certain notarial expenses which they have paid to the holders of the bills, and also for a commission which they (the drawers) have paid to their own bankers. The questions are, whether they are entitled to prove for these additional sums.

The notarial expenses claimed consist, first, of a sum of £108 10s. 4d., and, secondly, of a sum of £59 6s. The first sum represents the expenses of the protest for non-payment by the acceptors, which were paid by the holders and repaid to them by the drawers. These expenses fall within section 51, sub-section 2, of the Bills of Exchange Act, 1882, which renders protest for non-payment necessary, and within section 57, sub-section 1, of the same Act, which enacts that the holder may recover from any party liable on the bill, and that the drawer who has been compelled to pay the bill may recover from the acceptor the expenses of protest, "when protest is necessary." It is clear, then, that the applicants are entitled to prove for the £108 10s. 4d., and it was so admitted by the respondents' counsel.

The second sum, claimed for expenses, is for the expenses of protest for better security against the drawers. [His lordship stated the facts as above set out, and continued:—] The general rules for dealing with the Bills of Exchange Act are laid down by Lord Herschell in his speech in *Bank of England* v. *Vagliano Brothers*. It was intended to be a code of the law relating to negotiable instruments, and the proper course is, in the first instance, to examine the language of the statute, and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law; no appeal ought to be made to the previous law except upon some special ground. Examples of special grounds are given by Lord Herschell—such, for instance, as a provision in the statute being of doubtful impert, or words being found in the statute which had previously acquired a technical or special meaning. *In re Gillespie* was decided before the judgment was given in the House of Lords in the *Vagliano case*. It was submitted for the respondents that the decision was inconsistent with the rules laid down by Lord Herschell, but it was at the same time admitted that the decision in *In re Gillespie* must be accepted by me as binding, and I must not be understood as in any way questioning the authority of that decision. It turned principally on the 57th and 97th sections of the Act. The point decided was that, notwithstanding the 57th section, the drawer of a foreign bill of exchange upon an acceptor in England is entitled, upon the bill being dishonoured and protested, to recover from the acceptor damages in the nature of re-exchange, which the drawer is by the foreign law liable to pay to the holder of the bill. In dealing with the words "where a bill of exchange is dishonoured the measure of damages, which shall be deemed to be liquidated, shall be as follows," which occur at the beginning of the 57th section, Cave, J., appears to have been of opinion that these words were inserted for the purpose of a specially-indorsed writ; and, although some of the damages mentioned in the section would before the Act have been deemed unliquidated damages, yet that the section was not intended to take away the right which the drawer previously had by the common law to recover from the acceptor any special damages of an unliquidated character which he can prove that he has sustained. Accordingly he held that the drawer was entitled to recover as unliquidated damages by way of re-exchange the amount fixed by the law of Tobago, where the bills had been drawn. The Court of Appeal affirmed his decision with a reduction of the amount; they neither accepted or rejected his opinion on the general question of the right to recover unliquidated damages having been left unaffected by the statute. The grounds of their decision appear particularly at 18 Q. B. D., p. 292. Stated shortly, they are that the case of bills drawn abroad and dishonoured in this country is not dealt with by the 57th section, and that, being a *casus omissus*, it fell within the 97th section, which must be read with the 57th section. They confined the operation of the general terms of the 1st sub-section of section 57 to bills dishonoured at home.

In the case before me the argument in support of the claim for the expenses of the protest for better security were—first, that such expenses were given by the Act; secondly, that if not given they were not excluded; and, thirdly, that they fell within the 97th section and were recoverable under the head of damages under the common law doctrine of re-exchange. For the respondents, all these propositions were denied, and it was argued that these expenses were excluded by the terms of the Act.

In dealing with the claim for expenses, the first and second points may conveniently be taken together. The material sections of the Act are the 51st, sub-sections 2 and 5, section 57, sub-section 1 (*c*), and the *fasciculus* of sections 65 to 68, both inclusive, under the head of acceptance and payment for honour. Now, it is plain, on a comparison of the 51st and 57th sections, that a distinction is drawn between protests which are necessary and those which are not necessary, but are merely permissive. Where the bill is dishonoured by non-payment it "must" be duly protested for non-payment (section 51, sub-section 2); where the acceptor (as here) suspends payment before the bill matures, the holder "may" cause the bill to be protested for better security (section 51, sub-section 5); and the 57th section makes the expenses of protest recoverable against the acceptor only when the protest is necessary. It appears to me that the language of these sections is definite and precise, and that the expenses of an unnecessary protest are not recoverable. I cannot see my way to deal with the case of expenses of protest on the principle adopted by the Court of Appeal in *In re Gillespie* in reference to the question of damages for re-exchange which they had to decide, or to treat it as a *casus omissus* letting in the 97th section. Lindley, L.J., said, 18 Q. B. D., at p. 292, that sub-section 1 of the 57th section was not addressed to the case of a bill, the drawer of which is liable for damages for re-exchange. It appears to me that the same sub-section is addressed to the case of the expenses of protest, and that the case is there specifically dealt with, and that the expenses recoverable are limited to those of a necessary protest.

Further, the object of the protest is, as its name imports, to enable the holder to obtain better security. It is a condition precedent to the acceptance supra

protest for the honour of the drawer or other party liable on the bill (section 65, sub-section 1). The acceptance for honour of the drawer is for his benefit, operating to sustain his credit. The protest and the acceptance are both voluntary acts; and it may well be that the Legislature did not think fit to throw the expenses of such acts on the acceptor. The payer for honour, on paying to the holder the amount and "the notarial expenses incident to its dishonour, is entitled to receive both the bill itself and the protest" (section 68, sub-section 6). "The protest" here means the protest for non-payment by the acceptor, which is necessary in order to charge the acceptor for honour. By the 97th section, sub-section 2, the rules of common law, save in so far as they are inconsistent with the express provisions of the Act, are to continue to apply to bills of exchange. Finding, as I do, express provisions on the subject inconsistent with the supposed rules of common law, I think that the 97th section has no application. For the above reasons I think that the Act not only does not give, but excludes the expenses of the protest for better security. The payment of these expenses by the drawers through their London bankers to the holder was, therefore, a payment which they were not compellable to make, and the amount cannot be recovered by them from the acceptors.

But, assuming that the right to these expenses is not excluded by the other parts of the Act, and that the 97th section is let in so as to apply to these expenses as a *casus omissus* in the other parts of the Act, the applicants are in no better position. They claim the expenses, according to the third head of the argument, as damages for re-exchange. All the well-known treatises on bills of exchange, such as Byles, Chitty, Chalmers, and Daniel (U.S.A.), have been examined, and the decided cases have been searched through, and the result is that no trace or suggestion can be found of the expenses of a protest for better security being allowed as part of the damages for re-exchange (see Byles, 14th ed., p. 449; Chitty, 10th ed., p. 337; Chalmers, 4th ed., pp. 193-195; and 2 Daniel, 4th ed., p. 468). No evidence has been adduced of any mercantile custom justifying the claim. It must, then, be rejected.

The remaining question relates to the commission. It consists of a sum of £533 10s., being at the rate of ¼ per cent. paid by the applicants to their bankers for the acceptance of the bills for honour and for providing the money required to meet that acceptance. It is, then, the sum paid by the drawers for borrowing or obtaining an advance of money to meet the bills for their honour. The 57th section includes in the damages recoverable from the acceptor interest on the bill—see sub-section 1 (*c*)—and the applicants will be entitled to be paid this interest from the maturity of the bills out of the surplus of the acceptor's estate, in accordance with the decisions on the 26th order of the General Order of November, 1862 (see Buckley on the Companies Acts, 6th ed., p. 368, and p. 686). My observations on the claim for the expenses of the protest for better security apply generally to the claim for commission. The claim was supported principally on the 97th section and the doctrine of damages for re-exchange. Here also the text-books and the authorities have been searched, with the same result as above mentioned, and no evidence has been adduced of any mercantile custom. One authority only was relied on—viz., *Prehn* v. *Royal Bank of Liverpool*. But the action there was brought not on the bill of exchange, but on a special contract, which justified the court in allowing the claim for commission as special damages. The decision, therefore, is not in point. To this I add that the normal measure of damages for non-payment of money is interest where interest is allowable by contract or by law. The claim for commission cannot, therefore, be sustained.

Solicitors for the applicants, *Merriman, Pike, & Merriman.*

Solicitors for the respondents, *Freshfields & Williams.*

Q. B. Div.
(Wills and Lawrance, JJ.) May 3, 4.

WOOD *v.* MCCARTHY AND ANOTHER. (*a*.)

Practice—Parties—Persons having the same interest in one cause—Order authorizing one or more to defend on behalf of all—Ord. 16, *r.* 9.

By one of the rules of a labour protection league it was provided that any member who became permanently disabled by an accident was entitled to have a levy made for his benefit on all the members of the league.

The plaintiff brought an action against the president and secretary of the league for the purpose of enforcing his rights under the rule, and applied to the judge in chambers for an order authorizing the defendants to defend the action on behalf of all the other members of the league, who numbered about 4,000. *The application was opposed by the defendants, but the judge made the order.*

Held, that the order was rightly made.

Appeal of the defendants from an order of Bruce, J., in chambers, that the two defendants be authorized to defend the action on behalf of all the members of the Amalgamated Stevedores' Labour Protection League.

The plaintiff, who was a member of the league, met with an accident, while following his employment as a stevedore, and thereby became incapacitated for the remainder of his life from following his employment. Rule 27 of the league's rules provided that "in the event of any member meeting with an accident while following his employment, and thereby being incapacitated from following his employment for the remainder of his life, a levy of 6d. each shall be made on every member of the society for his benefit." The action was brought by the plaintiff for the purpose of enforcing his rights under that rule. The defendants were respectively the president and the secretary of the league, of which they were also members, and were sued personally and as representing the league and all the branches and members of the league.

The plaintiff claimed that the league, and the officers and members of the league, should be ordered by *mandamus* or otherwise to make the levy of 6d. under the above-mentioned rule, or to pay to the plaintiff an amount equal to the sum which would be raised by such levy, and that all judgments, declarations, and orders made in the action should be as binding on the league, and the officers and members of the league, and its branches, as if they were parties to the action.

The league consisted of about 4,000 members.

Crispe, for the defendants.—The defendants cannot be compelled against their will to defend on behalf of all the members of the league. The old practice of the Court of Chancery has been altered by ord. 16, r. 9, which only applies to cases where the plaintiff claims some beneficial proprietary right: *Temperton* v.

(*a*.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Russell, ante, p. 321, [1893] 1 Q. B. 435. There is no such claim made by the plaintiff in this action. [He also contended that the action would not lie because of the provisions of section 4 of the Trades Union Act, 1871, but the court held that that question could not be dealt with on this motion.]

Poulter, for the plaintiff.—The order can be made without the consent of the defendants, because the rule is intended for the benefit of plaintiffs. The practice is laid down in Daniell's Chancery Practice, 6th ed., vol. 1, p. 253, and there is no authority for saying that the old practice of the Court of Chancery has been in any way altered by ord. 16, r. 9.

He cited *Lloyd* v. *Loaring*, 6 Ves. 773; *Adair* v. *New River Co.*, 11 Ves. 429; *Cullen* v. *Duke of Queensbury* 1 Bro. C. C. 101; *Pare* v. *Clegg*, 9 W. R. 795, 29 Beav. 589; *Bromley* v. *Williams*, 11 W. R. 392, 32 Beav. 177; *May* v. *Newton*, 35 W. R. 363, 34 Ch. D. 347; *Andrews* v. *Salmon*, W. N., 1888, pp. 102, 176.

Crispe replied.

WILLS, J.—I am of opinion that the order appealed from was right. The action is brought to enforce a contractual obligation, which is one of the objects for which courts of law exist. The Court of Chancery has for a long time past been in the habit of allowing defendants to be sued as representatives of a class which could not be joined. In *Bromley* v. *Williams*, Sir John Romilly, M.R., said: "If that be so, provided all the members of the association were made parties, then this rule is well established: that if they are so numerous that they cannot be made parties to the cause with any chance of bringing it to a hearing in consequence of abatements and the like difficulties, then you may make two or three of a class defendants to represent the interest of all that class. Formerly that was not the practice of this court, but the rules have been modified and altered so as to suit the exigencies of modern practice, as was done by Lord Cottenham in separate instances. But if there be three or four classes who have separate and conflicting interest, then you may select two or three from each class to represent that interest, in the same way as if the whole class had been brought before the court." That was a case in which a suit was brought against seven persons as representing a large class who had agreed to contribute in the case of the loss of a ship belonging to a member of the insurance club. There is no difference in principle between that case and this one, and the judgment of the Master of the Rolls is a direct authority. But then it is said that ord. 16, r. 9, has altered the old practice. I do not think that it has. I think that rule was simply intended to apply the old practice of the Court of Chancery to all the divisions of the High Court. I cannot imagine that there was any intention to narrow the very sensible doctrine that formerly prevailed. It is said, however, that there are some expressions in the judgment of Lindley, L.J., in *Temperton* v. *Russell* which support the contention of the defendant. I am satisfied that that was not the intention of Lindley, L.J., and it is clear from his language that he was not narrowing the practice that has always prevailed, but was simply drawing a distinction between actions of contract and actions of tort, and showing that the old practice of the Court of Chancery was never applied to actions of tort, but was confined to cases in which persons had or claimed some beneficial proprietary right. In the present case, the plaintiff claims a right to be paid 6d. by every member of the league, and in my opinion that is a beneficial proprietary right of a very tangible character. The order appealed from must be affirmed.

LAWRANCE, J., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Finch & Turner.*

Solicitor for the defendants, *J. Turner.*

Q. B. Div.
(Wills and Charles, JJ.) April 27.

In re HOWELL THOMAS. (*a.*)

Solicitor—Practice—Agreement with client as to costs—Application to set aside such agreement—Summons at chambers—Attorneys and Solicitors Act, 1870 (33 & 34 *Vict. c.* 28), *s.* 8.

Since the Judicature Act, 1873, *an application to set aside an agreement between a solicitor and his client as to costs may be made by a summons in chambers, notwithstanding section* 8 *of the Attorneys and Solicitors Act*, 1870, *which provides that such agreement may be enforced or set aside "on motion or petition" by the court in which the business was done, or a judge thereof.*

Appeal from an order of Kennedy, J., at chambers, affirming an order of Master Archibald.

An application was made at chambers asking that Mr. Howell Thomas, formerly a solicitor of the Supreme Court, might be ordered to deliver certain accounts, and also asking that, if any agreement was at any time entered into by the applicant with the said Howell Thomas as his solicitor in connection with certain claims and actions, the same might be set aside or cancelled, and that the costs in respect of the business done by the said Howell Thomas might be taxed in the same manner as if no such agreement had been made.

Mr. Howell Thomas had acted as the solicitor for the applicant in connection with certain claims, and as it appeared that there had been an agreement made by the solicitor with the applicant as to the costs in the matter, the present summons at chambers was taken out by the applicant to set aside the agreement as to costs, and have the costs taxed.

When this summons came before the master objection was taken on behalf of Mr. Howell Thomas that the master had no jurisdiction to hear an application to set aside such an agreement. The master overruled this objection, and on appeal Kennedy, J., at chambers, affirmed the master's order that there was jurisdiction to deal with the matter upon a summons at chambers.

Mr. Howell Thomas appealed.

Section 4 of the Attorneys and Solicitors Act, 1870, enables a solicitor to make an agreement in writing with his client as to costs, and section 8 provides that "no action or suit shall be brought or instituted upon any such agreement, but . . . the agreement may be enforced or set aside, without suit or action, on motion or petition . . . by the court in which the business was done, or a judge thereof, or, if the business was not done in any court, . . . by any superior court of law or equity or a judge thereof," &c.

Danckwerts, for the appellant.—The application here ought to have been made by motion before the court, and not in chambers, and the master had no jurisdiction to hear the application. By section 8 of the Act of 1870 the jurisdiction to set aside such an agreement was expressly given to the court; and section 39 of the Judicature Act, 1873, provides as to the

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

jurisdiction of a judge in court or in chambers. A construction was placed on this section in the case of *Baker* v. *Oakes*, 25 W. R. 220, 2 Q. B. D. 171, and Brett, L.J., there said: "It was further argued that section 39 of the Judicature Act, 1873, applied; but that section does not enable a judge of the High Court to do anything that a judge could not have done before the passing of the Act." That applies here, for undoubtedly before the Judicature Act, 1873, a judge of the High Court in chambers could not have made an order setting this agreement aside, and since the Judicature Act no judge of the Queen's Bench Division sits to hear motions. [CHARLES, J.—That is not in accordance with the practice, and Lindley, J., seems to have exercised this jurisdiction in chambers in the case of *In re Lewis, Ex parte Munro*, 24 W. R. 1017, 1 Q. B. D. 724, and at p. 128 (note) of Chitty's Archbold, 14th ed., it is said: "The application may be made by summons at chambers, so held by Cave, J., at chambers, March 20, 1881."] No objection was made to the jurisdiction in that case. [WILLS, J.—In *Clover* v. *Adams*, 6 Q. B. D. 622, 29 W. R. Dig. 207, Grove, J., said: "By the operation of the Judicature Act, 1873, s. 39, a judge at chambers has the jurisdiction of the High Court generally, and represents all the courts," and Lindley, J., is to the same effect.] That may be so where jurisdiction is given by the rules, but it has no reference to cases where jurisdiction is given by an Act of Parliament, and here by the express terms of the Act of 1870 the power is to be exercised on motion or petition, and therefore it can be exercised only in open court.

He referred to *Smeeton* v. *Collier*, 1 Ex. 457.

Rolland, for the respondent, was not heard.

WILLS, J.—I am of opinion that this appeal should be dismissed. With regard to the objection that an application to set aside an agreement of this kind must be made to the court, it is true that the statute says that the agreement may be enforced or set aside "on motion or petition" to the court in which the business was done; and the section goes on to say that this jurisdiction may be exercised "by the court or a judge thereof." It is clear, therefore, that the intention of the statute was that a judge should have jurisdiction in the matter; but it is said that since the Judicature Act that jurisdiction is gone, because there is now no such thing as a single judge sitting in open court in the Queen's Bench Division to hear motions. I think that section 39 of the Judicature Act, 1873, was expressly intended to preserve that jurisdiction. I am clearly of opinion that the decision in this case was right, and that the universal practice which has prevailed of making these applications at chambers is not wrong.

CHARLES, J., concurred.

Appeal dismissed.

Solicitors for the appellant, *Wontner & Sons.*

Solicitor for the respondent, *F. Rolt.*

C. C. R.
(Lord Coleridge, C.J., and Hawkins, Cave, Day, and Collins, JJ.)

Jan. 21; Feb. 4; April 29.

REG. v. MARCELLUS THOMPSON. (a.)

Criminal law—Evidence—Confession—Admissibility of.

At the trial of a prisoner for the embezzlement of moneys of his master evidence was received of a confession made by the prisoner to his master. It was proved that shortly before this confession was made the master had said to the prisoner's brother, under circumstances from which it was to be inferred that his words would be conveyed to the prisoner, "It will be the right thing for Marcellus" (the prisoner) "to make a clean breast of it." The prisoner was convicted.

Held, by the court (Lord Coleridge, C.J., *and* Hawkins, Cave, Day, *and* Collins, JJ.), *that the confession was not admissible in evidence, and that the conviction must be quashed.*

Case stated by the acting chairman of the Westmoreland Quarter Sessions, as follows:—

At the Westmoreland Quarter Sessions of the Peace, holden at Kendal on October 21, 1892, Marcellus Thompson was tried before me and other magistrates of the county for embezzling certain moneys belonging to the Kendal Union Gas and Water Co., his masters.

William Dillworth Crewdson, the chairman of the company, at whose instance the warrant for the prisoner's apprehension had been issued, was called as a witness by the prosecution to prove, amongst other things, a confession of the prisoner.

As soon as this confession was sought to be put in evidence, objection was taken to its admissibility, and we thereupon, before receiving further proof, allowed the witness to be cross-examined by prisoner's counsel. In answer to the latter's questions the witness stated that prior to the confession being made the prisoner's brother and brother-in-law had sought an interview with him and had come to see him, and that at this interview witness said to the prisoner's brother in course of conversation: "It will be the right thing for Marcellus" (the prisoner) "to make a clean breast of it." The witness added: "I won't swear I didn't say it would be better for him to make a clean breast of it. I may have done so. I don't think I did. I expected what I said would be communicated to the prisoner. I won't swear I did not intend it should be conveyed to the prisoner. I should expect it would. I made no threat or promise to induce the prisoner to make a confession. I held out no hope that criminal proceedings would not be taken."

No evidence was produced to the court tending to prove that the details of the interview had been communicated to the prisoner, nor to rebut the evidence of Mr. Crewdson as to what took place at the interview.

It was then contended by the prisoner's counsel, who relied on *R.* v. *Warringham*, 2 Den. C. C. 447; *R.* v. *Bate*, 11 Cox. C. C. 686; *R.* v. *Fennell*, 29 W. R. 742, 7 Q. B. D. 147, and other authorities, that the above statements to the brother were inducements held out to the prisoner to confess by a person in authority which rendered the evidence tendered of the confession inadmissible.

We found that the witness Crewdson was a person in authority, and we inferred that the details of the interview would be communicated to the prisoner. We found as a fact that the statements made by the witness were calculated to elicit the truth, and that the confession was voluntary, and we accordingly admitted the evidence.

The said witness then proved that after the interview before referred to he charged the prisoner with embezzling the company's moneys, and one of the directors told the prisoner he was in a very embarrassing position. The prisoner replied, "I know that. I will give the company all the help I can." He said, in answer to witness's charge, "Yes, I took it, but I do not think it is more than £1,000. It

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

might be a few pounds more." No statement was made to the prisoner that the confession would save him from prosecution; no threat and no promise given.

Subsequently the prisoner made out a list of moneys which he admitted had not been accounted for by him, which list we also admitted in evidence.

The prisoner was convicted, and sentenced to three years' penal servitude.

The question for the opinion of the court is whether the evidence of the confession was properly admitted. If the court should be of that opinion the conviction is to be affirmed; if the court should be of opinion that such evidence ought not to have been admitted the conviction is to be quashed.

Jan. 21.—*Shee, Q.C.* (*Cavanagh* with him), for the prisoner.—The evidence of the confession was inadmissible. The cross-examination of Crewdson established a *primâ facie* case that the confession was not free and voluntary, but was induced by the statement made by Crewdson (who was a person in authority) to the prisoner's brother, which statement was no doubt communicated to the prisoner. It was incumbent on the prosecution to rebut this *primâ facie* case before evidence of the confession could be received.

They cited, in addition to the authorities mentioned in the case, Russell on Crimes, 5th ed., vol. 3, p. 491; *R.* v. *Baldry*, 2 Den. C. C. 430, 21 L. J. M. C. 130; *R.* v. *Garner*, 1 Den. C. C. 329, 2 C. & K. 920.

Segar (*C. M. Wilson* with him), for the prosecution.—The evidence was rightly received. The words used by Crewdson contained no threat or promise nor anything calculated to induce the prisoner to make an untrue statement, and that is the true test: *R.* v. *Reeve*, 20 W. R. 631, L. R. 1 C. C. R. 362; *R.* v. *Jarvis*, 16 W. R. 111, L. R. 1 C. C. R. 96; *R.* v. *Moore*, 2 Den. C. C. 522.

Shee replied.

Cur. adv. vult.

Feb. 4.—The COURT intimated that they required the case to be amended by setting out the whole of the evidence given at the trial, and especially stating what (if any) money was paid by the prisoner or his relatives to the prosecutor on behalf of the water company either before or after the time of the confession.

The magistrates added two paragraphs to the case and set out the notes of the evidence; it appeared that after the prisoner had made the confession £90 was paid to the company by the prisoner and £250 by his brother by way of restitution; suggestions were also made that the prisoner's brother should give a bill of sale to cover the prisoner's defalcations, but there never was any agreement that if the money were paid or security given criminal proceedings would not be taken.

The case came again before the court upon the 29th of April.

Shee, Q.C., and *Cavanagh*, for the prisoner, were not called upon to argue.

Segar (*C. M. Wilson* with him), for the prosecution.

Lord COLERIDGE, C.J.—In this case we are all agreed that the conviction cannot be supported, and my brother Cave will read a judgment which we have all seen and which embodies the decision of the court.

CAVE, J., then read the following judgment:—

The question in this case is whether a particular admission made by the prisoner was admissible in evidence against him. This is a question which must necessarily arise for decision in a number of cases both at petty and quarter sessions, and to my mind it is very unsatisfactory that the principle which must guide the decision of magistrates in these cases should be loosely or confusedly interpreted. Many reasons may be urged in favour of the admissibility of all confessions, subject, of course, to their being tested by the cross-examination of those who heard and testify of them. Bentham seems to have been of this opinion: Rationale of Judicial Evidence, bk. V., ch. vi., s. 3. But this is not the law of England. By this law, to be admissible, a confession must be free and voluntary. If it proceeds from remorse and a desire to make reparation for the crime, it is admissible. If it flows from hope or fear excited by a person in authority it is inadmissible. On this point the authorities are unanimous. As Mr. Taylor says in his Law of Evidence, part 2, ch. xv., s. 872:—"Before any confession can be received in evidence in a criminal case it must be shown have been *voluntarily* made; for, to adopt the somewhat inflated language of Eyre, C.B., "a confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected." The material question consequently is whether the confession has been obtained by the influence of hope or fear; and the evidence to this point, being in its nature preliminary, is, as we have seen, addressed to the judge, who will require the prosecutor to show affirmatively, to his satisfaction, that the statement was not made under the influence of an improper inducement, and who, in the event of any doubt subsisting on this head, will reject the confession." The case cited for this position is *R.* v. *Warringham*, where Parke, B., says to the counsel for the prosecution, "You are bound to satisfy me that the confession which you seek to use against the prisoner was not obtained from him by improper means. I am not satisfied of that; for it is impossible to collect from the answers of this witness whether such was the case or not." Parke, B., adds, "I reject the evidence of this witness, not being satisfied that it was voluntary."

In *Reg.* v. *Baldry* it is said by Pollock, C.B., that the true ground of exclusion is not that there is any presumption of the law that a confession not free and voluntary is false; but that it would not be safe to receive a statement made under any influence of fear. He also explains that the objection to telling the prisoner that it would be better to speak the truth is that the words import that it would be better for him to say something. With this view the statutory caution agrees, which commences with the words, "You are not obliged to say anything unless you desire to do so." These principles are re-stated and affirmed by the present Lord Chief Justice in *Reg.* v. *Fennell* in the following words; "The rule laid down in Russell on Crimes is that a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. It is well known that the chapter of Russell on Crimes containing that passage was written by Sir R. Williams, a great authority upon these matters." These principles and the reasons for them are, as it seems impossible to doubt, well founded, they afford to magistrates a simple test by which the admissibility of a confession may be decided. They have to ask, Is it proved affirmatively that the confession was free and voluntary—that is, was it preceded by any inducement held out by a person in authority to

make a statement? If so, and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissible. In the present case the magistrates appear to have intended to state the evidence which was before them, and to ask our opinion whether on that they did right in admitting the confession. Now there was obviously some ground for suspecting that the confession might have not been free and voluntary; and the question is whether the evidence was such as ought to have satisfied their minds that it was free and voluntary. Unfortunately, in my judgment, the magistrates do not seem to have understood what the precise point to be determined was, or what evidence was necessary to elicit it. The new evidence now before us throws a strong light on what was the object of the interview between Mr. Crewdson and the prisoner's brother and brother-in-law, why he made any communication to them, and why he expected what he said would be communicated to the prisoner. There is, indeed, no evidence that any communication was made to the prisoner at all; but it seems to me that, after Mr. Crewdson's statement that he had spoken to the prisoner's brother and brother-in-law about the desirability of the prisoner's making a clean breast of it, with the expectation that what he had said would be communicated to the prisoner, it was incumbent on the prosecution to prove whether any, and, if so, what, communication was actually made to the prisoner before the magistrates could properly be satisfied that the confession was free and voluntary. The magistrates go on to say that they inferred that the details of the interview would be (by which, I suppose, they intend to say that they inferred they were) communicated to the prisoner, which seems to have been the right inference to draw under the circumstances. They add that they found as a fact that the statements made by Crewdson were calculated to elicit the truth, and that the confession was voluntary.

The first of these findings, if the ruling of Pollock, C.B., in *Reg.* v. *Baldry* is (as I take it to be) correct, is entirely immaterial. The second finding, if it is a corollary from the first, does not follow from it, and if it is an independent finding is not warranted by the evidence; and as the question for us is whether this finding was warranted by the evidence, I feel compelled to say that in my judgment it was not. Taking the statement of Mr. Crewdson to have been "It will be the right thing for Marcellus to make a statement," and that the statement was communicated to the prisoner, I should say that that communication was calculated, in the language of Pollock, C.B., to lead the prisoner to believe that it would be better for him to say something. All this, however, is matter of conjecture; and I prefer to put my judgment on the ground that it is the duty of the prosecution to prove, in case of doubt, that the prisoner's statement was free and voluntary, and that they did not discharge themselves of this obligation. I would add that for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which, nevertheless, are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; the prisoner is not infrequently alleged to have been seized with the desire, born of penitence and remorse, to supplement it with a confession, and this desire itself again vanishes as soon as he appears in a court of justice. In this particular case there is no reason to suppose that Mr. Crewdson's evidence was not perfectly true and accurate, but on the broad plain ground that it was not proved satisfactorily that the confession was free and voluntary I think it ought not to have been received. No other principle can in my judgment be safely worked by magistrates.

Conviction quashed.

Solicitor for the prisoner, *G. B. Wheeler*, for *R. F. Thompson*, Kendal.

Solicitor for the prosecution, *John Bolton*, Kendal.

Prob. Div. & Adm. Div. Admiralty. } Feb. 14.

"THE ALPS." (*a*.)

Insurance — Marine insurance — Policy on chartered freight—Cessation of hire in consequence of working of vessel being delayed for more than twenty-four hours owing to damage occasioned by perils insured against —Injure non remota sed causa proxima spectatur.

By the charter-party of a vessel, the chartered freight of which, was insured against (inter alia) "*fire*," *it was provided that the vessel should be hired by the charterer at a stipulated sum per month, and that, in the event of loss of time from collision, stranding, want of repairs, breakdown of machinery, or any cause appertaining to the duties of the owner, preventing the working of the vessel for more than twenty-four hours, the payment of hire should cease from the hour when detention began until the ship should be again in a sufficient state to resume her service.*

During the continuation of the charter-party, and at a time when the chartered freight was covered by the policy, the vessel was damaged by fire to such an extent as necessitated her being repaired. During the time the repairs were being done—for more than twenty-four hours—the hire of the vessel "ceased" within the meaning of the charter-party, and a loss of chartered freight, amounting to £179 6s. 6d., thereby accrued to the shipowner. In an action by the shipowner on the policy to recover from the underwriters the portion of this amount for which they were liable,

Held, that there had been a loss of chartered freight by the perils assured against, and that the plaintiffs were entitled to judgment.

This was an action *in personam* instituted on behalf of the owners of *The Alps* against The Thames and Mersey Marine Insurance Co. (Limited) to recover the sum of £35 3s. 1d. alleged to be due from the defendants on a time policy upon the chartered freight of *The Alps*.

After the issue of the writ of summons in the action the parties agreed that the case should be heard on joint admissions of fact, and an order was made by consent that the question of law, whether, upon the facts stated in the average statement drawn up on behalf of the underwriters and the plaintiffs, and in the policy of insurance and other documents therein referred to, the plaintiffs were entitled to recover any, and what, sum in the action should be heard without a special case being stated.

Pickford and *Maurice Hill*, for the plaintiffs.—There has been obviously in this case a loss of chartered freight directly caused by "fire," one of the perils insured against by this policy. The efficiency of the ship was a condition precedent to earning the freight at risk, and directly the fire occurred the ship became inefficient. The plaintiffs are therefore entitled to recover in respect of the freight lost during the time the vessel was inefficient. The observations of Lord Watson in the *Inman Steamship*

(*a*.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

Co. v. *Bischoff*, 31 W. R. 141, 7 App. Cas. 670, 690, show that this was his opinion of what would be the law in the case of a charter-party framed as the charter-party in the present case. It is true that in the appeal then before the House of Lords their lordships held that there had been no loss of freight under a policy on outstanding freight where, the ship insured having become inefficient, the freight had not been paid under the charter-party during her inefficiency, but the reason of the decision then come to was that the payment of freight had not ceased by reason of the inefficiency caused by the perils insured against, but by reason of the charterers exercising an option given them by the charter-party to make an abatement in the amount paid as freight on the vessel becoming inefficient.

Joseph Walton, Q.C., for the defendants. — The defendants rely on *The Inman Steamship Co.* v. *Bischoff* as showing that the loss here was not immediately caused by the perils of the seas. The intention of the assured and the underwriters was only that freight lost under the ordinary contract of affreightment should be covered by the policy in this case, and not freight which, but for the operation of a special clause in the charter-party, would have been caused by the shipowner. [BARNES, J., referred to *Jackson* v. *The Union Marine Insurance Co.*, 22 W. R. 79, 23, *Ibid.* 169, L. R. 8 C. P. 572, 10 *Ibid.* 125, and *The Mercantile Steamship Co.* v. *Tyser*, 29 W. R. 790, 7 Q. B. D. 73.]

BARNES, J.—The question in this case arises under a policy of marine insurance, and is one of some interest, which I will presently deal with. But I desire at the outset to notice a remarkable feature about the case to which it is extremely desirable that attention should be drawn, involving as it does a new and decidedly beneficial step in legal procedure. The proceedings in the action were commenced only about ten days ago, and are of the utmost simplicity, consisting only of the writ, and an application in chambers to dispose of the matter in dispute under ord. 34, r. 2, of the Rules of the Supreme Court, and an order which I considered it right to make in order that the matter might be promptly disposed of. The order is to the effect that the question of law, whether upon the facts stated in an average statement and certain documents therein referred to the plaintiffs are entitled to recover any, and what, sum from the defendants, be tried without a special case to-day. Both parties, being desirous of obtaining a speedy decision of the court upon the point raised, have availed themselves of the facilities which exist, though not ordinarily used, for this purpose. So far as my experience goes, I cannot recall any case where this method of procedure has been adopted, but it is obvious that where both parties to a commercial case such as this are anxious to have their dispute determined at once, and do not insist upon the ordinary formalities, and particularly where there is little or no dispute of fact, this procedure affords the means of enabling the parties to have their case argued and decided in open court with rapidity and economy sufficient to satisfy the requirements of the commercial world. In my judgment the parties and their solicitors have taken a most businesslike course, which is worthy of every encouragement, and might be frequently followed with advantage in similar cases. I should add that, although actions of this kind have not usually been brought in this division, yet such actions, if brought here, may be retained in the division if the court considers it expedient so to do; and, in my opinion, it is expedient that this action should be disposed of here under the circumstances, and very desirable and convenient that the wish of the parties to have it so dealt with should be acceded to.

To come now to the point in dispute. The action is upon a policy of insurance effected by the plaintiffs with the defendants for £1,000 upon chartered freight, including all liberties, as per bill of lading, on the plaintiffs' ship or vessel, *The Alps*, for twelve months from the 9th of June, 1891, to the 8th of June, 1892, and the plaintiffs claim £35 3s. 1d. for a particular average loss under the said policy. It appears that the vessel was chartered by the plaintiffs to certain charterers by a charter-party, which provided that the vessel was let to the charterers and hired by them at the rate of £425 per calendar month, and at and after the same rate for any part of a month, payment to be made in cash at New York monthly in advance at current rates of exchange. The charter-party provided that in the event of loss of time from collision, stranding, want of repair, breakdown of machinery, or any cause appertaining to the duties of the owner, preventing the working of the vessel for more than twenty-four hours, the payment of hire should cease from the hour when detention began until the ship would be again in a sufficient state to resume her service. On the 18th of August, 1891, at about 3.30 a.m., the vessel, while lying at the Union Stores, Brooklyn, taking in cargo, was discovered to be on fire. By pouring water on the fire the fire was extinguished. On examination it was found that the forepeak was completely burnt out, the upper deck was also badly burnt as well as the sails and stores belonging to the vessel, including a towing hawser, and the skin of the vessel was injured by the heat. The vessel was repaired, and the repairs occupied thirteen days, and the hire for the vessel for these days was repaid to the charterers. The loss of freight to the shipowners was thus £179 5s. 6d. Insurances to the extent of £2,500 had been effected, and it was for the proportion applicable to the defendants' policy that this action was brought.

The question arises whether or not the loss was caused by the perils insured against, or one of them, or, as counsel for the defendants contend, is to be treated as a loss not due to the perils insured against proximately, but to the effect of the clause in the charter.

The case which both parties agree is decisive of this, according to the way it is looked at, is that of *The Inman Steamship Co.* v. *Bischoff*, reported in the Court of Appeal (6 Q. B. D. 648) and in the House of Lords *ubi suprà*. The plaintiffs there sought to recover, under a policy upon "freight outstanding," for loss of hire which had been caused by the Commissioners of the Admiralty putting the ship off pay under a special clause in the charter-party which had been effected for the vessel.

It is unnecessary to criticize that case with any great accuracy so far as its own terms are concerned, because it is obvious, and Lord Bramwell, the Bramwell, L.J., in dealing with that case in the Court of Appeal said that the Commissioners, acting under the clause, put the ship out of pay, and that as his lordship proceeds to say, that no doubt in that case the loss of hire was not to be treated as having been a loss due to the perils of the sea; because he considered in that particular case it was not proximately so caused. In the House of Lords Lord Selborne says: "The result is, in my opinion, a right to the freight in question must be deemed to have accrued under the terms of the charter-party, but to have been subsequently in July, 1879, defeated, under the power of abatement by way of mulct reserved by the contract to the Board of Admiralty. It has not been without doubt, or (I must add) without reluctance, that

I have come to the conclusion that this is not a loss so directly, proximately, and immediately resulting from the perils of the seas insured against, as to make it payable under the terms of the policy by the insurers." Then he goes on to say: "The general principle of *causa proxima, non remota, spectatur* is intelligible enough, and easy of application in many cases; but that there are cases in which a too literal application of it would work injustice, and would not really be justified by the principle itself, is apparent. . . ." Then he proceeds, a little later on in his judgment: "If in the present case, the other terms of the charter-party being the same, a power had been reserved to the charterers or their agents to determine the contract, and their liability to further freight, on the occurrence of any such damage to the ship by the perils of the sea as might render her inefficient for the service which she had undertaken, and if such power had been exercised before any further freight was earned, I should have been of opinion that this was a loss of freight by perils of the sea for which the insurers were liable. Nor would it, in my opinion, have made any difference although provision might have been made by the contract for the continuance of the troops and stores in the ship, after the exercise of the power to determine the contract, until such time as they could be conveniently landed or transferred to other vessels. But between such a case and that of a subsequent mulct under a special power, such as that contained in this charter-party, after freight had been earned which (unless the power of mulct were exercised) would be payable under the contract, there seems to me to be an important difference. The principle of such cases as *Hadkinson* v. *Robinson*, 3 B. & P. 388, *Taylor* v. *Dunbar*, 17 W. R. 382, L. R. 4 C. P. 206, and *McSwiney* v. *Royal Exchange Assurance Corporation*, 14 Q. B. 634, seems to be here and applicable, obliges me to conclude that the risk of loss by the exercise, under such circumstances, of such a special power is different from the risk of loss by perils of the seas, and ought to have been insured against in some more special manner if it was the intention of the parties that it should be covered by the policy. I do not dissemble that there appears to me to be something of refinement in the distinction, which the rule laid down by the authorities as applied to the particular facts of this case oblige me to make, but though refined it seems to me to be a real distinction, and to justify the judgment of the court below." Then Lord Blackburn said, after commenting upon the way in which the charter-party must be looked at:—"But as soon as it is ascertained that the policy attached on the hire under a particular charter-party, the charter-party must be read in order to see how the subject-matter was affected by the misfortune which happened. Under one charter-party a temporary disablement of the ship might occasion a loss for which the underwriters on ship would be responsible, but which would not have any effect at all on the assured's right to recover the hire of the vessel whilst she was disabled. Under another, such a temporary disablement might deprive the shipowner of all claim for hire during the time she was disabled. In the first of these cases there could be no claim against the underwriters on freight, for there was no loss of freight. In the second I do not see how it could properly be denied that there was such a loss." And then he comments upon the doctrine of *causa proxima, non causa remota, spectatur*, and says: "I must own that I have always sympathized with Lord Colonsay in *Rankin* v. *Potter*, L. R. 6 H. L., p. 160, where he says, 'Something is said about proximate and remote causes, and these are matters that are very apt to lead us into philosophical mazes.' . . . I think, as he did, that when we get a clear view of the fact it is best to keep clear of such philosophical mazes. . . . And, as I think, the question here is not what was the proximate cause of a loss of freight, but whether there was any loss of freight."

Now I do not say that the counsel for the defendants has led me off into a philosophical maze, but he has, with great ingenuity, endeavoured to point out how, under certain circumstances, a claim can be made under this policy for a partial loss, so that, as he contended, full effect might be given to the policy without allowing such a claim as the claim now in question. But that does not seem sufficient to conclude this particular case. Lord Watson says, in *The Inman Steamship Co.* v. *Bischoff*, putting it shortly: "If I am right in my construction of the charter-party, the case turns upon a very narrow point. The inefficiency of the vessel was admittedly due to perils of the sea which were within the risks insured by the policy; and if it had been expressly stipulated in the charter-party that freight should cease to be payable so long as the ship was incapable from that cause of efficiently performing her contract, I do not doubt that the insurers would have been liable. That would have been a plain case of cesser or loss of freight by the perils insured against. But that is not the present case." I apply the language of Lord Watson to the case before me. The inefficiency of this vessel was admittedly due to the fire, one of the perils insured against. It has been expressly stipulated in the charter-party that, in the event of loss of time from want of repairs, the hire should cease to be payable so long as the vessel was incapable from that cause of efficiently performing her service. It is a case of cesser, or loss of freight, through a peril insured against.

The counsel for the defendants urges that many other causes might produce want of repairs. Yes; but only certain perils are insured against, one of which is fire, and it seems to me that, having regard to the judgments I have referred to, and the principles they seem to indicate, and also to the case of *Jackson* v. *The Union Marine Insurance Co.*, the true view to take of an insurance such as this, applied to a very ordinary form of charter-party containing a very ordinary and usual clause, is that it casts upon the underwriters the risk of loss of freight when that clause is put into operation through the immediate action of the perils insured against.

I therefore think that the plaintiffs are entitled to succeed, and my judgment will be for them for the sum of £35 3s. 1d. I do not suppose interest is asked for; but, this being a test case, I certify that it is a proper one to have been tried in the High Court.

Solicitors for the plaintiffs, *Field, Roscoe, & Co.*

Solicitors for the defendants, *Waltons, Johnson, Bubb, & Whatton.*

Court of Appeal.

App. Bankruptcy.
(Lord Esher, M.R., and Lopes and A. L. Smith, L.JJ.) — May 5.

Ex parte OFFICIAL RECEIVER.
In re FLATAU. (*a*.)

Bankruptcy—Receiving order—Rescission—Consent of petitioning creditor.

A receiving order having been made against a debtor,

(*a*.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

he paid the petitioning creditor's debt and applied to the registrar to rescind the receiving order. The only fact proved before the registrar was that the petitioning creditor consented to the rescission. The registrar rescinded the receiving order.

Held, that the registrar had not sufficient evidence before him on which he could rescind the receiving order.

Appeal of the official receiver against an order made by the registrar rescinding a receiving order which he had previously made against the debtor.

The receiving order was made in due course after judgment recovered against the debtor and non-compliance with the bankruptcy notice. The debtor stated that he intended to appeal against the receiving order, and the registrar made an order staying the proceedings under the receiving order for seven days in order to allow the debtor to appeal. Subsequently the debtor abandoned his appeal, and paid the petitioning creditor's debt and costs. The debtor then applied to the registrar to set aside the receiving order; he gave no notice of his application to the official receiver, and filed no affidavit in support of it. The petitioning creditor consented to the application, and the registrar made an order rescinding the receiving order.

Sir John Rigby, S.G., and *Muir Mackenzie*, for the official receiver.—A receiving order having been made, it cannot be rescinded merely because the petitioning creditor consents. It is necessary to give notice to the official receiver, which was not done in this case, and all the circumstances of the case must be looked at: see *In re Hester*, 22 Q. B D. 632, 37 W. R. Dig. 20. The registrar thought the case was governed by *In re Brigstocke*, 25 W. R. 262, 4 Ch. D. 348, but in that case the petitioning creditor's debt was paid before the receiving order was made.

Debtor in person.

Lord ESHER, M.R.—In this case the registrar made a receiving order against the debtor, and the debtor at first intended to appeal against that receiving order, but he afterwards gave up that idea, and, therefore, there was a receiving order in existence which had not been appealed against All that could then be done was for the debtor to move to have the order rescinded, and the case would be governed by the rules which have been laid down with regard to the rescinding of receiving orders. The debtor went before the registrar, he produced no affidavit, but satisfied the registrar that the petitioning creditor consented, and the case must be decided on the footing that that was the only fact which was proved before the registrar.

The question is whether the registrar, having only that fact before him, had power to rescind the receiving order. In *In re Hester* the court laid down certain rules with regard to the rescinding of receiving orders, and that case shows that before the order could be rescinded there must be a very careful examination into all the circumstances of the case, and that even where there are many creditors and they all consent, still the court will not act on that fact alone, but will make inquiries of the widest kind in order to protect creditors against their own carelessness, and also to ascertain whether it would be in the interests of the public at large for the receiving order to be rescinded. In the present case, the consent of the petitioning creditor has been obtained, but there are other creditors in existence and nothing is known about the previous conduct of the debtor, and under those circumstances it is not right that the receiving order should be rescinded.

The registrar thought this was an exceptional case, and treated it as if the money had been paid before the receiving order was made. But he had no power to do so. The receiving order having been made the registrar was *functus officio*; and with regard to rescinding was bound by the rules which I have enumerated. The appeal must be allowed.

LOPES, L.J.—I am of the same opinion. The registrar acted on the authority of *In re Brigstock*. That case is distinguishable from this because there the payment of the creditors took place before the receiving order was made. The case must be decided on the principles laid down in *In re Hester*, which shows that the consent of the creditors to the rescinding of the receiving order is an element to be considered, but is not conclusive.

A. L. SMITH, L.J., concurred.

Appeal allowed.

Solicitor for the official receiver, *Solicitor to the Board of Trade.*

Solicitor for the debtor, *A. J. Benjamin.*

From Durham Palatine Court of Chancery. (Lindley, Bowen, and Kay, L.JJ.) — May 4.

In re MACKENZIE.
Ex parte SHORT. (*a.*)

Solicitor and client—Costs—Taxation—Allowance by solicitor of part of bill—More than one-sixth taxed off—Special circumstances—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 37.

A firm of solicitors sent in to their clients, who were two surviving trustees, a detailed bill of their charges in respect of business connected with the trust for which they had been employed. The bill was for £44 2s. 8d., and there was added at the foot, "By allowance, £7 2s. 8d." The taxing master disallowed £10 19s. 4d. from the bill (of £44 2s. 8d.), but stated in his certificate that he treated the bill as one for £37, as he considered the £7 2s. 8d. allowance to be unconditional; many of the charges were disallowed on the ground that the trustees themselves ought to have performed the work in respect of which the disallowed charges were made, but it appeared that the solicitors had been expressly instructed by the acting trustee (since deceased) to perform it; and the taxing master considered the solicitors entitled to the costs of taxation.

Held (affirming the decision of the Chancellor of the Durham Palatine Court of Chancery) *that the bill was properly taxable on £44 2s. 8d.*

Held, also, that the facts were sufficient to justify the Chancellor in allowing, in the exercise of his discretion, the solicitors the costs of the taxation.

In re Carthew, In re Paull, 32 *W. R.* 940, 27 *Ch. D.* 485, *followed.*

Appeal from a decision of the Chancellor of the Durham Palatine Court of Chancery.

In November, 1892, the respondents, who were solicitors, delivered to the appellants, who were the surviving trustees of one George Short, a detailed bill of their charges and disbursements in relation to certain business connected with the trust. The bill amounted to £44 2s. 8d., at the foot of which was added "By allowance £7 2s. 8d.," thus reducing the amount to £37.

On the 6th of January, 1893, upon the petition of

(*a.*) Reported by ARTHUR LAWRENCE, Esq., Barrister-at-Law.

the solicitors an order for taxing the bill was made, and upon the taxation the taxing master disallowed from the bill as delivered the sum of £10 19s. 4d., which, being more than one-sixth of the whole, the clients claimed the costs of the taxation, contending that the circumstances of the present case were similar to those of *In re Carthew*, *In re Paull*, 32 W. R. 940, 27 Ch. D. 485.

The taxing master disallowed the clients' contention, and gave the solicitors their costs of taxation. In his certificate, made pursuant to section 37 of the Solicitors Act, 1843, which he issued after taking time to consider his decision, the taxing master said, "On taxation I disallowed the sum of £10 19s. 4d., which, being more than one-sixth of the amount of the bill as delivered, . . . the clients claimed to be entitled to the costs of the taxation. It was contended on their behalf that the circumstances of the present case were similar to those of the cases of *In re Carthew* and *In re Paull*. I held, however, that there were circumstances in the present case which distinguished it from *In re Carthew* and *In re Paull*. . . . In the present instance the solicitors actually deducted £7 2s. 8d. from the total of their bill, thus reducing the amount of it to £37, and I therefore treated it as one for £37. There was, in my opinion, no implied condition attached that £37 would only be accepted in case taxation was dispensed with. . . . Many of the charges which I felt it my duty to disallow were disallowed on the ground that the work in respect of which such charges were made appeared to be work which in strictness the trustees themselves (the clients) ought to have performed. It should, however, be borne in mind in considering by whom the costs of taxation should be paid that it was pointed out to me on behalf of the solicitors, and the fact appeared to be, that, owing to considerable friction existing between the three trustees, Thomas Short, the acting trustee (since deceased), for whom the solicitors acted, declined on several occasions to meet his co-trustees, and had expressly instructed the solicitors to perform the work in respect of which the disallowed items were charged. After giving a careful consideration to all the circumstances of the case, I have now, in the exercise of the discretion vested in me under section 37 of the Act, to certify that in my opinion the solicitors should be allowed the costs of taxation of their said bill."

On the 29th of March, on motion by the solicitors asking for the costs in accordance with the taxing master's certificate, the Chancellor was of opinion that, on the authority of *In re Carthew* and *In re Paull*, more than one-sixth of the bill had been taxed off, but he held the solicitors to be entitled to the costs of the taxation as the registrar had certified "specially certain circumstances."

The clients appealed. [They also, on the appeal, proposed to question the solicitors' retainer, but the point had not been raised before the Chancellor, though it had been dealt with by the taxing master, and the court refused to entertain it.]

Bramwell Davis, for the appellants.—The bill must be an item bill, and the taxation must be upon the footing of this bill being one for £44 2s. 8d.: *In re Carthew*; therefore more than one-sixth has been taxed off, and the solicitors ought *primâ facie* not to have the costs of taxation. Then there is nothing here sufficient to constitute "special circumstances" so as to entitle them to have them: *In re Paull*.

Warrington, for the respondents, was not called upon to argue.

LINDLEY, L.J.—This is an appeal which ought never to have been brought. A common order to tax a solicitors' bill of costs was obtained as against two surviving trustees. The bill was for £44 2s. 8d., and £7 2s. 8d. was deducted, making it £37. Then the taxation proceeded as if the bill was for £44 2s. 8d. which, on the authority of *In re Carthew*, was quite right. The taxing master taxed off £10 19s. 4d.—practically £4 more than the solicitors had allowed—and certified "special circumstances," making that certificate under section 37 of the Solicitors Act, 1843, which provides that the proper officer "shall in all cases be at liberty to certify specially any circumstances relating to" the "bill or taxation, and the court or judge shall be at liberty to make thereupon any such order as such court or judge may think right respecting the payment of the costs of such taxation." The Chancellor exercised his discretion, and said he would not order the solicitors to pay the costs. We think the facts are quite sufficient to justify him in so deciding. In the exercise of his discretion he did what he did, and it would take a very strong case to induce us to interfere with a case of that sort. The appeal must be dismissed. The trustees must pay the costs of the appeal.

BOWEN, L.J.—I agree.

KAY, L.J.—I also.

Appeal dismissed.

Solicitors for the appellants, *J. E. & H. Scott*, for *Graham & Shepherd*, Sunderland.

Solicitors for the respondents, *Patersons, Snow, Bloxam, & Kinder*.

From Q. B. Div. (Lord Esher, M.R., and Lopes and A. L. Smith, L.JJ.) — April 26, 27.

HAMLYN v. CROWN ACCIDENT INSURANCE CO. (a.)

Insurance—Accident—"Injury caused by violent, accidental, external, and visible means"—Dislocation of knee.

By a policy of insurance against accident the defendants agreed to pay the plaintiff compensation if he should sustain "any bodily injury caused by violent, accidental, external, and visible means." The policy contained a proviso that the insurance should not cover injury arising from natural disease or weakness. The plaintiff sustained injury by breaking a ligament in his knee while he was in the act of stooping.

Held, that such injury was covered by the policy.

Application by the defendants for a new trial or for judgment.

The action was brought on a policy of insurance against accidents by which the defendants agreed to pay the plaintiff compensation if, at any time within one year from the date or during the continuance of the policy, he should sustain "any bodily injury caused by violent, accidental, external, and visible means." There was a proviso that the policy should not extend to or cover the death or injury of the insured arising from natural disease, or weakness, or exhaustion consequent upon disease, or any surgical operation rendered necessary thereby or arising from such disease or weakness. The plaintiff, who was a shopkeeper, was standing in his shop near the counter, when a boy, who had come into the shop with a customer, dropped a marble, which rolled along a sloping part of the shop floor. The plaintiff, in order to stop the marble and pick it up, bent down and

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

stooped, having his knees turned outwards and far apart. When he resumed an upright position he found that one of his knees was injured. He had not slipped, nor hit his leg or knee against anything.

The medical evidence showed that the ligament which joined the two cartilages which separated the upper and lower bones of the leg had broken, and the cartilages had been forced out of their place, and the knee had become stiff. The knee remained stiff till the cartilages were put back into their place. The medical evidence also showed that what had happened was a natural thing to happen if a man stooped down in the particular way in which the plaintiff appeared to have stooped.

By a reference to arbitration in accordance with the terms of the policy the amount of compensation, if any was recoverable, had been fixed at £60.

The action was tried by Lawrance, J., and a jury, at Bodmin. The learned judge was of opinion that the facts proved brought the case within the terms of the policy, and directed the jury to find a verdict for the plaintiff, and entered judgment accordingly.

The defendants moved for a new trial or judgment.

Bompas, Q.C., and *Blake Odgers*, for the defendants.—The injury which the plaintiff sustained does not come within the terms of the policy, which applies to injuries "caused by violent, accidental, external, and visible means." The means which caused the injury which the plaintiff sustained was his stooping, his putting his body into the position into which he did put it. This was not violent, accidental, nor external; nor, so far as it was not external, was it visible. "Violent" means caused by unusual physical force; "accidental" means unintentional; "external" means caused by something outside the body of the person injured; "visible" means something which can be seen, and of which evidence can be given by any person who is present, in contradistinction to such a thing as a sunstroke. The plaintiff's stooping was not caused by unusual physical force. Neither was it unintentional. The plaintiff placed his body in the position in which he intended to place it; it was only the result that was unintentional. *Sinclair* v. *Maritime Passengers' Assurance Co.*, 9 W. R. 342, shows that this was not "accidental" in the sense in which that word is used in a policy of insurance. Neither was it something *ab extra*, as in the cases where the assured was suffocated by drowning: *Trew* v. *Railway Passengers' Assurance Co.*, 9 W. R. 671, 6 H. & N. 839; *Reynolds* v. *Accidental Insurance Co.*, 18 W. R. 1141; *Winspear* v. *Accident Insurance Co.*, 29 W. R. 116, 6 Q. B. D. 42. It does not follow that, because the case does not come within the terms of the proviso, therefore liability must attach under the operative words of the policy. An injury sustained apart from external cause, even though not arising from natural disease, is excluded from the policy. Neither was the means here visible. No doubt the outward motion of the plaintiff's body was visible; but the whole of the means which caused the injury was not visible. If, however, it was external it must be admitted it was also visible.

S. J. Fraser Macleod (*Bullen* with him), for the plaintiff.

Lord ESHER, M.R.—It seems to me that the real question in contest at the trial of this action was as to the meaning of the policy. It must be taken to have been admitted that, if the policy bore one meaning, the plaintiff was entitled to succeed, and, if it bore another, the defendants were entitled to succeed. The question, therefore, here is whether on the true construction of the policy the facts proved bring the case within it. The words which we have to construe are the words which impose a liability on the defendants in case of the plaintiff sustaining "any bodily injury caused by violent, accidental, external, and visible means." It seems to me clear that "caused by" is equivalent to "the result of"; and "means" is equivalent to "cause." Therefore the sentence may be read thus—"any bodily injury being the result of any violent, accidental, external, and visible cause."

Now, what happened was that the plaintiff, seeing a little boy's marble rolling along the sloping floor of his shop, tried to stop it in order to give it back to the child. He opened his knees, as he describes it, bent them, and stooped down, and grasped at the marble. But he did it awkwardly, and wrenched his leg. It was the wrench that did the mischief; that was the cause of the injury which he sustained. That this wrench was accidental I cannot doubt; he certainly did not mean to wrench his leg. The cause of which the injury was the result was therefore accidental. Neither can it be denied that it was violent. The question whether it was an external cause requires consideration. I feel certain that the word "external" in this policy ought to be construed with reference to the proviso at the end of the policy, and that it is here used as the antithesis of "internal," it being intended that what may be called internal causes should be dealt with by the proviso. If an injury were sustained which was the result of some internal cause, that is, if it arose from "natural disease or weakness consequent upon disease," as, for instance, a clot of blood arising in the system or some inherent weakness in the constitution, that would not be within the policy. I think that an external cause is the opposite of such internal cause. In this sense it is clear that the wrenching of the plaintiff's leg was an external cause. It is also plain that it was a visible cause. Therefore what happened in this case is within the terms of the policy, and the plaintiff is entitled to succeed. I think that the judgment of Lawrance, J., is right, and the application must be dismissed.

LOPES, L.J.—I am of the same opinion. Reading the policy as a person of ordinary intelligence would read it, I find words in the proviso which say that the policy is not to extend to or cover injury arising from natural disease or weakness; those words deal with injury caused by internal matters. Then in the earlier part of the policy I find the words now in question; and they seem to me to deal with injury caused by external matters, that is, by matters different from and intended to be contradistinguished from those internal matters which are dealt with in the proviso. In my opinion the words mean any bodily injury arising from any violent, accidental, external, and visible cause. If that is the meaning of the words, the admitted facts seem to me to show that the case is within the policy. What the plaintiff did when he wrenched himself in the way described was certainly "violent"; he used extra exertion, extra physical force, and in so doing he overreached himself. It was also "accidental," which means something unexpected, unforeseen, casual; it might be said to have been an unexpected casualty. Then as to whether it was "external," it is most important in answering this question to refer to the other part of the policy, in order to see whether this was an injury caused by any such internal matter as is dealt with in the proviso. It is clear that the stooping and reaching after the marble and the wrenching of the plaintiff's leg did not arise from any disease or inherent weakness in the plaintiff, and, therefore, what happened was not an internal matter within the proviso. It follows that it was "external" within the meaning of that

word in the earlier part of the policy. There can be no question that it was also "visible."

I think, therefore, that the judgment was correct.

A. L. SMITH, L.J., concurred.

Application refused.

Solicitors for the plaintiff, *Bolton & Co.*, for *Wellington Dale*, Penzance.

Solicitors for the defendants, *Burton, Yeates, & Hart*, for *Trythall & Bodilly*, Penzance.

From Prob. Div. & Adm. Div. [Divisional Court.] (Lindley, Kay, and A. L. Smith, L.JJ.) — March 27.

THE SHIP "CRESCENT."

GREAT NORTHERN STEAMSHIP FISHING CO. (LIMITED) *v.* OWNERS OF THE STEAMSHIP "CRESCENT." (*a.*)

Practice—Appeal from City of London Court—No note of proceedings in court below—Order of Divisional Court for production and examination of witnesses examined at the trial—Jurisdiction—Rules of the Supreme Court, 1883, *ord.* 59, *r.* 8.

When no note of what occurred in the county court has been taken, a Divisional Court has, upon appeal, jurisdiction to order that the witnesses of both parties called and examined in the court below should be produced and examined on the hearing of the appeal; but care ought to be taken by the court to prevent fresh evidence being given, so that such appeal should not become practically a new trial.

Order of the Divisional Court (Jeune, P., *and* Barnes, J.) *affirmed.*

Appeal from an order of a divisional court of the Admiralty Division (Jeune, P., and Barnes, J.).

The action was brought in the City of London Court on the admiralty side by the Great Northern Steamship Fishing Co. (Limited) against the owners of the steamship *Crescent* to recover £100 and costs for damage by collision between *The Crescent* and a ship belonging to the plaintiff company. The trial took place before Mr. Commissioner Kerr on the 1st of March, 1893. Neither party took any note of the evidence given at the trial or of what took place there. The learned judge, who did not take any note, and was not asked to do so, gave judgment for the plaintiffs with £70 damages.

The defendants gave notice of appeal, and moved before the Divisional Court for an order, under ord. 59, r. 8, of the Rules of the Supreme Court, that upon the hearing of the appeal the witnesses called and examined at the trial of the action in the court below, both by the plaintiffs and defendants, might be examined *vivâ voce* before the Divisional Court as to what they had said in the court below, upon the ground that the learned judge in the court below had taken no note of the evidence, and that otherwise the appellants would be deprived of their right to appeal. Ord. 59, r. 8, is as follows: "On any motion by way of appeal from an inferior court, the court to which any such appeal may be brought shall have power, if the notes of the judge of such inferior court are not produced, to hear and determine such appeals upon any other evidence or statement of what occurred before such judge which the court may deem sufficient."

The Divisional Court, on the 6th of March, 1893, decided that the appeal ought to be heard, and ordered that the witnesses of both parties called and examined in the court below must be produced and examined at the hearing of the appeal.

The plaintiffs appealed.

Walton, Q.C., and *Butler Aspinall*, for the appellants.—The court has no power under ord. 59, r. 8, to make such an order as was made in this case, for the hearing would amount practically to a new trial, and not to an appeal, which is the proper remedy. There is a right of appeal from a final judgment in an admiralty action in the county court: County Courts Act, 1868, s. 26; County Courts Act, 1888, s. 120; *The Eden*, 40 W. R. 415, [1892] P. 67. Under section 120 of the Act of 1888 a note by the judge of what took place at the trial in the county court is a condition precedent to the hearing of any appeal: *Cook* v. *Gordon*, 61 L. J. Q. B. 445, 40 W. R. Dig. 63. In the absence of special circumstances an order of this kind ought not to be made: *The Busy Bee*, 20 W. R. 803, L. R. 3 A. & E. 527; *The Confidence*, 40 L. T. N. S. 201, 27 W. R. Dig. 65.

F. N. Laing, for the respondents, was not called upon.

LINDLEY, L.J.—I do not think that we can go to the length of discharging this order. It is a somewhat unusual one. [His lordship read the order.] The action was brought in the City of London Court. The matter not being a very important one as regards the amount of money involved, no one took any note of what was said by the witnesses or of what took place at the trial. The learned commissioner, as is known, is so overburdened by his work that he is unable to take notes of the evidence. It is unfortunate that there are no means of having notes taken of what takes place in the court, but perhaps there may be hereafter. In the meantime matters are at a deadlock. The decision was against the defendants. They have a right to appeal, but there are no materials upon which the Divisional Court can hear the appeal. The defendants accordingly applied to that court to make an order under ord. 59, r. 8, of the Rules of Court for the examination before that court of the witnesses examined at the trial of the action in the court below. The court had power to make such an order, and has, in the exercise of its discretion, made the order which I have read. Can we say that it is wrong? I think that the defendants are not entitled under the rule to have a new trial, but only to have the evidence given in the court below reproduced. I admit that there may be some difficulty in preventing fresh evidence being given, and the appeal so becoming practically a new trial, but the Divisional Court must be trusted to deal with that as they think best. I cannot say that the Divisional Court was wrong in making the order in question, and I think we should be doing more harm than good if we were to reverse their decision. The appeal must be dismissed, with costs.

KAY, L.J.—I am of the same opinion. Rule 8 of order 59 does not authorize a new trial, but, there being nothing in the present case to show the Divisional Court what took place in the City of London Court, it has power to hear the appeal upon any evidence of what occurred in the court below which it thinks fit. What evidence can be obtained except by calling the witnesses and asking them what evidence they gave at the trial? There is, I admit, a great difficulty in drawing a distinction between that and a new trial, but this court has not to deal with that. I cannot say that it was not within the jurisdiction of the Divisional Court under the rule to make the order in question if there are no other

(*a.*) Reported by W. A. G. WOODS, Esq., Barrister-at-Law.

means of finding out what took place at the trial. They may say that they will have the witnesses before them and ask them to repeat all that they said. That is within the very letter of the rule. That means of ascertaining the evidence must be used in such a way, if possible, as to prevent the appeal taking the form of a new trial; but we must leave the Divisional Court to deal with that. All that we say now is that the Divisional Court was not going beyond its jurisdiction in making the order appealed from.

A. L. SMITH, L.J.—I quite agree. I only add that this case does not either agree or disagree with *Cook* v. *Gordon*, which was a case under section 120 of the County Courts Act, 1888. If that case ever comes up again for discussion the court which has to deal with it will not, in my opinion, be fettered by anything which has happened to-day.

Appeal dismissed.

Solicitors for the appellants, *Lowless & Co.*

Solicitors for the respondents, *J. A. & H. E. Farnfield.*

High Court of Justice.

Chan. Div. North, J. March 23.

BENNO JAFFÉ AND DARMSTAEDTER LANOLIN FABRIK v. JOHN RICHARDSON & CO. (LIMITED).

Patent — Action for infringement — Interrogatories — Refusal to answer — Validity of patent denied — R. S. C., 1883, *ord.* 31, *r.* 20.

In an action for infringement of a patent the plaintiffs administered interrogatories to the defendants, based on the statements in the plaintiffs' specification, asking the defendants if they used the processes therein described. The defendants denied the validity of the patent, and refused to answer certain of the interrogatories, on the ground (inter alia) *that the discovery sought depended on the determination of a question in dispute—namely, the validity of the patent.*

Held, that the discovery sought could not be postponed until after the validity of the patent had been established, and that the plaintiffs were entitled to specific answers to the interrogatories.

Adjourned summons.

In 1892 the Benno Jaffé and Darmstaedter Co., a company incorporated in Prussia, who were assignees of a patent, No. 4,992 of 1882, granted to F. C. Glaser for the new and improved manufacture of fatty matter from wool fat, called "lanolin," commenced an action against John Richardson & Co. for an injunction to restrain them from infringing the said patent. The defendants, who were the manufacturers of a substance called "anaspaline," denied infringement, and alleged that the invention was not new or useful, and was not proper subject-matter, and did not admit that the plaintiffs were assignees, or that Glaser was the first and true inventor or importer.

On the 27th of October, 1892, the plaintiffs, having obtained leave, administered, *inter alia*, the following interrogatories:—(5) Do the defendants, or did they ever, in the manufacture of "anaspaline," treat wool fat with water, and whether or not by kneading the wool fat with water, or in what manner do the defendants, or did they ever, in and for the manufacture aforesaid, treat wool fat with water? (8) Do the defendants, or did they ever, in and for the manufacture aforesaid, treat wool fat which has been obtained by—certain processes set out in the interrogatories—or from the waste liquors of wool washing works with water, and whether or not, by kneading with water, or in what manner, do the defendants, or did they ever, in or for the manufacture aforesaid, treat the last-mentioned wool fat with water?

The defendants objected to answer the above interrogatories, on the ground that the discovery sought depended on the determination of the question in dispute—namely, the validity of the plaintiffs' patent, that the matters inquired into were not sufficiently material at this stage, and constituted a trade secret of the defendants' business. This was a summons to obtain, *inter alia*, further answers to the above interrogatories.

Lawson, for the plaintiffs, referred to *Rawes* v. *Chance*, 7 Rep. Pat. Cas. 281; *Renard* v. *Levinstein*, 10 L. T. N. S. 94, 12 W. R. Ch. Dig. 68; *Badische Anilin* v. *Levinstein*, 31 W. R. 913, 24 Ch. D. 156; *Ashworth* v. *Roberts*, 39 W. R. 170, 45 Ch. D. 623; *De la Rue* v. *Dickenson*, 3 K. & J. 388; *Foxwell* v. *Webster*, 12 W. R. 94, 2 Dr. & Sm. 250.

Dove, for the defendants.—The plaintiffs ought to establish the validity of their patent before they can be entitled to the discovery sought. I rely on ord. 31, r. 20, which provides that the court may, if satisfied that the right to the discovery sought depends on the determination of any issue in dispute, order such issue to be determined first, and reserve the question as to discovery.

He referred to *Rawes* v. *Chance*; *Renard* v. *Levinstein*; *Badische Anilin* v. *Levinstein*; *Leitch* v. *Abbott*, 34 W. R. 506, 31 Ch. D. 374; *Fennessy* v. *Clark*, 37 Ch. D. 184, 36 W. R. Dig. 159; *Parker* v. *Wells*, 39 W. R. 392, 18 Ch. D. 477.

NORTH, J.—Before the rules of 1883 and the preceding rules under the Judicature Act on the same lines, no doubt discovery was enforced more than has been done since, and sometimes in such a way as to cause unnecessary expense and unnecessary disclosure of facts that in the result turned out to be immaterial. There were evils arising from that in two ways, both from pressure on a defendant and also from costs incurred, and a very salutary alteration has been made by giving the court a discretion now which it used not to have, both as to saying whether discovery should be given at a particular stage or postponed to a later stage, as well as that of refusing it altogether. But if that means what it is contended it does mean, that in every patent action in which invalidity is set up—that is to say, in every patent action ever launched—there is first to be a deliberate trial before the judge and jury, if necessary, of the validity of the patent, and only after that has been settled are issues to be raised and discovery obtained by interrogatories and otherwise with regard to the question of infringement, the benefit gained by getting rid of the waste of time and money in answering interrogatories will be far more than made up for by the increased waste of time and money involved in having two trials of every patent action in which the plaintiff succeeds in establishing his patent instead of one. In my opinion that is not the meaning of the rules, and it would have a very bad effect if that were so. The rule is intended to give the court the opportunity of saying that discovery should not be given before the trial of the action unless it is wanted for the purposes of the trial; for example, if a mortgagor

(*a.*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

wants to redeem an estate, and it is denied that he has a right to redeem at all, it is quite useless going into any questions of accounts until it is known whether there is such a right or not, and then if that right is established at the trial the taking the accounts afterwards is a matter of course. So in the case of a action by a principal against an agent; agency denied. If the agency does not exist, or the relation of principal and agent does not exist, there no accounts to be taken; and it is unnecessary to put the parties to the trouble and expense of going into statements of accounts, which, unless the agency is established, would never be necessary at all.

But in the case of a patent it is different. No doubt validity is one thing, and infringement another; but they both have to come on to be tried at the same time, and the parties must come before the court ready to deal with both cases at one trial. If the present contention was right, that discovery was to be postponed until the validity of the patent was tried, discovery by interrogatories would be refused altogether, because it would not practically be given there. The plaintiff's right to discovery would be taken away, and he would only have the opportunity of getting out what he could on cross-examination, without having the materials to lead up to it, and without having the evidence there that he would have had if the interrogatories had been answered at an earlier stage. Now in the present case the plaintiffs put forward particular things claimed by their patent. If the defendants' excuse for not answering were allowed, the result would be either the plaintiffs would have no discovery about these matters, and would not know what the defendants were doing, and would have to try the question of infringement in the dark, or their case would fail.

In my opinion they are clearly entitled to have specific answers to the specific interrogatories (Nos. 5 and 8) put here as to what the defendants are doing, following the interrogatories framed upon the lines of the allegations in the specification.

Solicitors for the plaintiffs, *Johnson, Son, & Ellis.*

Solicitors for the defendants, *Crowders & Vizard*, for *Owston, Dickenson, & Simpson*, Leicester.

Chan. Div. } Stirling, J. } March 11, 29.

In re BOWEN.

LLOYD PHILLIPS *v.* DAVIS. (*a.*)

Will—Construction—Bequest to charity for ever—Gift over to individuals if general system of education established—Rule against perpetuities.

A testator bequeathed certain moneys to trustees upon trust to invest the same, and to establish and continue for ever certain day-schools in Wales, and he declared that, if at any time thereafter the Government should establish a general system of education, the trusts should determine and the moneys should go to the residuary legatees under his will. Under the Elementary Education Acts, 1870-90, a general system of education was established.

Held, that, upon the true construction of the will, there was an immediate disposition in favour of charity a perpetuity, followed by a gift over, under which the residuary legatees took a future interest, to arise upon an event which need not necessarily occur within perpetuity limits; and that, therefore, the gift over was void.

Adjourned summons.

(*a.*) Reported by W. A. G. WOODS, Esq., Barrister-at-Law.

The Rev. Daniel Bowen, by his will, dated the 3rd of September, 1846, made two charitable bequests of £1,700 and £500 to trustees upon trust to invest the same, and to establish Welsh day-schools in certain parishes in Wales, and to continue the same schools for ever thereafter, and he declared "that if at any time hereafter the Government of this kingdom shall establish a general system of education, the several trusts of the said several sums of £1,700 and £500 shall cease and determine, and I bequeath the said several sums in the same manner as I have bequeathed the residue of my personal estate." He appointed his sisters, Jane Lloyd, Annie W. Phillips, and Rachel Rees, executrixes and residuary legatees of his will.

The testator died on the 9th of October, 1847, and his will was duly proved on the 31st of December, 1847.

The Elementary Education Acts, 1870-90, have established a general system of education.

This summons was taken out by the persons interested in the residuary estate of the testator against the Attorney-General and the trustees of the respective sums of money for the determination of the question whether, in the events that had happened, the trusts of such moneys had determined, and whether the moneys had fallen into the residue.

Hastings, Q.C., and *Swinfen Eady*, for the plaintiffs.—The gift over to the residuary legatees has come into effect, inasmuch as a general system of education has been established by the Elementary Education Acts. The rule against perpetuities does not apply, because here the gift over follows a gift to a charity: *Christ's Hospital* v. *Grainger*, 1 Mac. & G. 460, 464.

They also referred to *In re Randell, Randell* v. *Dixon*, 36 W. R. 543, 38 Ch. D. 213, and *Walsh* v. *Secretary of State for India*, 11 W. R. 823, 10 H. L. Cas. 367.

Cruickshank, for the trustees of the respective funds.

Sir J. Rigby, S.G., and *Ingle Joyce*, for the Attorney-General.—The gift over is bad, for it depends upon a future event which may not happen within the limit of the rules against perpetuities: *London and South-Western Railway Co.* v. *Gomm*, 30 W. R. 620, 20 Ch. D. 562. The general rule does not apply to a gift to a charity followed by a gift to another charity, but a gift over to individuals after a gift to a charity is within the rule: Gray on the Rule against Perpetuities, pp. 192, 363. *In re Randell, Randell* v. *Dixon* does not apply, for in that case the gift to the charity was a terminable gift, and not, as in this case, a gift in perpetuity.

Hastings, Q.C., replied.

STIRLING, J., after stating the facts, said: According to the law as stated by Sir G. Jessel, M.R., in *London and South-Western Railway Co.* v. *Gomm*, if the gift in favour of the residuary legatees is one which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests, then the gift is bad, unless the circumstance that the prior gift is in favour of a charity makes a difference. It has been decided that the rule against perpetuities has no application to the transfer in a certain event of property from one charity to another: *Christ's Hospital* v. *Grainger*; *In re Tyler, Tyler* v. *Tyler*, 40 W. R. 7, [1891] 3 Ch. 252. The principle of those decisions, however, does not extend, in my opinion, to cases where (1) an immediate gift in favour of private individuals is followed by an executory gift in favour of charity, or (2) an imme-

diate gift in favour of charity is followed by an executory gift in favour of private individuals. Of the former class of cases, Lord Selborne, L.C., giving the judgment of the Court of Appeal in *Chamberlayne* v. *Brockett*, 21 W. R. 299, L. R. 8 Ch. App. 206, 211, says: "If the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment, to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises; if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities the gift fails *ab initio*."

The second class of cases does not seem to have fallen under the consideration of any court in this country; but the Supreme Court of Massachusetts has in *Brattle-square Church* v. *Grant*, 3 Gray, 142, and *Theological Education Society* v. *Attorney-General*, 21 Lathrop, 285, held that the rule against perpetuities applies to them. For the knowledge of these decisions I am indebted to the very learned and able treatise of Professor J. C. Gray, on "The Rule against Perpetuities" (see section 593), to which I was referred in argument. On the other hand, as property may be given to a charity in perpetuity, it may be given for any shorter period, however long; and the interest undisposed of, even if it cannot be the subject of a direct executory gift, may be left to devolve as the law prescribes. Of this an example is to be found in *In re Randell, Randell* v. *Dixon*, in which the head-note is as follows:—"A testatrix bequeathed £14,000 on trust to pay the income to the incumbent of the church at H. for the time being so long as he permitted the sittings to be occupied free; in case payment for sittings was ever demanded she directed the £14,000 to fall into her residue. Held, first, that the testatrix had not expressed a general intention to devote the £14,000 to charitable purposes, so that in case of failure of the trust for the benefit of the incumbent the fund would be applied *cy-près*; secondly, that the direction that the fund should fall into the residue, being a direction that the fund should go as the law would otherwise carry it, did not offend the rule against perpetuities."

The question which I have to decide, therefore, appears to me to reduce itself to one of the construction of the testator's will—*i.e.*, whether the testator has given the property to charity in perpetuity, subject to an executory gift in favour of the residuary legatee, or one for a limited period, leaving the undisposed of interest to fall into residue. In construing the will the rule to be applied is that stated by Lord Selborne in *Pearks* v. *Moseley*, 29 W. R. 1, 5 App. Cas. 714, 719:—"You are not to import the law of remoteness into the construction of the instrument by which you investigate the expressed intention of the testator. You take his words and endeavour to arrive at their meaning exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect." Now, the sums of £1,700 and £500 are bequeathed to trustees who are obviously selected with a view to the efficient administration of the charitable trusts created by the will, and were not intended by the testator to be charged with any duties as regards any other portion of his property. He directs the trustees named in the will, by means of the funds paid in to them by his executors, to establish certain schools, "and to continue the same schools for ever thereafter." He contemplates a perpetual succession of trustees in whom the execution of the trusts is to be vested. I think that on the true construction of the will there is an immediate disposition in favour of charity in perpetuity, and not for any shorter period. That is followed by a gift over if at any time the Government should establish a general system of education; and under that gift over the residuary legatees take not an immediate but a future interest. As the event on which that future interest is to arise is one which need not necessarily occur within perpetuity limits, it follows that the gift over is bad; and, consequently, the summons must be dismissed.

Summons dismissed.

Solicitor for the plaintiffs, *Sharon Grote Turner.*

Solicitors for the Attorney-General, *Hare & Co.*

Solicitors for the trustees, *Helder, Roberts, Son, & Walton*, for *W. Morgan Griffiths*, Carmarthen.

Chan. Div. Kekewich, J. } March 8, 9, 14; April 12.

In re SOMERSET.

SOMERSET *v.* EARL POULETT AND OTHERS. (*a.*)

Trustee—Breach of trust—Investment on mortgage—Valuation — Statute of Limitations — Measure of liability—Consent of beneficiary—Impounding interest —Trustee Act, 1888 (51 & 52 *Vict. c.* 59), *ss.* 4-6, 8.

The trustees of a marriage settlement, in contemplating an investment of the trust funds on mortgage, through their solicitor instructed an experienced valuer to report on the property and advise them what sum could be safely advanced upon it. With the instructions was sent a letter containing the following words: "It is desired by both mortgagor and mortgagees that as much money shall be advanced as you can advise will be properly secured."

The solicitor who so instructed the valuer on behalf of the trustees was also the solicitor of the proposed mortgagor. The valuer, in his report, valued the property at £42,750, and estimated the net rental at £1,070. He at the same time wrote a letter to the solicitor advising that £30,000 might be safely advanced. The proposed mortgagor being dissatisfied with this sum, the solicitor had an interview with the valuer, and subsequently the latter advised that £35,000 might safely be advanced upon the property, giving as the ground of this opinion the fact that he thought increased rents might be obtained. The trustees thereupon, in 1878, advanced the whole of the trust fund, consisting of a sum of £34,612, upon security of the property. The investment was made with the written consent of the tenant for life, and at his instigation and request. Interest on the mortgage was duly paid down to 1890, when it was found that the security was insufficient.

In an action brought against the surviving trustees by the tenant for life and his infant children entitled in remainder,

Held, as between the infant plaintiffs and the defendants, that the investment of the £34,612 was a breach of trust, and that the defendants were jointly and severally liable to make good the same.

Held, that £26,000 was the largest sum which might properly have been advanced, within the meaning of section 5 of the Trustee Act, 1888; *but*

Held, as between the tenant for life and the defendants, that his right of action was barred by section 8 of the Trustee Act, 1888, *and that his life interest in the whole trust estate must be impounded by way of indemnity to the defendants.*

Trial of action.

The plaintiffs in this action were Vere Francis John

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

Somerset and his infant children; and the defendants were Earl Poulett, Lord Dorchester, and Sir T. Meyrick, the surviving trustees of his marriage settlement.

By the settlement, dated in 1875, it was declared that the defendants and Granville R. H. Somerset (since deceased) should stand possessed of certain stocks and securities upon trust, after the marriage, with the consent in writing of the husband and wife during their joint lives, to sell and invest the same on real and other securities, and to pay the income to the husband for life, then to the wife for life, and, after the death of the survivor, to hold the trust estate on trusts for the children of the marriage. There were five children of the marriage, who with their father, Vere Somerset, were the plaintiffs in the action.

In 1878 Vere Somerset was desirous that the trust funds should be invested upon mortgage of the Hawkstone estate in Shropshire belonging to Lord Hill. With a view to this investment, Mr. Berger, a member of the firm of Wild, Berger, & Co., the solicitor of Lord Hill was employed to instruct a firm of valuers to value the estate on behalf of the trustees. A mortgage already existed on the estate, and it was proposed to transfer this to the trustees and to advance such further sum as might be advised. The instructions were sent to Farebrother, Ellis, & Co., who were thereby requested "to inspect the farms and report, and also to advise the trustees what additional sum can be safely advanced to Viscount Hill on the security of the property."

With the instructions was sent a letter containing the following words:—"It is desired by both mortgagor and mortgagees that as much money shall be advanced as you can advise will be properly secured."

The property was accordingly valued by Sir J. Ellis, a member of the firm of Farebrother, Ellis, & Co., who valued it at £42,750, and estimated the net rental at £1,070. He, at the same time, advised that £30,000 might be advanced on the property.

Lord Hill was dissatisfied with this figure, and Mr. Berger interviewed Sir J. Ellis upon the subject. Two days after the interview Sir J. Ellis wrote a letter advising the trustees that £35,000 might be safely advanced, the ground of his opinion being that he thought the rents might be increased if Lord Hill were willing to take that course.

The trust funds were thereupon sold and the proceeds, amounting to a sum of £34,612, were advanced to Lord Hill upon the security of the Hawkstone estate. The investment was made with the written consent of Mr. and Mrs. Vere Somerset, and at the request of Vere Somerset, although there was no direct evidence that he knew the advance to be improper.

Granville R. H. Somerset, who was a member of the bar and experienced in dealing with landed estates, and upon whose judgment his co-trustees stated that they relied, died in 1881. Mrs. Vere Somerset died in 1889. Mr. Jenkins, referred to in the judgment, was solicitor to Colonel Hill, Vere Somerset's father-in-law.

Warmington, Q.C., and *O. L. Clare*, for the plaintiffs.—No proper valuation of the property was made. The valuer was not employed independently of the owner of the property: *Learoyd* v. *Whiteley*, 36 W. R. 721, 12 App. Cas. 727; *In re Salmon, Priest* v. *Uppleby*, 38 W. R. 150, 42 Ch. D. 351; *Rae* v. *Meek*, 14 App. Cas. 558, 38 W. R. Dig. 179. The case does not come within section 6 of the Trustee Act, 1888. Vere Somerset did not consent to a breach of trust, but merely to an investment in Lord Hill's real estate.

Marten, Q.C., and *T. H. Carson*, for the defendants.—The valuer was instructed independently of the owner within the meaning of section 4 of the Trustee Act, 1888. The interests of the mortgagor and mortgagees were not so necessarily inconsistent that one person could not represent them both. The trustees reasonably belived that an able practical surveyor or valuer was instructed and employed independently of the owner of the property, and we submit that that is the true construction of the section. The plaintiff Vere Somerset is barred by section 8 of the Act: *In re Bowden, Andrew* v. *Cooper*, 39 W. R. 219, 45 Ch. D. 444; *Want* v. *Campain*, 9 Times L. R. 254. The life interest of the same plaintiff must be impounded under section 6 to indemnify the trustees if they are liable: *Griffith* v. *Hughes*, 40 W. R. 524, [1892] 3 Ch. 105. In any case we are liable only for the excess of the amount advanced over the amount which might properly have been advanced.

They referred also to *In re Godfrey, Godfrey* v. *Faulkner*, 32 W. R. 23, 23 Ch. D. 483; *In re Pearson, Oxley* v. *Scarth*, 51 L. T. N. S. 692, 33 W. R. Dig. 224; *Howell* v. *Young*, 5 B. & C. 259; *Smith* v. *Fox*, 6 Hare, 386; *Ricketts* v. *Ricketts*, 64 L. T. N. S. 263, 39 W. R. Dig. 243; and *Bradley* v. *Riches*, 26 W. R. 910, 9 Ch. D. 189.

Warmington, Q.C., in reply.—The net rental was insufficient to pay the interest on the mortgage, and it was a mere speculation that increased rents might be obtained.

He referred to *Fry* v. *Tapson*, 33 W. R. 113, 28 Ch. D. 268; *In re Page, Jones* v. *Morgan*, 41 W. R. 357, [1893] 1 Ch. 304; *In re Walker, Walker* v. *Walker*, 62 L. T. N. S. 449, 38 W. R. Dig. 203; *Hughes* v. *Twisden*, 34 W. R. 498; and *In re Swain, Swain* v. *Bringeman*, [1891] 3 Ch. 233, 40 W. R. Dig. 269.

Cur. adv. vult.

April 12.—KEKEWICH, J.—At the conclusion of the arguments I observed that this was one of the most difficult, and probably the most important, of pure chancery cases that had come before me as judge. Reflection has confirmed that impression. The general law, perhaps, is not now so difficult as formerly, because it has been fully expounded in several authorities, to some of which I must presently refer, and particularly by one emanating from the highest court in the realm, but, notwithstanding the Trustee Act, 1888, it is of vast importance, and the ever-changing scenes of life constantly present it under new aspects and raise new points of interest. This case itself is an illustration of such varieties. Further difficulties are introduced by the statute, and I can conceive no subject of deeper interest to trustees, or to those who have to advise them or conduct their cases, than the proper construction and application of its provisions. I have therefore reflected on the arguments in this case, and studied the facts, documents, and authorities with the utmost devotion of which I am capable, and with earnest anxiety to arrive, if possible, at a right conclusion on all and every the main points requiring consideration. In my judgment, which will run to some, perhaps, too great length, I shall have occasion to mention some of these facts, documents, and authorities. I could not mention all without even greater prolixity, and it is possible that some may be omitted which ought to be noticed, but they have been studied and weighed, and if some have failed to influence me as they ought, it is not because the opportunity has not been afforded.

Before determining, and in order to determine, the main points arising under the Trustee Act, 1888, it is necessary to consider to what extent, and on what grounds, the defendants can be held liable indepen-

dently of that statute—that is, under the law previously existing. And for this purpose it will be convenient to state shortly what I conceive to be that law, so far as it is applicable to the case in hand. It may be taken to be settled (see *Speight* v. *Gaunt*, 32 W. R. 435, 9 App. Cas. 1; and *Learoyd* v. *Whiteley*) that trustees must exercise in the discharge of their duties ordinary care and prudence, by which is meant such care and prudence as a reasonable man would exercise in the management of his own private affairs, and that so long as they do this, and act within the limits of their legal powers, they cannot be made liable for loss, even though incurred by what turns out to be a failure in discretion. Further, generally speaking, but subject, possibly, to some limitation, it may be taken to be settled that the liability of trustees as regards any particular transaction is not increased by reason of the fact that one of their number is skilled in the business with which that transaction is concerned.

As regards investments on mortgage, it is the duty of trustees to conclude for themselves, and by the exercise of their own judgment, whether any given security is sufficient for the amount which they propose to advance against it, and this holds good notwithstanding that the surveyor, solicitor, or other trusted agent expressed an opinion on the subject. There is no absolute rule respecting the choice of security falling within the strict limits of authorized investments, or the amount proper to be advanced against any particular security, but *Learoyd* v. *Whiteley* is a warning to trustees that land devoted to trade may not be regarded as a proper security at all, and the same case combined with others (see, for instance, *Fry* v. *Tapson*) shows that there are undefined, but fairly well understood, limits beyond which advances ought not to be made. Lord Watson says (12 App. Cas., at p. 734) that these limits must be understood as indicating the lowest margins which, under ordinary circumstances, a careful investor of trust funds ought to accept; and if, on the one hand, that implies that under special circumstances those margins need not be observed, it equally implies that it may not be safe to be content with them. In order to fix the limit of advance in any particular case it is necessary for trustees to be advised respecting the value of the property, and, unless they themselves are personally acquainted with it, they must also be advised respecting the character of the property and the probability of its continuing to be a proper trust security. The object of trustees must ever be to make a permanent investment—that is, one which will be maintained for a considerable period, and which will not only during that period yield the stipulated income, but will ultimately and whenever required realize the full sum advanced.

In *Learoyd* v. *Whiteley* (12 App. Cas., at p. 732), the Lord Chancellor dwells on the importance of securing the capital sum, but did not, I am convinced, intend to place in the background the importance of also securing the income, which may be, and often is, as essential to the welfare of the remainderman as it is to that of the tenant for life. Trustees, therefore, must regard any advice given to them respecting value from this double point of view, and cannot be absolved from liability for loss arising on a particular transaction by showing that their advance was within the allowed limits as regards capital if they were exceeded as regards income, and the income was insufficient to pay the stipulated interest.

I express myself thus because the limits stated with reference to capital have not been specifically applied to income, and I am not sure that, as regards income, some larger latitude might not safely be permitted. On the question how far, if at all, trustees may properly rely on the position of the borrower, there is, so far as I am aware, no authority. Men of ordinary care and prudence managing their own affairs, would no doubt take this into consideration, and in the mercantile world it is frequently treated as equally important with the value of the security. It is impossible, I think, to exclude it from the consideration of trustees, who are bound to have regard to all the circumstances connected with any proposed advance on security, and it would not be difficult to put cases in which the solvency or insolvency of the borrower would probably influence them in making an advance somewhat in excess of the limits generally allowed, or declining the transaction altogether; but where the object is to make a permanent investment of trust money on mortgage of real estate, it seems to me wrong to advance a sum largely in excess of what is otherwise right because it is believed that the borrower is now, and it is anticipated that he will remain, capable of paying the principal and interest, or such part thereof as cannot be realized from the security. The mortgages of May, August, and September, 1878, impeached in this action, and which for practical purposes may be treated as one transaction, must be examined on these principles.

When, how, and by whom this disastrous mortgage was first suggested does not clearly appear, and is perhaps immaterial. Suffice it to say that in the autumn of 1876 the plaintiff, Mr. Vere Somerset, who was tenant for life of the funds comprised in his marriage settlement, wished to have those investments realized and the proceeds advanced on the security of Lord Hill's Hawkstone estate. It is clear that from the first he desired thus to invest the whole of the trust funds, calculated to be £35,000 sterling, and that in this he was at one with his father-in-law, Colonel Hill, and the intended mortgagor, Lord Hill.

There are expressions in some of the early letters, such as Mr. Jenkins's letter of the 23rd of November, 1876, pointing in this direction, and to the same effect are Colonel Hill's two letters of some days in 1878, and Mr. Haste's two letters of the 4th of February, 1878. This is important, because it explains a passage in Messrs. Wild & Co.'s instructions to Sir John Ellis, which must be mentioned presently. There is no direct evidence of any communication of this to the trustees. It might or might not be right to infer that it was made, but, at any rate, Messrs. Wild & Co., who acted both for mortgagor and mortgagees, knew what was intended, and I must impute to the trustees the information which they possessed. It is not unusual, it is indeed very usual, for the same solicitor to act on behalf of mortgagor and mortgagee, and, where the investment is of trust money, to act also for the tenant for life, who has an immediate interest in the investment, and whose consent is generally, as here, required. It is only fair to solicitors to say that this difficult and delicate duty of acting impartially to clients with conflicting interests is generally discharged with perfect fairness and seldom gives rise to any complaint, but the position is, nevertheless, an embarrassing one, and when complaint is made, necessarily renders scrutiny of conduct more suspicious. I am particularly anxious to be careful in what I say respecting Mr. Berger, who managed the business in the present case, not so much because he is a member of a well-known firm of solicitors as because he has not had an opportunity in this action of explaining his conduct. I have already said, and I desire to repeat, that I have not a word to say against the discretion of the defendants' counsel in not calling Mr. Berger as their witness. This was a matter entirely for the determination of counsel, and I wish to uphold counsel in

the exercise of their discretion. I am quite satisfied that Mr. Marten exercised his in the best interest of his client, and experience tells me that some risk of observation must be incurred in the discreet selection or rejection of witnesses. But Mr. Berger was not called, and I cannot altogether avoid making remarks which may be disagreeable to him, and to which he possibly has a complete answer. Mr. Berger knew that it was a condition of the proposed mortgage on Lord Hill's part that his firm should act both for mortgagor and mortgagees. He knew, further, that Mr. Haste, Lord Hill's agent, was in communication with Mr. Vere Somerset, who over much assumed the position of mortgagee, though his trustees really filled that character, and that Mr. Haste apparently acted, as according to Mr. Vere Somerset's admission he in truth acted, as agent quite as much for that gentleman as for Lord Hill. He also knew that the intended mortgage was to be for as much as £35,000, and that this would be as advantageous to Lord Hill as to Mr. Vere Somerset. For all this, I need only refer to the correspondence, which contains abundant proof without quoting particular passages. He seemed to have assumed that the trustees concurred with Mr. Vere Somerset in wishing that the whole trust moneys should be advanced to Lord Hill on the security of the Hawkstone estate. At least I find in the correspondence no inquiry by him from them and no statement by them to him contradicting this view. Mr. Vere Somerset knew the Hawkstone estate. That he was acquainted with the details of the property or the rentals of the several farms is not shown by the evidence, and I do not think was the fact, but he had some knowledge of it, whereas his trustees appear to have had none. This also, I think, must have been known to Mr. Berger. It is only fair to the trustees to say that though in the event they were guided, perhaps foolishly, yet not unnaturally, by Mr. Berger, and although the other three also not unnaturally relied on their colleague, Mr. Granville Somerset, who, besides being a member of the bar, is said to have had large experience in landed estates, yet they were by no means eager to embark on this transaction or to advance the trust money without proper precaution, or on other than good security. I cannot but think that if Mr. Berger had stood firm, or if he had pointed out to them the objections to the course pursued and the risks which they were incurring, they would have drawn back and would have avoided this litigation. The transaction was, nevertheless, theirs, and they cannot be heard to say that the instructions given to Sir John Ellis were not given on their behalf, or that his advice was not given to them and did not form the basis of thier action. On those instructions and on that advice it is now my duty to comment.

On the instructions strictly so called I have only two remarks (neither of them of great importance) to make. The statement that the property was then in mortgage to clients of Messrs. Wild & Co. for £12,700 not explained by the documents or evidence, but it can hardly be material from any point of view, and I pass it by. The request that Sir John Ellis would advise the trustees what additional sum they might properly advance to Lord Hill on the security offered is so common and has received such sanction from the Legislature (Trustee Act, 1888, s. 4) that, though in my opinion improper, I will not comment on it. But with the instructions was sent a letter which cannot be thus lightly dealt with. In this letter is the statement: "It is desired by both mortgagor and mortgagees that as much money shall be advanced as you can advise will be properly secured." Wish to give all due weight to the word "properly," and I will take it to have been intended to have been of the essence of the passage in which it occurs. Nevertheless I deem that passage to have been wholly wrong. In the first place there is not a tittle of evidence to show that the mortgagees did desire to advance as much as could properly be secured. Lord Hill did and Mr. Vere Somerset did. But the trustees were the mortgagees, and their desire, if it existed, has not been expressed. Apart from that the passage starts the valuation on a wrong basis, and suggests to the valuer that he shall at least not err on the side of caution. Sir John Ellis's report is contained in two documents: one a valuation and the other a letter of July 8, 1878. Of the valuation, having seen Sir John Ellis in the witness box and heard his explanation, I need only say that it is a strange instance of the sanguine view of the value of land frequently adopted some years ago and bitterly negatived by present facts.

The letter deals with the amount to be advanced. Sir John Ellis practically admitted that three-fourths of any value was a large proportion to advance on real security, and of course it was in excess of what trustees could properly advance under, say, ordinary circumstances, but in the letter he guarded himself by referring to the position of the borrower as possibly influencing the prudence of a large advance. The question is not whether he ought to have said this, but whether the trustees ought to have given any weight to it. If the principles above laid down are as sound as I believe them to be there is no room for doubt on this point. I conclude from the evidence of the trustees that they all had an opportunity of seeing, and that some of them certainly did see, the valuations. I am not sure that they saw the letter, but they were told (see Messrs. Wild & Co.'s letter of the 10th of July, 1878) that according to the report £30,000 might be advanced, and this is really a trifle less than three-fourths of the value put on the property. If the matter had stopped there—that is, if they had advanced £30,000 and no more—they might possibly have saved themselves. It was more, as will be presently seen, than they, in my opinion, ought to have advanced, but it might not have been held such an imprudence as imposed liability. Unfortunately it did not stop there. It appears that Lord Hill was not satisfied. He had always intended to raise £35,000, and knowing that it was Mr. Vere Somerset's intention he was naturally disappointed to find that £30,000 only would be forthcoming. This must have been communicated to Mr. Berger, who thereupon saw Sir John Ellis. I know from that gentleman, but unfortunately without Mr. Berger's correction, what passed at the interview. Sir John Ellis considered himself as no longer occupying the position of valuer, but as called in to advise the parties in a friendly manner what might be done, and if the desire mentioned in the letter of the 18th of June, 1878, was not then repeated, as I should infer it was, the letter itself must have been present to his mind. Acting as the friend of the parties, *amicus curiæ* he styled it, he advised that £35,000 might be advanced. This advice is contained in a letter of 17th July, 1878, and is there based, not so much on the present value, which, be it observed, is not stated to be greater than that fixed by the report, as on the increased rents which, if Lord Hill would but sanction it, might, in his opinion, be obtained. The trustees were informed of this. Whether they all were told how the rise from £30,000 to £35,000 was justified I do not know, but in the letter of the 17th of July, 1878, addressed to Mr. Granville Somerset, it was explained in the best possible manner—namely, by enclosing a copy of that received from Sir John Ellis. On this the trustees advanced, not £35,000, because that full amount was not forthcoming, but £34,612, which I

understand to have been all that the trust fund could produce. The impropriety of it is, in my judgment, beyond question. The amount was far in excess of what, according to any rule applied with any latitude or laxity, ought to have been advanced, and it was arrived at by a process unsound in itself, and especially objectionable when applied to the investment of trust funds. The liability of the defendants according to law, standing independently of the Trustee Act, 1888, being thus established, it remains to consider the several questions arising under that Act. They must be treated separately, and it will be convenient first to take those sections which are said to negative the liability wholly or partially, and afterwards those which are invoked to show that the liability cannot be enforced by, or is compensated by, counter-claim against one of the plaintiffs, Mr. Vere Somerset.

I will not read any section at length, the language being before me as well as before all interested in the case, but particular words and expressions must be noticed and receive some comment.

A question of grammar arises on section 4, which is the first to be considered. Mr. Marten, who argued this case with even more than his usual industry and ability, almost persuaded me that the words "believed to be" governed "instructed and employed independently of any owner of property," so that on the assumption that the trustees were ignorant, and not culpably ignorant, of any instructions to, or employment of, Sir John Ellis, on behalf of Lord Hill, they would be entitled to rely on that gentleman's report as to the value of the property, because made by an able practical surveyor or valuer, whom they believed to have been instructed and employed independently of any owner of the property. The point has become immaterial, and I need not pursue it further than to say that I remain of the opinion expressed in *Walker* v. *Walker*, that this is not the grammatical or right construction of the section. Such a construction, however, would not avail the defendants, because there was only one report as to the value of the property, and the sum advanced exceeded two equal third parts of that value. This excess is fatal to the defendants' plea of the 4th section. As regards the 5th section the puzzle is not how to construe it, but how properly to apply its provisions to the facts of this case. It seems to suppose that whenever a mortgage security is found to have been a proper investment in all respects there is a possibility of determining what less sum than was actually advanced thereon might have been safely advanced. I entertain a strong opinion that if the trustees had acted prudently with reference to Sir John Ellis' report (I set aside for this purpose his advice respecting the amount which might be advanced) they would have said that it did not afford materials sufficient to enable them to arrive at a conclusion. They would have observed that the high value placed on the property could not well have been calculated, and Sir John Ellis admitted that it ought not to have been, and really was not, calculated with reference to the then rental, and, further, that the rental certainly did not, and that the value possibly did not, make any allowance for deductions in respect of tithe and land tax, notwithstanding that they were mentioned in the body of the report as falling on the landlord. If, however, they had set themselves to consider, as trustees, that is, as men of ordinary prudence, to determine what sum might safely be advanced on mortgage, they would, as I have already endeavoured to explain, have considered the receivable income as much as the capital value, and they would have made an advance calculated on the basis that they might depend on the receipt of interest at, say, four per cent. from the actual rental. Seeing that the capital value was large, they might have been justified in not insisting on more than a small margin of rent; but this would have been the extreme limit of prudence. Some margin there must be to provide against contingencies, including possession and collection. The actual rental was £1,180, from which had to be deducted for tithe and land tax £110 odd, leaving, say, a net rental of £1,070.

If, recognizing the investment as a proper one in all respects, I am compelled by the language of the section to say what less sum than that actually advanced might have been advanced thereon, I fix the utmost limit at £26,000. In this I am giving a large interpretation to a remedial statute, and treating the trustees with a generosity barely warranted by the materials which the trustees have placed at my disposal. According to the actual and prospective realization of the security stated to me in the course of the argument, this figure will not be of great practical advantage to them, but they shall have it for what it is worth. Passing by for the moment section 6, I proceed to consider the question suggested by section 8, sub-section (*b*). The investment was made in 1878, the writ in this action was issued in 1892, so that if this provision means that the right of action against trustees under such circumstances as here exist shall be barred as against a beneficiary whose interest is in possession at the expiration of six years from the date of investment, Mr. Vere Somerset's right to sue is gone, though the trustees remain liable to his infant children. The plaintiff's argument was that the principle of *Howell* v. *Young* has no application to such a case as this, and that according to the words of the statute itself the action must be treated as one for money had and received, and that so treating it the plea cannot be maintained. The meaning of the provision, that is of the particular language in which the provision is expressed, is not, to my mind, by any means clear, but I do not think that it means what was contended by the plaintiff. It would have been easy, and possibly better, to provide, if that had been the intention, that an action against trustees to recover money or other property to which no existing statute of limitations applied should be brought within six years from the time when the right of recovery accrued, but notwithstanding that it has not been so plainly provided, that must, I think, be the meaning of the section. I suppose that the words "money had and received" were used because in that particular form of action for debt there was more analogy to pleadings and procedure in Chancery than in any other like action, and in truth an action of that character might have been brought, and sometimes was brought, against trustees in what we now call the Queen's Bench Division before the Judicature Acts. The controlling words for the purposes of construction are, I think, an action of debt, and in such an action a plea that the right accrued six years before writ issued is good and can only be defeated by acknowledgment or some other act taking the case out of the statute.

This apparently was the view of other judges before whom the section has come, although the precise point either did not arise or was not argued before them. I am referring to *In re Bowden, Andrew* v. *Cooper*, before Fry, L.J.; *In re Swain, Swain* v. *Bringeman, In re Page, Jones* v. *Morgan*, before North, J.; and *Want* v. *Campain*, before Wright, J. The attempted answer is that there has been what has been equivalent to acknowledgment, namely, that from the date of investment until some time in 1890 the mortgage was treated as good, and interest at the stipulated rate was paid, and the plaintiff calls in aid of the argument a

passage in the judgment of Fry, L.J., in the case above noticed. His language is this: "If this had been an action for debt for money had and received, and the debt had arisen more than six years ago, and no acknowledgment had taken place in the meanwhile, the lapse of time would have furnished a defence." I desire humbly to express my entire concurrence with the view of Fry, L.J., that an acknowledgment suffices to defeat a plea of the statute as much in an action against a trustee as in any other action for money had and received, but I fail to see how what has occurred here can be regarded as an acknowledgment for this purpose. There has been no concealment, no disclosure of new facts, no payment of interest except on the basis of a mortgage the character of which was as well known to Mr. Somerset as to the trustees themselves. According to the short report in the *Times*, Wright, J., deals with this precise point in *Want* v. *Campain*. He is there reported to have held that a tenant for life was barred by the provision of section 8 now under consideration, notwithstanding the receipt of interest by her until shortly before the issue of the writ, and I follow his decision, not merely because he has decided the point (for with so recent a case not fully reported before me I might not be justified in doing that), but because it entirely commends itself to my judgment. As against Mr. Vere Somerset I must hold that the statute affords a complete answer on the part of the defendants.

On the application of the 6th section there is little, I may venture to say no, authority. The point, although new and important, and by no means free from difficulty, can be simply stated. Mr. Vere Somerset consented in writing to the mortgage made, and it was made at his instigation and request. If that were all required he would certainly be liable to have his life interest impounded to indemnify the trustees against the loss which they are bound to make good to his children. But the statute contemplates a breach of trust committed by the trustee, and it is of the essence of the section that such breach of trust, nothing more or less, was committed at the instigation or request or with the consent in writing of the beneficiary sought to be charged. It is urged that Mr. Vere Somerset never intended to be a party, and was not in fact a party, to a breach of trust. No doubt he intended that the funds subject to the trusts of his marriage settlement should be advanced on the security of this property, and that he wished the whole of it to be advanced on that security, but he intended his trustees only to advance safely and prudently, and that he trusted them, their solicitors, and the valuer employed to see that all proper precautions were taken to this end.

It may be conceeded that Mr. Vere Somerset did not wish any advance to be made in excess of what would be properly secured. His object was to have the trust funds permanently invested on a good security yielding 4 per cent. interest. And if he had appreciated the risk which was being run in making so large an advance on such a security he would have hesitated to give, and I conclude he would not have given, his consent. But he was a party to all that occurred. He conducted the negociations to some extent himself, and more largely through Mr. Haste, who was his agent as much as that of Lord Hill, and if he did not actually know as much as was communicated to Mr. Granville Somerset respecting the interview between Mr. Berger and Sir John Ellis, and the friendly advice of the latter which followed that interview, he at least knew that £35,000, or in the event £34,612, was intended to be advanced on the security of property which was yielding only £1,070 net income, and that the high value, I will call it no more, of £42,750 left but a trifling margin. If this provision of the statute, which is based on the highest principles of equity long administered by the Court of Chancery, is to be allowed to have any operation at all, it must, I think, be applied to such a case as the present.

My judgment will be to the following effect:—There will be a declaration, as between the infant plaintiffs and the defendants, that the investment by the defendants and Mr. Granville Somerset of the £34,612 was a breach of trust, and that the defendants are jointly and severally liable to make good to the trust estate the difference between the sum actually advanced on the security of the property and £28,000, which is the largest sum which might properly have been advanced by the trustees on the security thereof. The same plaintiffs will be declared entitled to a lien on the proceeds of sale of the property already sold and on the property remaining unsold for the payment of this amount. There will be directions for the sale of what property remains unsold, and an inquiry to bring out the ultimate loss for which the defendants are liable. As between Mr. Vere Somerset and the defendants there will be a declaration that his right to sue is barred by the statute, and, further, that the defendants are entitled to have his life interest in the whole trust estate, whatever it be, impounded by way of indemnity to them against the liability before declared, and proper directions must be given to this end. The defendants must pay the infant plaintiffs' costs of action, and the order should provide for the payment of these costs directly to the plaintiffs' solicitors. This seems necessary because Mr. Vere Somerset is the next friend of the infants as well as personally plaintiff, and there can be no set off of costs due to and from him. He must pay the defendants' costs of the action so far as they have been increased by his joining as plaintiff and seeking relief against the defendants. These costs must be separately ascertained. There will probably be some other consequential directions, and I gather that it may be as well to appoint new trustees. Mr. Clare will be good enough to prepare minutes according to the above judgment, with such amplifications and additions as circumstances require.

Solicitors, *Pritchard, Englefield, & Co.*, for *E. Bygott*, Wem, Salop; *Hulberts & Hussey*.

Chan. Div.
Romer, J. } Feb. 2-4.

THORNLEY v. THORNLEY. (*a*.)

Husband and wife—Joint tenancy—Tenancy by entireties—Divorce—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1, 5.

A husband and wife purchased real property, some of which was conveyed to them jointly before the Married Women's Property Act, 1882, *and some after it. The husband and wife were subsequently divorced.*

Held, that the decree absolute in the divorce proceedings rendered them joint tenants as regards property conveyed to them before the said Act, even though before it they were tenants by entireties; that, as regards property conveyed to them as joint tenants since the Act, the wife's share belonged to her for her separate use; and that she was entitled to an account of the rents and profits.

Trial of action.

This was an action brought by Caroline Ruth

(*a*.) Reported by J. W. GREIG, Esq., Barrister-at-Law.

Thornley against Joseph Thornley, her late husband, who had obtained a divorce from her. The action related to various plots of land purchased in the joint names of the husband and wife, with moneys the proceeds of a business of pedlars and furniture dealers carried on by them.

The parties were married in the year 1860, and in 1889 they separated. The husband subsequently presented a petition for dissolution of the marriage, which was granted, and on the 25th of October, 1892, the decree absolute was made.

By an indenture dated the 15th of January, 1876, and made between H. C. Best of the one part, and Joseph Thornley and Caroline Ruth, his wife, of the other part, H. C. Best, for the consideration therein mentioned and expressed to be paid to her by J. Thornley, conveyed to J. Thornley and his heirs a piece of land at Southsea, to hold the same unto J. Thornley and his heirs "to such uses, for such estates, and in such manner as the said Joseph Thornley and Caroline Ruth, his wife, shall by any deed or deeds jointly appoint; and in default of such appointment and so far as any such appointment shall not extend to the use of the said Joseph Thornley and Caroline Ruth, his wife, during their joint lives without impeachment of waste, and from and immediately after the decease of such one of them as shall first die to such uses, for such estates, and in such manner as the survivor should by deed or will appoint, and in default of such last-mentioned appointment, and so far as any such appointment should not extend to the use of the survivor of the said Joseph Thornley and Caroline Ruth, his wife, his or her heirs or assigns, for ever."

By an indenture dated the 13th of January, 1883, and made between Thomas Maidment of the one part and Joseph Thornley and Caroline Ruth, his wife, of the other part, in consideration of £515 expressed to be paid by Joseph Thornley and Caroline Ruth, his wife, Thomas Maidment conveyed to Joseph Thornley and his heirs a piece of land and two messuages at Southsea, to hold the same to Joseph Thornley and his heirs to uses which were similar to those contained in the deed of 1876.

By an indenture dated the 27th of February, 1884, in consideration of £2,090 paid by Joseph Thornley and Caroline Ruth, his wife, Mark Morgan and George Dimmer conveyed to Joseph Thornley and his heirs certain lands and messuages in Portsea, to hold the same unto Joseph Thornley and his heirs to such uses, upon such trusts, and for such purposes, and generally in such manner as Joseph Thornley and Caroline Ruth, his wife, should by deed jointly appoint, and in default thereof and subject thereto to the use of Joseph Thornley and Caroline Ruth, his wife, during their joint lives, and after the determination of that estate to the use of the survivor in fee simple.

By an indenture dated the 9th of May, 1888, in consideration of £625 paid by Joseph Thornley and Caroline Ruth, his wife, certain lands and hereditaments in Southsea were conveyed by J. H. Page to Joseph Thornley and Caroline Ruth, his wife, in fee simple to such uses as they should by deed jointly appoint, and in default thereof to the use of Joseph Thornley and Caroline Ruth, his wife, and the survivor of them in fee simple.

By an indenture dated the 9th of August, 1888, and made between A. L. Owen and W. H. Underhill (thereinafter called the vendors) of the first part, Caroline Ruth Thornley, the wife of Joseph Thornley, of the second part, Joseph Thornley of the third part, and F. Bevis of the fourth part, in consideration of £400 expressed to be paid by C. R. Thornley out of money belonging to her for her separate use, the vendors conveyed a piece of land at Southsea to C. R. Thornley in fee simple as and for part of her separate estate. And by an indenture indorsed on the last-mentioned deed, and dated the 18th of August, 1888, C. R. Thornley, as beneficial owner, conveyed the same land to J. Thornley in fee simple to the use of the said Joseph Thornley and Caroline Ruth, his wife, in fee simple as joint tenants.

By an indenture, dated the 29th of September, 1888, E. A. Sanders, W. Barnes, and E. J. Sanders, in consideration of £700 expressed to be paid to them by Joseph Thornley and Caroline Ruth, his wife (therein called the purchasers), out of moneys belonging to them on a joint account, conveyed a piece of land and certain messuages at Southsea, to hold the same unto and to the use of the purchasers in fee simple after the separation.

After the separation the husband received the rents and profits of these various properties.

The claim asked a declaration that C. R. Thornley was beneficially entitled for her separate use to the freehold properties purchased as aforesaid, and absolutely entitled to the businesses and certain furniture and for accounts of rents and profits from the date of the separation in 1889.

Alexander, Q.C., and *P. B. Abraham*, for the plaintiff.—Land conveyed to the use of the husband and wife before the Married Women's Property Act of 1882 became vested in them as tenants by entireties, that is to say, whilst the husband may do what he pleases with the rents and profits during the coverture, he cannot dispose of any part of the inheritance without his wife's concurrence: Williams on Real Property, 12th ed., p. 226. The divorce made them in law separate persons and entitled to the property as joint tenants. The property conveyed after the Act was held by them as joint tenants, the wife's interest belonging to her for her separate use: *In re Jupp*, 36 W. R. 712, 39 Ch. D. 148. The plaintiff is entitled to an account of the rents and profits of the property from the dates respectively from which she was excluded from the receipt.

Neville, Q.C., and *W. B. Heath*, for the defendant.—The meaning of the deeds is that the wife shall take after the husband's death. There is a resulting trust in favour of the husband.

Alexander, Q.C., replied.

ROMER, J. [after deciding that the business belonged to the husband].—With regard to such portion of the plaintiff's case as depends upon the deeds which have been executed, I will first deal with the deeds which were executed before the coming into operation of the Married Women's Property Act, 1882, and which purport to give estates to the husband and wife in terms which would have made them joint tenants if they had not been married. Now in the eye of the law they were during coverture one person, and they held by entireties, the husband being entitled to receive the rents during coverture, though neither could deal with the estate apart from the other so as to affect the rights of the survivor. What happened then, on the divorce taking place? They ceased to be husband and wife, they ceased to be one person, and in my judgment they held the estate as ordinary joint tenants, and the husband's right to receive the rents, which existed during coverture, came to an end. From the time of the divorce the wife, being *feme sole*, became entitled under 4 & 5 Anne, c. 3, s. 27, to an account as a joint tenant against her late husband. It has been agreed before me without argument, and without it being necessary to decide the point, that the account asked for runs as from the date of the decree absolute, and not from the decree

sini. I have now to deal with the estates conveyed after the Act of 1882 to the husband and wife in terms which would have given them, if not married, a joint estate. The presumption is that where a husband's property is conveyed by his directions in such a form as to give the wife an interest, the wife's interest is intended by the husband as an advancement by him, and the presumption is that there is not a resulting trust as between the wife and the husband. In the case before me that presumption is not only not rebutted, but is strengthened, and such interest as the wife obtained from the conveyances I am now dealing with became her own, and she certainly did not hold those interests in trust for her husband. What is the effect of the Act of 1882 upon the interests so given to the wife? In my judgment the wife's interest, such as it was, clearly became her's for her separate estate, and to hold, not in entireties, but as joint tenant with her husband, her interest as joint tenant being for her separate use. She can accordingly maintain an action for an account against her husband so far as she has not assented to his receiving her share of the income—that is to say, in the case before me, from the date of the separation in 1889. There is no dispute, I think, between the parties as to that date being the proper date to be considered for the purpose. Of course, so far as the husband has since that date made payment to the wife on account of her separate estate he will get credit for that in the account, and where the wife's interests with the husband's are jointly covered by a mortgage the husband will take credit for the interest he has paid on the mortgage debt and for all outgoings generally which were a charge upon the interest. That settles the principle on which the plaintiff is entitled to recover as against the husband in the action.

Solicitors for the plaintiff, *Emanuel & Simmonds.*

Solicitor for the defendant, *Edwin Wood.*

Q. B. Div.
(Lord Coleridge, C.J., and Cave, J.) — Jan. 17; May 19.

NEWBOLD FRIENDLY SOCIETY (*Appellants*) v. BARLOW (*Respondent*). (*a.*)

Friendly society—Sum paid for funeral expenses of child under ten years of age—Production of certificate of death—Industrial assurance company—Persons "who issue, or are liable upon, policies of assurance upon human life"—Friendly Societies Act, 1875 (38 & 39 *Vict. c.* 60), *ss.* 4, 28—*Life Assurance Companies Act,* 1870 (33 & 34 *Vict. c.* 61), *s.* 2.

By section 28 *of the Friendly Societies Act,* 1875, *it is made an offence for any "society" to pay any sum on the death of a child under ten years of age, except upon the production by the parent of the child of a certificate of death issued by the registrar of deaths; and (sub-section* 7) *"society" is defined to include "industrial assurance companies assuring the payment of money on the death of children under the age of ten years."*

By section 4, *"industrial assurance company" is defined to mean (if not inconsistent with the context) "any company as defined by the Life Assurance Companies Act,* 1870, *which grants assurances on any one life for a less sum than twenty pounds, and which receives contributions . . . by means of collectors at less periodical intervals than two months."*

By section 2 *of the Life Assurance Companies Act,* 1870, *"company" is defined to mean "any person or persons, corporate or unincorporate, not being registered under the Acts relating to friendly societies, who issue, or are liable under, policies of assurance upon human life."*

A society, whose registration under the Friendly Societies Acts had been cancelled, and which was registered under the Companies Acts, did not issue policies of assurance, but collected and entered upon a contribution card fortnightly contributions from its members, and was liable to pay sums of money upon the death of a member for funeral expenses. The society was convicted under section 28 *of the Friendly Societies Act,* 1875, *for having paid such a sum on the death of a child under the age of ten years without the production of a certificate of death.*

Held, that the words in section 2 *of the Life Assurance Companies Act,* 1870, *"who issue, or are liable under, policies of assurance upon human life," must be excluded from the definition of "society" in section* 28 *of the Friendly Societies Act,* 1875, *as being inconsistent with the context; and that the society fell within that definition, and the conviction was right.*

Special case stated by justices of the borough of Rochdale. The material parts of the case were as follows:—

At a petty sessions holden at Rochdale on the 17th of August, 1892, an information was preferred by the respondent on behalf of the Chief Registrar of Friendly Societies against the appellants for that they did unlawfully commit a breach of section 28, sub-section 2, of the Friendly Societies Act, 1875, by paying a sum of money, to wit, £4, on the death of a child named John James Kay, under ten years of age, to Alice Kay, the parent of such child without the production by such parent of a certificate of death issued by the registrar of deaths containing the particulars required by the said section. The magistrates convicted the appellants and adjudged them to pay a penalty of £2 and £3 10s. 4d. costs.

Upon the hearing of the information it was admitted by both parties that the registration of the appellants under the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), was cancelled by the Chief Registrar of Friendly Societies on the 22nd of January, 1885, and that the appellants subsequently carried on their business as an unregistered society, and were afterwards registered as a company under the Companies Acts, 1862 to 1890.

The objects of the company were stated in the memorandum of association to be "to take over and carry on the business of the friendly society called The Newbold Friendly Society, and to provide by subscriptions, with or without the aid of donations, for the relief or maintenance of members of the society during sickness or other infirmity not being mental, and for insuring money to be paid for the funeral expenses of members and for all other purposes incident to the carrying into effect the above-named objects," and it was thereby declared that "the society does not intend nor shall it be empowered to issue policies of assurance on human life or to grant annuities on human life within the meaning of the Life Assurance Companies Act, 1870."

It was provided by the articles of association that members of the society should pay an entrance fee and a fortnightly subscription, which varied according to the age of the member, and should be entitled to sick pay and funeral gifts upon a scale based upon the amount of the contribution. Each member received a subscription card, upon which the appellants' collectors entered the contributions received.

Article 71 was as follows:—"In the event of the death of any member immediate notice shall be given

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

to the collectors of the district, who shall receive a certificate of the death from the parents or guardians of the deceased member and forward the same to the president, vice-president or secretary, or the committee of management may at their discretion dispense with any such certificate. The collector of the district shall view the corpse," but if the corpse should be outside the district and over six miles from the registered office of the society, a certificate from the registrar should be deemed sufficient.

The Friendly Societies Act, 1875, provides as follows:—Section 28—"With respect to payments on the death of children under ten years of age the following provisions shall have effect:—(2) No society shall pay any sum on the death of a child under ten years of age except to the parent of such child or to the personal representative of such parent, and upon the production by such parent, or his personal representative, of a certificate of death issued by the registrar of deaths or other person having the care of the register of deaths containing the particulars aftermentioned. (6) It shall be an offence under this Act (*a*) if any society pays money on the death of a child under ten years of age otherwise than is provided by this Act. (7) The word 'society' in the present section shall include all industrial assurance companies assuring the payment of money on the death of children under the age of ten years."

By section 4 of the same Act "industrial assurance company" is defined to mean "any company as defined by the Life Assurance Companies Act, 1870, which grants assurances on any one life for a less sum than £20, and which receives premiums or contributions in Great Britain or Ireland by means of collectors at less periodical intervals than two months."

By section 2 of the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), the term "company" is defined to mean "any person or persons, corporate or unincorporate, not being registered under the Acts relating to friendly societies, who issue, or are liable under, policies of assurance upon human life within the United Kingdom, or who grant annuities upon human life within the United Kingdom."

The following facts were admitted by both parties, viz.:—That Alice Kay was a member of the said society, and had paid contributions which entitled her to the sum of £5 in the event of the death of her son, John James Kay, for funeral expenses; that the said John James Kay died on the 20th of April, 1892, aged six years; that on the 21st of April, 1892, the sum of £5, being the amount of the funeral expenses insured to the said Alice Kay upon the death of the said John James Kay as aforesaid was paid to the said Alice Kay by a collector on behalf of the appellants without the production of a certificate of death, but in other respects according to the provisions of article 71 of the articles of association.

It was contended by the respondent at the hearing before the magistrates that the appellants were a society as defined by section 28, sub-section 7, of the Friendly Societies Act, 1875, and that the declaration in the memorandum of association that the appellants should not issue policies on human life within the meaning of the Life Assurance Companies Act, 1870, did not prevent the application of section 28 of the Friendly Societies Act, 1875; that the appellants did issue policies on human life within the meaning of section 2 of the Life Assurance Companies Act, 1870, and that the appellant society was an industrial assurance company as defined by section 4 of the Friendly Societies Act, 1875.

The respondent, while contending that the appellants were a "company" as defined by section 2 of the Life Assurance Companies Act, 1870, admitted in argument that they were not a life assurance company for the purposes of that Act.

It was contended on behalf of the appellants that the clause in the memorandum of association which declares that the society does not intend nor shall it be empowered to issue policies of assurance on human life or grant annuities on human life within the meaning of the Life Assurance Companies Act, 1870, showed conclusively the objects of the society, and that the society was not subject to any of the provisions of the Friendly Societies Act, 1875, and, in particular, was not subject to section 28 of the Act; that the society was not a life assurance company within the meaning of the Life Assurance Companies Act, 1870; that 'funeral gifts' were not life assurances; that the card given to the member was only an acknowledgment of the contributions paid, and was not a policy of assurance within the meaning of section 2 of the Life Assurance Companies Act, 1870; and that by article 71 of the articles of association ample provision was made to prevent the mischief aimed at by the Friendly Societies Act, 1875, in respect of insurances on infant life.

The question for the opinion of the court was whether the appellant society was a society as defined in section 28, sub-section (7), of the Friendly Societies Act, 1875, and subject to sub-section (2) of the same section.

If the opinion of the court should be in the affirmative the conviction was to stand, but if the court be of a contrary opinion then the conviction was to be quashed.

Jan. 17.—*Arnold Herbert* (*Pankhurst* with him), for the appellants.

Sir Charles Russell, A.G. (*Henry Sutton* with him), for the respondent.

The arguments sufficiently appear from the foregoing statement of the case by the justices.

As to the meaning of the word "policy" the judgments in *Good* v. *Elliott*, 3 T. R. 693, were referred to.

Cur. adv. vult.

May 19.—The judgment of the COURT (Lord COLERIDGE, C.J., and CAVE, J.), was delivered by

CAVE, J.—The question in this case is whether the appellants were liable to be convicted under the Friendly Societies Act, 1875, s. 28, sub-section 2, which enacts, "No society shall pay any sum on the death of a child under ten years of age, except to the parent of such child, or to the personal representative of such parent, and upon the production by such parent or his personal representative of a certificate of death issued by the registrar of deaths or other person having the care of the register of deaths containing the particulars after mentioned."

The appellants were admittedly guilty of the offence if they were a society within the meaning of the section. As to that sub-section 7 enacts that "the word 'society' in the present section shall include all industrial assurance companies assuring the payment of money on the death of children under the age of ten years."

Section 4 of the same Act enacts that "if not inconsistent with the context, 'industrial assurance company' means any company as defined by the Life Assurance Companies Act, 1870, which grants assurances on any one life for a less sum than twenty pounds, and which receives premiums or contributions in Great Britain or Ireland by means of collectors at less periodical intervals than two months."

The Life Assurance Companies Act, 1870, by section 2, enacts that "the term 'company' means any person or persons, corporate or unincorporate, not being registered under the Acts relating to friendly societies, who issue or are liable under policies of assurance upon human life within the United Kingdom, or who grant annuities upon human life within the United Kingdom.

Putting all these enactments together, sub-section 2 of section 28 of the Friendly Societies Act of 1875 will read as follows:—"No society (which word includes, if not inconsistent with the context, any person or persons, corporate or unincorporate, not being registered under the Acts relating to friendly societies, who issue or are liable upon policies of assurance upon human life within the United Kingdom, or who grant annuities upon human life within the United Kingdom, and who grant assurances on any one life for a less sum than £20, and who receive premiums or contributions in Great Britain or Ireland by means of collectors at less periodical intervals than two months, and who assure the payment of money on the death of children under the age of ten years) shall pay any sum on the death of a child under ten years of age, except to the parent of such child, or to the personal representative of such parent, and upon the production by such parent or his personal representive of a certificate of death issued by the registrar of deaths or other person having the care of the register of deaths containing the particulars after mentioned."

It is contended for the appellants that they do not fall within this enactment, on the ground that, although they come within the rest of the definition, they do not issue and are not liable upon policies of assurance.

Now, we cannot perceive any ordinary sense of the words "policies of assurance" under which it can be said that the appellants issue such policies, and if they do not issue such policies we do not see how it can be said that they are liable under policies of assurance without using the words "policies of assurance" in two senses—one when they are read with the word "issue," and another when they are read with the words "liable upon," which in our judgment is inadmissible.

On the other hand, to hold that the appellants are not within section 28, sub-section 2, would be to deprive sub-section 7 of all meaning, and that where it is most important that it should have a meaning. If such bodies as the appellants are not within the section, the lives of children under ten are deprived of the protection intended to be thrown around them by the section in question.

In our judgment, the words "who issue or are liable under policies of assurance" are to be rejected altogether as inconsistent with the context, which sufficiently limits these companies by requiring that they shall be companies assuring the payment of sums of less than £20 on the death of children under ten, the premiums on which are collected at less periodical intervals than two months.

In our judgment the magistrates were right, and the appeal must be dismissed, with costs.

Appeal dismissed.

Solicitors for the appellants, *Woodcock, Rylands, & Parker*, for *Taylor & Co.*, Rochdale.

Solicitor for the respondent, *The Solicitor to the Treasury.*

Court of Appeal.

From Chan. Div. (Lindley, Bowen, and Kay, L.JJ.) — May 4.

POWELL v. LONDON AND PROVINCIAL BANK. (a.)

Company—Stock—Trustee—Deposit of certificate—Blank transfer—Subsequent filling up by transferee—Delivery—Execution—Purchase for value without notice—Legal title—Companies Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 16), *ss.* 14, 15, 18.

M. E., the executor of a sole surviving trustee of a marriage settlement, held on behalf of the trust a sum of stock of a company which was governed by the provisions of the Companies Clauses Consolidation Act, 1845; *his name was indorsed as executor on the certificate, and the certificate bore on the face of it that "no interest in this stock can be acquired by the deposit of this certificate." He deposited the certificate with a bank to secure an overdraft, stating that the stock belonged to him absolutely; he also signed and deposited a loan note, undertaking when called upon to execute a proper assignment or transfer; and he further deposited a blank transfer, signed and sealed by him, purporting to transfer the stock. The period of credit having run out, the bank, after giving notice to him that they proposed to register the stock in their name, filled in the blank transfer, with their own name as transferees, and got themselves registered as owners of the stock. The transfer, at the time of and after being filled up, was never seen by M. E., but the bank afterwards wrote and told him that they had received the dividend on the stock, and that they proposed to credit him with the amount, and they were subsequently authorized by him to sell the stock, but it was not, in fact, sold.*

Held, that there had been nothing amounting to a redelivery of the transfer by the transferor after the blanks had been filled in by the bank, and that the bank had no legal title to the stock.

Decision of Wright, J., *affirmed.*

Appeal from a decision of Wright, J.

The plaintiffs were two trustees under a marriage settlement and a beneficiary thereunder. The defendant bank was registered as owners of a sum of £1,000 stock of the Penarth Harbour Co. This sum was claimed by the plaintiffs and was the subject of the present action.

Prior to 1885 certain shares or stock, subsequently represented by the stock in question, stood in the company's books in the name of a sole surviving trustee without any entry showing a trust. The trustee held the certificate, which bore on the face of it that "no interest in this stock can be acquired by the deposit of this certificate." He died in 1884, leaving a will by which, after a specific legacy, he gave his whole estate to his son Martin Edwards, and appointed him executor with another person who never proved. The will did not mention the stock or refer in any way to the settlement or to any trust. Martin Edwards, in December, 1885, sent to the harbour company the probate of the will and the certificate, and the proper entries of the probate and of the name of Martin Edwards as the executor were made in the register and indorsed on the certificate. In May, 1886, Martin Edwards applied to the bank for leave to overdraw temporarily on the security of the deposit of the stock certificate. In view of the indorsement thereon the bank inquired from him whether the stock belonged to him, and was told that

(a.) Reported by ARTHUR LAWRENCE, Esq., Barrister-at-Law.

it belonged to him absolutely. Either then or at some previous time the bank manager had seen the will, and he was aware of its contents. He asked Edwards to procure and deposit a new certificate in the name of Edwards, and in June, 1886, Edwards deposited the old certificate with a letter from the harbour company's secretary to the effect that it was not in accordance with their practice to issue a new certificate under the circumstances. Edwards also signed and deposited a loan note in the usual form, undertaking when called upon to execute a proper assignment or transfer of the stock. He also deposited a blank transfer signed and sealed by him purporting to transfer in consideration of five shillings £1,000 stock of the Harbour Co. It was not dated nor then executed by the bank, nor stamped, nor did it contain the name of the bank or of any person as transferee. Large advances were made by the bank on this security, and as they were not reduced when the period of credit had run out, the bank, after writing to Edwards that unless the requirements for payment were attended to "the Penarth Harbour, Dock, and Railway Stock held as security would be registered in the name of the bank," in September, 1887, filled up and executed the blank transfer and sent it in for registration, and they became and remained registered as owners of it. The blank transfer when filled up was never redelivered or re-executed by Edwards, nor was there evidence of any authority under seal from him to the bank to act upon the blank transfer, nor was it filled in or executed by the bank in his presence. In 1888 the bank wrote to Edwards that they had received a dividend on the stock "for your credit." In 1889 Edwards authorized the bank to sell the stock upon conditions which the bank did not, however, agree to, and it was not sold. Edwards had paid the interest on the stock to the plaintiff beneficiary by his own cheque during all this time, thus preventing inquiry. At length he absconded and the facts became fully known in 1891. In May, 1891, the two plaintiff trustees were appointed trustees of the settlement, and this action was commenced against the bank and Edwards, and on his being adjudicated a bankrupt in November, 1891, his trustee in bankruptcy was made a defendant.

Wright, J., held that the bank had never had the legal title in the shares, the transfer which they sent in for registration not being Edwards' deed at all.

The defendant bank appealed.

Sir Horace Davey, Q.C., and *R. F. Norton*, for the appellants.—The real question is whether the legal estate passed to the bank, and our main contention is that really there was a redelivery of the transfer by Edwards after it was filled in by the bank, and so the legal estate passed. There is no magic in the form of words in delivery; all that is wanted is that the delivering party should indicate that the altered deed is his act. Here there is ample acknowledgment by Edwards to make the transfer as filled up effectual.

They referred to *Goodright d. Carter* v. *Straphan*, Cowp. 201; *Tupper* v. *Foulkes*, 9 W. R. 349, 9 C. B. N. S. 809; *Hudson* v. *Revett*, 5 Bing. 368; and Shep. Touch. 57.

Giffard, Q.C., and *Kenyon Parker*, for the respondents, were not called upon.

LINDLEY, L.J.—The stock in question is governed by the Companies Clauses Consolidation Act, 1845, and section 14 of that Act of Parliament is the one which relates to the transfers. It provides that, subject as therein mentioned, every shareholder may transfer all or any part of his interest in the stock of the company, and "every such transfer shall be by deed duly stamped, in which the consideration shall be duly stated." Then section 15 provides that the deed of transfer (when duly executed) shall be delivered to the secretary and kept by him, and it is to be entered in the register of transfers. Then by section 18 there is provision made for the transmission of shares by other means than by a transfer, that is to say, to executors, and so on, but there is nothing in the Act of Parliament which enables an executor to transfer otherwise than by a deed duly executed. I do not dwell upon the point of the stamp nor on that part of the Act which says that the consideration is to be duly stated. No case that I know of can be cited to show that that part of the Act is otherwise than directory. No case that I know of can be cited to show that a misstated consideration or an erroneous stamp would invalidate the deed. But a deed is by the Act of Parliament essential, and in order to acquire the legal title to stock or shares in companies governed by the Companies Clauses Consolidation Act you must have a deed executed by the transferor, and you must have that transfer registered. Until you have got both, you have not got the legal title in the transferee.

Mr. Martin Edwards gave to the bank a transfer sealed by him, and so far as form goes probably delivered by him to the bank, but with blanks. It was not in a complete form. It was never in that form in which such an instrument, however much wax there might be at the bottom, could amount to a deed by the transferor. We all know that both at common law and under these statutes if you execute a transfer in blank that instrument with the blanks is not a deed. It is done constantly, but they are not deeds. That document so executed by Edwards in blank was filled up afterwards by the bank, probably as was intended, and the bank itself was put in as the transferee, and the bank got itself registered.

Now, what was the effect of that? It was not that the bank had got a good title. The registration of the stock in the name of the bank, unless preceded by a valid deed transferring the stock from the owner of it, does not give the transferee a good title at all. We have not to consider the effect of documents executed in blank as agreements enforceable in equity. We have nothing to do with that, but we are considering the legal title of the bank. The bank had no legal title at all. That is as plain upon the authorities as any proposition of law can be. If so, how did they get it afterwards? They say, Mr. Martin Edwards was afterwards informed that this transfer had been made to the bank, and he was told that it would be sent in for registration, and he knew later on that he had credit for a dividend, and he knew what had been done. So the appellants ask us to infer that he had executed the deed before it was registered. Can we do so? On what principle are we asked to draw such an inference in the teeth of the acts of the parties?

It is said there is a doctrine about redelivery; if a man executes a deed, that is to say, seals it, and then afterwards acknowledges it as his own, it is said that will amount to a delivery. That may be true; and in the case of *Goodright* v. *Straphan* that doctrine was carried to a considerable length, but in that case there was no alteration at all. The first authority which has been cited in which there was an alteration, is the case of *Hudson* v. *Revett*. There the person who had sealed the deed knew what the alteration was. It was altered in his presence, and he knew exactly the state in which it was. Knowing the condition in which it was he assented to it as his deed, and it was held that that amounted to a redelivery. I follow that, but there

is nothing of the sort here. There is not a particle of evidence to show that Mr. M. Edwards ever knew how these blanks were filled up. He never saw the document, and it was never brought to his attention further than that he was told the document was sent in for registration. To ask us to infer that he acknowledged that deed, which he never saw, as his deed, is asking us to do that which I, for one, cannot possibly do.

Wright, J., has come to the conclusion that there was no redelivery. I not only cannot differ from him, but I think the inference is correct. I cannot part with the case without calling attention to what the consequence would be if we were to stretch our consciences and decide in favour of the bank. We should be driving a coach and four through this Act of Parliament. Bearing in mind how common these transfers in blank are, we should reduce to a nullity that clause which requires transfers to be by deed, and we should enable transfers to be by any instrument sealed or unsealed, and there would always be a conflict of evidence on the subject. We should, in fact, be repealing the Act of Parliament. To infer redelivery seems to me to be entirely against the evidence, and in my opinion the appeal must be dismissed with costs.

BOWEN, L.J.—I am of the same opinion. The bank seems to me to have no legal title, and that is the short point on which the case turns.

At the time when this deed was registered it had never passed back into the hands of the grantor. He had never seen it again, and it seems to me, therefore, it was not registered within section 15 of the Act. I cannot see how that objection can be got over. As a matter of fact it seems to me that the deed never was, as against the parties to this suit, the deed of the grantor. The transfer was never made under this deed. A deed in order to be a deed ought to be, and must be, sealed and delivered. The sealing and delivery are essential parts of a deed. We all know that you can take the objection that a deed was never delivered. That is a conclusive point. A deed, therefore, must be delivered. When was this deed ever delivered? At the time of its delivery it was in blank. When was it redelivered, if at all? The redelivery must be done by the grantor or by someone who acts for him. The grantor in this case never saw the deed again. He did not redeliver it. He may by his conduct estop himself as between himself and other persons from saying that he did not redeliver it, but this is not a case in which such an estoppel can arise.

Then it is said he may have redelivered it because he may have so conducted himself as to preclude himself from saying he has not redelivered, and so conducted himself as actually to have done that which in law amounts to redelivery. If a deed which has been executed in blank, and is not a deed at the time, comes back into the custody of the person who originally sealed it, he can by his assent complete the delivery. There is no doubt about that. That is the case of *Hudson* v. *Revett*, where the grantor of the deed knew of the alterations and the blank was filled up in his presence.

Then it is said that even though the deed does not come back into his presence, the grantor may so conduct himself so that his conduct amounts to a redelivery. I am dealing with the case where the delivery is not through an agent but through the man himself. I should require to examine the cases very closely to see if that had ever been established at law. It is said that the case of *Goodright* v. *Strapham* proves it, but I am by no means satisfied that in that case there is anything more than an estoppel which arose between the parties. But at all events, if such an assent can amount to redelivery by a man who is a hundred miles off the deed, one would have thought, it must be an assent which brings home to his knowledge that which has been done to the deed, and the condition in which the deed is at the moment his assent is supposed to have been given. In this case there is nothing of the sort, and without accepting the proposition without further examination it seems to me that the facts do not justify its application.

Then can it be said that if not redelivered by the grantee it has been redelivered by some agent? An agent to deliver a deed must be an agent appointed under seal. I quite agree that here again the doctrine of estoppel may prevent the application of the leading principle. But estoppel here is out of the case. It is not a case in which estoppel can be prayed in aid from the constitution of the suit. But as to the doctrine that an agent can deliver for a principal without authority under seal I can only say it seems to me a novel one. It is quite true that you may deliver a deed on a condition that when the condition is performed the performance of the condition effectuates the delivery, but that is by virtue of the original intention and act of the grantor. But apart from those cases of conditional delivery or delivery to operate on the condition being performed, can it be true that an agent can deliver without any authority under seal? It cannot upon principle. If you arrive at a firm ground upon the basis of the proposition that a deed is a writing that is duly sealed and delivered, it is well-known law that an agent cannot execute the deed or do one part of the execution which makes it a deed unless he is appointed under seal.

Then it is said that under these circumstances, although there are no acts in law which amount to redelivery, yet we ought to say that the learned judge ought to have strained his conscience and found delivery to suit the justice of the case. Two innocent persons are concerned in this case, and the question is upon whose shoulders the injury should fall. It seems to me the case of the appellants utterly fails. I am sorry for them, but the loss must fall on somebody, and it must fall on those who have not the legal title.

KAY, L.J.—I am of the same opinion. The essence of the case is, Have the appellants, or have they not, the legal interest? Being purchasers for value without notice they cannot succeed unless they can make out that, having an inferior equity, they have clothed it with a legal interest. All that depends on whether this deed of transfer has been duly executed by the grantor.

The grounds on which the appellants rely to make out their case are, not that they ever showed the deed in its completed condition to the grantor, who had signed and sealed it in its imperfect condition, for he never saw it at all; not that they told him how they filled in the blanks, for they never did tell him how they filled in the blanks, and he never knew; but they say this: "We told him we were going to register it, and therefore he must be taken to have understood that before we could do that, the blanks would have to be filled in; we told him also we were going to register in the name of the bank, and therefore he must be taken to have understood that the bank intended to fill in their own name as transferees; and then afterwards we informed him we had registered, and we told him that we, the bank, had received dividends and proposed to credit him with the amount so received;" and afterwards, at a later period again, he having had this information, which

he seems to have treated with silence all along, he told the bank to sell the shares. Therefore it is said the court must infer—what? It must infer he knew how the deed had been filled up, that he assented to that filling up, that he assented to the registration which took place after the filling up, and that accordingly he, by that assent, put himself into such a position that the proper inference is that he redelivered that deed. Certainly no case has been cited which goes so far as that. It is perfectly idle to say he ever made the bank his agents to redeliver the deed for him. I absolutely dissent from the argument that Mr. Norton was so bold as to argue that such an agent can be appointed without deed. In *Hibblewhite* v. *M'Morine*, 6 M. & W. 200, Parke, B., was dealing with a similar document, which, when it was sealed and delivered, had the name of the vendee in blank, and therefore, he says, was void. But he says, at p. 214: "Assuming, then, the instrument to be a deed, it was wholly improper if the name of the vendee was left out; and to allow it to be afterwards filled up by an agent appointed by parol, and then delivered in the absence of the principal as a deed, would be a violation of the principle that an attorney to execute and deliver a deed for another must himself be appointed by deed." Therefore the point could not possibly be maintained that the bank had authority to deliver this deed on behalf of the grantor.

But, it is said, even if they had not, it must be inferred from the facts I have stated that the grantor himself assented to that deed in such a form and in such a manner that it amounted to a redelivery. No case has ever decided that because a man knew that people had been acting on a blank deed as if it were a perfect deed, it must, therefore, be inferred that he knew that the deed was filled up, that he knew how it was filled up, and that he must be taken to have redelivered it. That is carrying the doctrine far beyond any case that can possibly be referred to. In the case of *France* v. *Clark*, 32 W. R. 466, 26 Ch. D. 257, it was decided most distinctly by Lord Selborne, C., that the registration, where the deed itself is incomplete, does not perfect the title of the transferee at all. He says this: "He cannot by his own subsequent act alter the legal character, or enlarge in his own favour the legal or equitable operation, of the instrument. This, in our opinion, renders it unnecessary to consider whether before the registration was completed the company and the appellant had notice of the plaintiff's claim; for registration in the name of a transferee only gives complete effect to a prior valid transfer: registration does not make effectual a document which was as between the alleged transferor and transferee inoperative and of no effect." Therefore, in order to make out their defence that they are legal owners, the appellants' must show not merely that there was a registration, but that the deed which was registered was a perfect deed at the time it was registered. Otherwise the registration does not help their case. I think the evidence falls short of what would be requisite to enable anyone, jury or judge, honestly to find that this was a completed deed, or that there ever had been anything like redelivery.

Accordingly I think the appeal fails, and must be dismissed, with costs.

Appeal dismissed.

Solicitors, *Munns & Longden; White & Sons.*

High Court of Justice.

Chan. Div. Chitty, J. } March 10, 17.

PÉPÉ *v.* CITY AND SUBURBAN BUILDING SOCIETY. (a.)

Building society — Member — Notice of withdrawal — Alteration of rules after notice and before payment — Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *ss.* 16, 18.

By the rules of a building society a member, on giving the prescribed notice, might withdraw his shares, and the rules might be altered by the prescribed majority of members.

The society altered a rule to the detriment of a member, P., after P. had given notice to withdraw, but before P. was repaid.

Held, that, though P. had a vested right to be paid when he gave his notice, that right was liable to be divested by an exercise of the power left in the society, and liable to be exercised against P., of altering the rules; and that P. was, therefore, bound by the altered rule.

Davies *v.* Second Chatham Building Society, 61 *L. T. N. S.* 680, 38 *W. R. Dig.* 24, *followed.*

Motion.

The plaintiff was the holder of four fully paid-up £50 shares in the defendant society, which he bought in March, 1888.

By rule 5 of the society's rules "upon giving one month's notice in writing . . . any member" might "withdraw his investments at any monthly meeting of the society," and, if several members should give notice to withdraw within any one month, they were to be repaid *pro rata*.

By rule 33 the rules were not to be altered unless at a general meeting, and with the concurrence of three-fourths of the members then and there present.

In January, 1891, the plaintiff duly gave notice to withdraw his shares, But after such notice and before he was repaid, viz., in May, 1892, the society made an addition to rule 5, giving the directors power in their discretion to make prior payment to any member holding not more than £50 in the society. The plaintiff thereupon commenced this action, in which he claimed a declaration that the above alteration in rule 5 was not binding upon him and was *ultrà vires*, and specific performance of the agreement between the plaintiff and the society constituted by rule 5, and he now moved for an injunction to restrain the society from acting on rule 5 as altered to his prejudice.

The motion was taken by consent as the trial of the action.

Morton Daniel, for the plaintiff.—I gave notice of withdrawal long before the new rule. That being so, the society could not alter their contract with me by that rule: *Auld* v. *Glasgow, &c., Building Society*, 35 W. R. 632, 12 App. Cas. 197. In virtue of my notice I had a right to withdraw under the rules in force at the time when I gave my notice. *Davies* v. *Second Chatham Building Society*, 61 L. T. N. S. 680, 38 W. R. Dig. 24, on which the defendants will rely, was not a decision on this point, but on procedure.

Farwell, Q.C., and *A. d'B. Terrell*, for the defendant society.—If the plaintiff is a member, he is bound; and he does not cease to be a member by his notice, *Davies* v. *Second Chatham Building Society*; which is the only case where a new rule was actually passed after the member's notice of withdrawal. *Auld* v.

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

Glasgow, &c., Building Society has no bearing on this case.

They also referred to the Building Societies Act, 1874, ss. 16, 18; *Rosenberg* v. *Northumberland Building Society*, 37 W. R. 368, 22 Q. B. D. 373; *Wilson* v. *Miles Platting Building Society*, 37 W. R. 369 n., 22 Q. B. D. 381 n.; *Walker* v. *General Mutual Building Society*, 36 Ch. D. 777, at p. 783, 36 W. R. Dig. 26; and *Sibun* v. *Pearce*, 38 W. R. 658, 44 Ch. D. 354.

Morton Daniel, in reply.—The moment my client gave notice he had a vested interest to be paid according to the existing rules: *Auld* v. *Glasgow, &c., Building Society*, per Lord Herschell. *Davies's case* is distinguishable, because the question there was whether he continued to be a member. Moreover, the alterations there were insignificant.

CHITTY, J.—The question is whether the plaintiff is bound by the altered rule. He gave notice to withdraw under the rules in force when he became a member. The rule was altered to his detriment. The alteration confers a discretionary power on the directors to make prior payment to any member having not more than £50 standing to his credit in the books of the society. The effect of the alteration is to postpone payment to the plaintiff. It was part of the contract between the plaintiff and the society that the rules might be altered, and the contract was altered according to the rules, by which the concurrence of three-fourths of the members then and there present at the meeting when the alteration was proposed was required.

I start, therefore, with the proposition that it was part of the contract between the plaintiff and the society that these rules might be altered.

The question may be asked, What is the position of members who have given notice to withdraw? I cannot answer that question better than it is answered by Lindley, L.J., in *Sibun* v. *Pearce*, 38 W. R., at p. 660, 44 Ch. D. at p. 371, "Some say he is a member; some say he is a creditor. The true mode of describing him is to describe him as a member who has given notice of withdrawal and is entitled to payment." It is settled by the authorities that a person in this position is still a member. And it seems to me to follow that, as a member of a society like this, which has power to alter its rules, he remains subject to the rules as duly altered. It is not questioned that the new rule was passed in accordance with the terms of the original rule.

Mr. Daniel well said that the plaintiff had a vested right to be paid when he gave his notice. But as the society had power to alter the rules the question is, Was not this vested right liable to be divested in virtue of a substitutionary duly passed rule?

It may seem strange that a society should take such a power of altering its rules, but it is questionable whether it is not on the whole greatly for the benefit of all that there should be such a power. The members rely on the sense of justice of the three-fourths majority, and must be taken to be content, while they remain members, to leave themselves in the hands of the society. *Rosenberg* v. *Northumberland Building Society* and *Wilson* v. *Miles Platting Building Society* do not decide this point; they are cases of mortgage deeds containing covenants which are addressed in terms to alterations of the rules. But in *Davies* v. *Second Chatham Building Society* the point appears to me to have arisen directly. The question here was whether alterations in the rules made after the plaintiff had given notice of withdrawal from the society bound her or not, and the court held that she was bound. The gist of the decision is to be found in the judgment of Huddleston, B., where he says: "Did she still continue to be a member of the society after the notice of withdrawal? If she did, the second set of rules was binding upon her. In my judgment she did not cease to be a member." Mr. Daniel says that this case only shows that the altered rules bind in such circumstances when the alterations are slight, but I find no such proposition, nor do I see how on principle I could make the distinction. The court would have in each case to examine the subject-matter to which the alteration applied, and then decide according to its importance or insignificance, which would mean embarking on a very difficult course, and I do not see how the court could draw the line. Mr. Daniel says "at vested rights" anyway, but I have shown that the rights are vested subject to the power still left in the society, and liable to be exercised against the plaintiff, of altering the rules. The alteration in *Rosenberg's case* was considerable, and operated to the detriment of the mortgagor. The result is that the altered rule operates to bind the plaintiff, and I refuse this motion, but without costs.

Judgment for the defendant.

Solicitors for the plaintiff, *Cuddon & Co.*

Solicitors for the defendant, *Skipper & Tucker*.

Chan. Div. } Feb. 4.
Chitty, J. }

RANELAGH v. RANELAGH. (a.)

Will—Construction—Survivors—Longest liver.

Pecuniary legacies were severally given to four persons during their natural lives, and in case of the demise of any of them without legitimate issue his or her proportion to be divided amongst the survivors. The last surviving legatee died without leaving issue.

Held, that his legacy fell into residue.

The decision of the Privy Council *in* King *v.* Frost, 15 *App. Cas.* 548, 39 *W. R. Dig.* 264, *followed.*

Maden *v.* Taylor, 45 *L. J. Ch.* 569, 24 *W. R. Dig.* 325; Davidson *v.* Kimpton, 29 *W. R.* 912, 18 *Ch. D.* 213; *and* In re Roper's Estate, 37 *W. R.* 731, 41 *Ch. D.* 409, *not followed.*

Petition.

This case is reported as being an adoption by the High Court, of the Privy Council decision in *King* v. *Frost*, 15 App. Cas. 548, 39 W. R. Dig. 264, and the consequent rejection of the line of cases following *Maden* v. *Taylor*, 45 L. J. Ch. 569, 24 W. R. Dig. 325.

The testator, Lord Ranelagh, by his will, dated the 20th of August, 1814, gave his residuary personal estate in trust for the benefit of his eldest son, the plaintiff, Lord Ranelagh, for life, and, after his decease, for the benefit of his first and other sons, with certain limitations over.

By his first codicil, dated the 18th of December, 1818, he expressed himself as follows:—

"My daughter, Mary Ann Jones, having a fortune of £10,000, which I hold in trust for her, &c., I give her for the present only £200 to buy mourning. I give to my two daughters, Sarah Antonia Jones and Louisa Jones, during their natural lives, £4,000 each. I give to my two sons, Thomas Cowley Jones and Thomas Edward Jones, £2,000 sterling each during their natural lives. Legal interest at £5 per cent. to be paid to all of them, in equal quarterly payments, commencing from the day of my decease, till my son, the Honourable Thomas Jones, or my heir in entail,

(a.) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

attains his or her twenty-first year of age. To prevent any mistake or misconception of my directions, I repeat my intentions respecting the above legacies in figures:—

To Mary Ann Jones £200 to be paid forthwith.

Sarah Antonia Jones	£4,000	£5 per cent. interest to be paid quarterly till my heir is 21 years of age.
Louisa Jones . .	4,000	
Thomas Cowley Jones	2,000	
Thomas Edward Jones	2,000	

In case of the demise of any of the above parties without legitimate issue, their, his, or her proportions to be divided equally amongst the survivors."

It was decided in *Ranelagh* v. *Ranelagh*, 2 My. & K. 441, that the above gift over did not contemplate an indefinite failure of issue, and the legacies were ordered to be paid into court to the separate account of each legatee, the dividends to be paid to each legatee for life, with liberty to apply upon the death of each legatee.

Sarah Antonia Jones died on the 21st of October, 1840, a spinster. It was decided in *Ranelagh* v. *Ranelagh*, 4 Beav. 419, that the surviving legatees were entitled to her legacy absolutely.

Thomas Cowley Jones died on the 13th of March, 1849, leaving three children. It was decided in *Ranelagh* v. *Ranelagh*, 12 Beav. 200, that the children did not take by implication, but that the legacy fell into residue.

Louisa Jones died on the 16th of November, 1886, a widow. The devolution of her legacy raised no new question.

Thomas Edward Jones died on the 20th of September, 1892, without leaving issue. By his will he left all his property to his wife, the petitioner, and appointed her executrix. The petitioner claimed the fund as part of Thos. E. Jones's estate, on the ground that he was the last survivor.

Byrne, Q.C., and *Edward Beaumont*, for the petitioner.—Survivor must be read "longest liver": *Maden* v. *Taylor*, 45 L. J. Ch. 569, 24 W. R. Dig. 325 (Sir George Jessel); followed by Sir Edward Fry in *Davidson* v. *Kimpton*, 29 W. R. 912, 18 Ch. D. 213, and again by your lordship in *In re Roper's Estate*, 37 W. R. 731, 41 Ch. D. 409.

Farwell, Q.C., and *J. G. Wood*, for the residuary legatees, respondents.—The Privy Council have virtually overruled those decisions in *King* v. *Frost*. *Maden* v. *Taylor* was doubted by Kay, L.J., then Kay, J., in *Griffiths* v. *Mortimer*, 33 W. R. 441, and by North, J., in *Askew* v. *Askew*, 36 W. R. 620.

Byrne, Q.C., in reply.—The decisions of the Privy Council, though of great weight, are not binding on this court.

CHITTY, J., held that although the decision of the Privy Council in *King* v. *Frost* was not binding on him, yet having regard to the constitution of the particular committee which consisted of such eminent lawyers as Lord Watson, Lord Macnaghten, Sir Barnes Peacock, and Sir Richard Couch, and seeing that they had fully considered the former authorities, their decision was one of the greatest weight, and he should follow it in preference to the authorities cited on behalf of the petitioner. There would be a declaration that on the death of Thomas Edward Jones without leaving issue the legacy of £2,000 bequeathed to him fell into residue.

Solicitors for the petitioner, *Fladgates*.

Solicitors for the respondents, *Helder, Roberts, Son, & Walton*.

Chan. Div. North, J. } Dec. 13-15; Jan. 12, 17-19, 24, 25.

COLLINGHAM v. SLOPER.

FOREIGN, AMERICAN, AND GENERAL INVESTMENT TRUST CO. v. SLOPER. (a.)

Company—Debenture-holders—Debenture trust—Failure of trust—Return of money to debenture-holders—Minority of debenture-holders.

A company, incorporated under Spanish law, obtained a concession from the Spanish Government to construct and work a railway in Spain. The line was to be constructed in three sections, and was to form part of a through route. The company created by deed first mortgage debentures to bearer, and hypothecated the railway to secure the same. The company entered into contracts with a construction company to make the line and provide rolling stock, and by the contracts engaged to issue certain of the debentures, the proceeds of which were to be paid to three commissioners as trustees for the debenture-holders, to be applied, subject to interest and amortization of bonds, in completing the railway. The company thereupon issued a prospectus inviting subscriptions. £320,000 was raised and paid to Paris bankers, but, owing to litigation in Paris, was only paid to the commissioners after considerable delay, reduced by expenses and the service of the loan. Meanwhile the construction of the railway was impeded for lack of funds. One section only was partially completed, and the other two had not been commenced. The concessson, owing to breaches thereof, was liable to forfeiture. In 1890 the contracts with the construction company were put an end to and the contractors released, whereupon a temporary contract was entered into with another company to keep the works going. Two actions were commenced by a small, but substantial, minority of the bondholders, who desired a return of their money, and a third action by other bondholders, who wished to have the scheme carried out.

Held, that the court must decide whether the company possessed resources in presenti *or* in prospectu *available to complete the line; that, on the evidence, there was no reasonable hope, as a matter of business, that the line could be completed out of such resources; that a portion of the line was comparatively valueless; that the minority of the bondholders were entitled to a return of their money, subject to costs and charges properly incurred, and subject to a sufficient part of the funds being applied to properly realize the property of the company charged in favour of the bondholders; that payment of interest and the amortization of outstanding bonds must cease; and an inquiry directed to ascertain in what way the property charged could best be realized.*

The Saragossa and Mediterranean Railway Co. was a company constituted under Spanish law to construct and work a railway in Spain, from La Puebla de Hijar to San Carlos de Rapita on the coast, about 100 miles in length. This railway was to form part of a through route, and was to be constructed in three sections; the first, from La Puebla de Hijar to Alcaniz, the most inland section, of moderate difficulty; the second, from the coast to Chata, easy of construction; and the third, connecting the other two sections, of great difficulty. The capital of the company was £500,000, of which 50 per cent. had been called up. The shares of the company were to bearer. In 1887 the company became the holders of a concession granted by the Spanish Government for the construction and working of the above line. The concession, which stated that the contemplated line was of general utility, required a deposit of £50,000, and granted

(a.) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

subventions from the State to the amount of £260,000, payable in instalments as the works progressed. The concession was for ninety-nine years dating from 1882, but was to lapse unless the works progressed and terminated within certain specified times. By a deed of the 6th of October, 1887, in pursuance of certain articles of the company, the company created 75,000 first mortgage debentures to bearer for £20 each, with interest at 3 per cent., to be redeemed at certain dates within ninety-three years, and the proposed railway line was hypothecated to secure the same. Under a deed of the 15th of June, 1888, the company entered into a contract with the Barcelona Construction Co. for the construction of the line and the provision of rolling stock. After reciting that the preliminary expenses of the concession, plans, and works in progress had been provided for by the called-up capital, part of the Government subvention, and the issue of 13,450 debentures, the contract provided that the contractors should construct the line and provide rolling stock fit for traffic, and hand over the same complete to the Saragossa Co., the works to be executed in three sections within stated times, the last to be completed by September, 1890; and that the contractors should provide the company with £50,000 for expenses, and were to receive in payment the whole pecuniary resources of the company, including the Government subvention, the unpaid capital, the moneys to be received on the issue of bonds, and the £50,000 deposited with the Government.

On the 13th of February, 1889, the company passed certain resolutions to the effect that the remaining debentures were to be issued and that bankers in Great Britain and the Continent were to be employed to offer them for sale, who, after payment of expenses, were to hand over the proceeds to three gentlemen in London, called the London commissioners; that the commissioners were out of the said proceeds, after payment of expenses, &c., to set apart the moneys necessary from time to time for the payment of the interest and the amortization of all the debentures from time to time issued until six months after completion and delivery over of the line and rolling stock; to pay to the company the £50,000 agreed to be paid to it by the contractors in the above contract, to hold and apply the balance of the funds in payments to the contractors of such moneys as might become due to them under the above contract; to have the power of investing the funds in their hands, and to pay any balance of the said funds, after providing for all the above payments, to the contractors. Any modification of the above contract or of the supplemental contract next below stated to be subject to the approval of the commissioners. On the same date a supplemental contract was entered into between the company, the contractors, and the London commissioners, which carried into effect the above resolutions, and provided that the company would permit the intended offer of the debentures for subscription in accordance with the prospectus to be issued, and would for that purpose do and execute all things and documents required by the commissioners; that the company would duly call up the uncalled capital, and in default thereof that the commissioners were entitled to require the company to do all acts to enforce such calls; and that the commissioners might receive the subventions. The contractors guaranteed to the company and the commissioners the uncalled capital, the commissioners being empowered to deduct the contract price if it was not paid up.

In pursuance of these contracts the company issued a prospectus on May 1, 1889, inviting subscriptions for 75,000 debentures of £20 each at 3 per cent. The price of issue was £11. Of these, however, as 13,450 had been already issued, 61,550 only remained to be issued. About 45,000 were issued; 32,000 by the Banque d'Escompte in Paris. The banque, however, refused to hand over the proceeds of these latter debentures to the London commissioners, a point having been raised that there was misrepresentation in the prospectus. After two decisions in Paris and a compromise the residue of the money in the hands of the banque, some £311,000, was paid over to the commissioners on January 2, 1892. In the meantime difficulties arose. The works could not be continued for want of funds. The Government subventions were to some extent discontinued. For a time the works were absolutely stopped, and when not stopped were only partially carried on. The times limited by the concession for the completion of the works, which had been several times extended, were also running out, but in 1889 were again extended, as to the first section until February, 1894, and as to the remaining two sections until February 8, 1894, it being declared that should the company fail to complete the line within the given times the concession should be *ipso facto* forfeited.

Then, by a deed of August 14, 1890, the contracts between the company and the Barcelona Construction Co. were put an end to and the contractors released. This deed—after reciting that the first section of the line was nearly completed—assigned to the contractors a large portion of the Government subvention, provided for the payment by the company to the contractors of some £70,000, for the transfer to the company of all the lands the contractors had acquired, and for the assignment to the company of all the rights and interests of the contractors in the funds in the hands of the commissioners. The London commissioners were not parties to this deed, nor had it their active consent.

In September, 1890, there being no contract for the execution of the works, a company called the Aragon and Catalonia Co. was formed by some of the bondholders in order to attempt to keep the works going as a temporary expedient, and an arrangement was made with the company to that effect, under which the Aragon Co. was to be paid the prime cost of the work done, with a commission of 15 per cent. Some £10,500 of the £311,000 in their hands was paid by the commissioners in respect of work done, when, on February 19, 1892, the Foreign, American, and General Investment Trust Co. and three other trust companies, underwriters and holders of bonds, issued a writ to have the trusts under which the money was held by the commissioners performed. The commissioners then did nothing further, but a Mr. Shelford was sent out to Spain to report. On August 5 the above plaintiffs delivered their statement of claim, asking for a declaration that the undertaking could no longer be carried on, and that the money in the hands of the commissioners might be returned to the said plaintiffs. In the meantime, on July 25, a writ was issued by a Mr. Collingham and some other bondholders with larger holdings than the first plaintiffs, who wished the scheme to be carried out, and who asked that the trusts of the deed might be executed by the court.

On the 10th of August the plaintiffs in the first action commenced a second, substantially identical with their first, except that the Aragon Co. were omitted as defendants. These actions, together with two summonses—one to consider a further contract for the completion of sections 1 and 2 of the line, proposed to be entered into with the Aragon Co., and the other a minor matter—were now heard together. The evidence showed that it would take at least three years to complete the works according to the original

scheme; that about £34,000 would be required annually (hereunder called the service of the loan) out of the funds to meet the interest and amortization of the debentures during the time the railway was being constructed and for six months after it was finished; that there was no contract existing for the performance of the whole work; and that the concession was liable to forfeiture, a breach of one of the last provisions for the extension of time having taken place. Two estimates of the probable cost of completing sections 1 and 2 of the line were before the court—one by the engineer of the line, Mr. Dawson, amounting to £220,000; and one by Mr. Shelford, which exceeded Mr. Dawson's by £500,000. The centre section was, for the present, proposed to be left in abeyance.

Finlay, Q.C., and *Eve*, for the plaintiffs in *Collingham* v. *Sloper*.—Rescission of the contract with one firm of contractors does not entitle the debenture-holders to a return of their money. The conduct of the Spanish Government is not such as to lead us to apprehend that they will withdraw the concession. It must be shown that the undertaking is practically impossible of fulfilment, which cannot be done.

They referred to *Wilson* v. *Church*, 13 Ch. D. 1; *National Bolivian Navigation Co.* v. *Wilson*, 5 App. Cas. 176, 28 W. R. Dig. 94.

Sir H. Davey, Q.C., R. T. Reid, Q.C., and *Macnaghten*, for the plaintiffs in the other actions.—The contract on the faith of which the public were induced to subscribe is at an end, and there is no reasonable probability of obtaining another so as to complete the works in the manner originally proposed. There is therefore a resulting trust in favour of the debenture-holders. The present concession lies at the mercy of the Spanish Government. We cannot be forced to allow our money to be applied under altered conditions. This case is within *Wilson* v. *Church*.

Sir H. James, Q.C., S. Hall, Q.C., and *Swinfen Eady*, for the railway company.—The court has neither jurisdiction or competent knowledge to form an opinion as to what the future resources of the company may be. This case is not like *Wilson* v. *Church*, where there was a total failure of consideration.

Cozens-Hardy, Q.C., and *Kirby*, for Messrs. Sloper and Robinson, two of the London commissioners.

C. T. Mitchell, for Mr. Wilde, one of the London commissioners.

Abraham, for the Aragon Co.

Sir H. Davey, Q.C., in reply.—The debenture-holders here are *cestui que trustents* under a deed, and the question is whether or not those trusts can be fulfilled, an issue which a court of equity is competent to decide.

NORTH, J.—This is a case of great importance from the amount at stake, and also of great novelty, because, although the case of *Wilson* v. *Church* had certain matters in it which looked like those in the present case, yet there are very material and substantial differences between the two cases; and although I am desirous of considering the matter more fully, yet, as time was of vital importance, I think I am justified in giving judgment at once. [His lordship then, in fully stating the facts above set out, said that with regard to the prospectus no one now suggested that it was not perfectly fair and honest. With regard to the giving up of the contracts with the Barcelona Co., he was not satisfied whether or not the company had the power to give them up without the consent of the London commissioners. He had no means of forming an opinion whether it was a desirable bargain or not, but it did not seem to him that the putting an end to the contracts in any way altered the legal relations of the company, the commissioners, and the debenture-holders respectively to one another; though, no doubt, it altered the chance of carrying on the works. The Aragon Co. was in no sense a delusion or a sham, but a fair combination of debenture-holders formed to fill up a gap, and to benefit themselves and others also. His lordship then continued:—] Now the question is what is to be done? Is it a case in which the debenture-holders or the obligation-holders are entitled to have their money returned? I agree altogether in the view put forward by Sir Horace Davey, that it is a case in which they are persons who have entered into a bargain, and that bargain is contained in the prospectus which they approved, and in the resolutions and in the contracts, and it is a case, therefore, in which money has been placed in the hands of trustees for the purpose of being applied to the purposes of the trust. I think it quite clear that it must be applied for the purposes of the trust and for nothing else. The claim made proceeds on the footing that it cannot be applied for that purpose, and that, therefore, it ought to be returned; and there can be no doubt that if it cannot be applied for the purposes of the trust it must not be left in court, either to remain there or to be applied in redeeming such of the obligations as may be first drawn, but that it ought to be divided *pari passu* amongst the holders of the obligations. If, on the other hand, the trust can be carried out, in that case it must be; and I do not think I am in a position to say, now that the time has arrived at which no latitude can be given to the Saragossa Co., if they are in a position to show at the present time that there is a reasonable prospect, as a matter of business, of carrying out the railway for the purpose of constructing which this money was subscribed.

In the first place, one of the points pressed very strongly is that there has been ample time given, and it is said that the time is running out. It is a very long time since the law was passed, and it is ten years since the concession was granted; on the other hand, it is not a very long time, only three years, since the obligations were issued, and the time, therefore, in that respect is not very long. On the other hand, this has to be borne in mind: that the railway has yet to be made, and it is admitted by Mr. Dawson in the witness box that to complete it according to the scheme originally proposed will require from two and a half to three years. I do not think I am going far wrong in saying that it is quite fair under those circumstances to take three years as the time it would require, and that is assuming also that the money is available for the purpose of doing it. Then, again, these obligations are repayable out of capital until six months after that time, because they are to be repayable out of capital until "completion of the line."

Now a point has been made as to what "completion of the line" means; and as to that I do not think there is the slightest doubt. The words are clear in themselves, and I do not know what "completion of the line" can mean but completion of the whole line. I do not see how completion of part of the line could be completion of the whole. More than that, looking at the scheme it is quite obvious what is meant. The scheme is that the obligation-holders are to subscribe their money on terms that will induce them to lend it, the terms being that interest is to be payable from the first moment, and that the redemption is to commence from the first moment, but there are no means whatever of providing for such payments before the line is completed except out of capital.

[His lordship then showed that the service of the loan for 3½ years would require £120,000 out of the funds in the hands of the London commissioners; that there was no contract before the court for the complete construction of the works, and that the only suggested contract—that with the Aragon Co.—was one under which it was proposed only to complete the 1st and 2nd sections of the line, leaving the 3rd section untouched. His lordship then proceeded:—]

Then I should say this further with regard to that particular contract: although I have said that the Aragon and Catalonia Co. was in my opinion an honest company formed by obligation-holders in order to get over a difficulty, and I do not see that a word can be said against them in that respect, yet when I come to consider that they are the persons who are proposed to be the contractors under this new contract, I must say that I do not see that they are in a position of such substance and such means that they can be looked to as furnishing, by their own status, any guarantee of any kind that even what is proposed—the limited works that are proposed—will be accomplished by them within the time. If we cannot look to the Aragon Co. as sufficient of itself to carry it out, what are the means and resources available for the purpose of carrying out the contract?

Before considering that I should, perhaps, deal with a matter very much pressed on me, which is this: that it is quite obvious that under no possible arrangement of any kind could the work be carried out within the period fixed by the concession, which expires in February, 1894, and, what is more, that there has been a breach of the provisions of the last extension of time already, so that at the present moment it is said this concession is *ipso facto* forfeited. As regards the position of the parties with reference to the concession it is no doubt a very serious matter. The Government has allowed the concession to last a very long time. Although the concession is forfeited (I am using the language of the law) it is said the Government at the present time are, through their inspectors, inspecting the works, authorizing the expenditure, and, what is more, they are pressing on the works, with a view to carry them out. Well, this statement about the pressing on of the works may mean two things: it may mean that the Government are prepared to waive all the delay that has taken place if the contract is carried on as from this date; and it may also mean this, that the Government are pressing now much more than they ever did, as showing that the concession is forfeited, though, if great indulgence is used and the work is pressed on very much, that forfeiture would not be taken advantage of. The conclusion I have come to myself about it is this, that the Government are desirous of having the work done. They said from the first that it is a matter of public utility, and for their own purposes I am satisfied they would not avail themselves of this right of declaring the concession forfeited if they see their way to getting the end they have desired accomplished, namely, the construction of this work of public utility. And it is obvious that if the present company can reasonably do it in any way it is far more to the advantage of the Government and everybody else that they should carry it on than that the concession should be forfeited, and the Government should be allowed to take this step and then obtain a new concessionaire to take up the work and begin it comparatively afresh. I have not the least doubt that the Government, although they may be in a position to say it is forfeited if they please, will not do anything to forfeit it so long as they see that their own object will be accomplished—namely, the getting of the work done. I have this further test of it, the allowing the work to go on, I mean their not interfering with or stopping the works which have been going on, and to the cost of which they will themselves at the proper time have to contribute, because they have agreed to pay one-fourth of the estimate, and although, for reasons I entirely appreciate, they have not paid the subvention, and have not been asked to make the payment, yet, if in point of fact the works were completed by that company, they would have eventually to make large payments, allowing the work to go on in the meantime.

Under these circumstances I do not feel very much pressed by the argument that the concession has come to an end, and that what the obligation-holders were entitled to was the security of the concession which was in existence, and that *de facto*, because the time has expired, they are entitled to the return of the money. In my opinion that is not so; but the fact that they are in this perilous condition with the Government, that their right to the continuance of the concession is hanging in the balance is a very important point to consider in looking to what their means are to carry out the railway.

Then we come to the most important question of all, and it is a question that, in my opinion, I am bound to consider. As a matter of business—as a practical matter—can the railway be made by this company with the funds that they have, I will not say in hand, but with the available funds, as to which there is a reasonable probability of their being able to get them? I am told by Sir Henry James that the High Court of Justice has neither jurisdiction nor competent knowledge to form an opinion as to the resources of this company or what it may be able to do hereafter. I agree to a great extent as to that; I feel that I am not competent to a great extent to do so, but there is one thing I think I am bound to do, and I must deal with it—the question not what the possible resources may be, but what the resources at present or in prospect are by means of which there can be any reasonable hope, as a matter of business, that the line could be completed. I think that it is settled for me by the decision of the court in the *Bolivian case*, because although in that case, as I have said, the circumstances were in many respects very distinguishable indeed from the present case, yet there are certain points in common. One important point of distinction was that the concession was revoked, and in that respect I think the present case is totally different, but the court did not proceed solely on that ground, because, if so, that would be sufficient for the judgment, but they went to other points, and to justify the view taken I will refer to that case. [His lordship then read the judgment of James, L.J., in *Wilson* v. *Church*, 13 Ch. D., at pp. 45, 46, from "The purpose" to "of no utility whatever," and the judgment of Cotton, L.J., at pp. 61-63, from "It was said there is an existing contract" to "as a matter of business to be made," and also the judgment of Lord Cairns, L.C., in the House of Lords (5 App. Cas. 184) from "So far as time is concerned" to "would be the result," and continued:—] Under the circumstances it seems to me that I am not only entitled, but bound, as best I can, to arrive at a conclusion as to whether there are resources forthcoming *in præsenti* or *in prospectu* out of which there is any reasonable prospect, as a matter of business, that this railway can be made. There is one matter that is of rather great importance before I go to the evidence, which is this: that the persons who are the plaintiffs here, asking to have their money back, are only a very small portion of the holders of the obligations. Altogether they are a substantial proportion—there is £35,000 or thereabouts at stake; but

still the proportion is very much smaller than the remainder of the obligation-holders. Then, out of the remainder of the obligation-holders there are a great many whose views I do not know; but I have the view of a number of persons far greater, so far as the extent of their holding goes, than those plaintiffs who do object to the fund being paid out and divided among the holders of the obligations, and who are desirous of having the railway proceeded with. That is a matter that, in my opinion, I ought to give great weight to. I do not say it is a question of majority and minority at all, but when I find a considerable number of persons who have money of their own at stake in the matter, and who, as far as I can see, have no object on the other side to gain by wishing their money to be thrown away, the fact remains that there is a large preponderance of persons who claim that the matter should be continued rather than that it should be discontinued.

That does not, however, relieve me from considering the position of matters, but before dealing with them I should mention one point. As I pointed out, it was originally contemplated that this was to be a through railway, and all calculations of profit are based on the assumption that the money earned will be such as a first-class railway carrying through traffic would produce. If only two out of the three sections are completed there is an end of all hopes of through traffic. That source of income is entirely destroyed, and all that can be relied on in the way of income would be the proceeds of local traffic. Therefore the calculations of profit from an incomplete line must necessarily be very much less than those from a completed line. Again, it is said that in considering what the prospects of the line are which may render it possible to believe that further money can be borrowed on the faith of its completion, there are certain reasons originally existing for the belief that the line would be a financial success which have ceased since the concession was granted; to put it shortly, certain rival companies have obtained a more formidable position, but upon the evidence I do not think there is anything substantial in that. But the fact that at present it is proposed to leave the centre third of the line in abeyance does seem to me a matter of the utmost importance.

[His lordship then considered the resources of the company, and the mode in which it was proposed to apply them. The funds in the hands of the commissioners were £225,000, subject to a charge which reduced them to £195,000. From that must be deducted £10,000 for costs and expenses, and £120,000 for the service of the loan during three and a half years; leaving the moneys in the hands of the commissioners available for the works at £65,000. The total Government subvention on the whole line, deducting charges to which it was subject, was £164,000, spread over a long period, and there was about £50,000 caution money, payable only on completion of the whole line. Some 13,000 obligations were still unissued, which at £10 each would amount to £130,000, but it was idle to ask his lordship to treat that as an existing asset to that extent, considering the position of the company. There was £250,000 callable on the share capital. But being callable on shares to bearer, his lordship could not understand how it could be hoped that one penny of it could be procured. Mr. Shelford's estimate greatly exceeded that of Mr. Dawson's, but in his lordship's opinion Mr. Dawson's was the more correct. Mr. Dawson estimated the cost of completing sections 1 and 2 at £220,000, and considered that to meet that there was £195,000 in the commissioners' hands, and also £34,000, that portion of the subvention that would be due on sections 1 and 2. But his lordship pointed out that, even allowing the £34,000, which was not payable until the whole line was constructed, together with £65,000 in the hands of the commissioners, for, as above stated, not more than that sum was available, only £100,000 in round figures was available to meet Mr. Dawson's estimate of £220,000 for sections 1 and 2. This calculation, however, did not provide at all for the 3rd section, which was essential for through traffic, on which the estimate of profits was based. As to that section, Mr. Dawson's estimated cost was over £500,000. His lordship then continued:—]

Now looking at that as far as a person who is a practical man would look at it, it is a case in which in my opinion there are no available sums at present in hand or in prospect by which the undertaking can possibly be carried out by means of the trust constituted by the contracts and the resolution and the prospectus.

Then it was put that the case of *Wilson* v. *Church* is very different, because there was in that case a total failure of consideration. I agree there is a very great difference in that respect. I do not agree that it is literally correct. There was not a total failure of consideration, because a good deal of money had been spent, but still there was a greater failure than in the present case, because a good deal of money has been spent upon this land, and whether it be £80,000 or £100,000, as Sir Henry James suggested, is not, I think, material for this purpose. I do not think the point to be decided is whether there has been failure of consideration at all. The contract is not to be at an end on the ground of failure of consideration, but the question is whether the trust under which the money was deposited can or cannot be carried into effect. Then it was said, Why should the money be returned if one-tenth of the work had been done; if nine-tenths of the work had been done it was said the court would not have thought of any return; and if there has been one-tenth done how can there be said to be any difference so long as the whole has not been done? I am not satisfied with the proposition which supposes that if nine-tenths had been done the money would not be returned. If nine-tenths were done it would require very much less to convince one that there were means available for the completion of the rest. But assuming that the court had come to the conclusion that although nine-tenths were done it was absolutely impossible to complete the rest, and the fund available could not be applied to complete the rest, I am not prepared to admit that the court would not do, in the case where nine-tenths of the expenditure had been incurred, what it would do if only one-tenth had been.

The conclusion I come to is that the obligation-holders are entitled to say that there is no prospect whatever of completing the purposes of the trust, and therefore that the resulting trust (if that is what it is to be called) in their favour ought to have effect given to it, subject, as Sir Horace Davey said, to the payment of whatever are the proper charges on it which have not been satisfied. I think there is the greatest difference between this case and the *Belize case*, according to the view the judges before whom it came took of it; but I must say, in my opinion, the case does come within the words used by Lord Hatherley in his judgment in that case, where he expressed a much more lenient view with respect to the company than some of the other judges who gave opinions did. He said: "My own opinion is that in the present case there has been a common misfortune, the work has proved to be beyond the strength of those who undertook to perform it, there was a mistake on the part of those who engaged to

enter into it in regard to the supply of the necessary means by which alone the money could be raised and by which alone the contract made with the public, as contained in the prospectus, could be carried into effect." I agree with what Sir Henry James said, and I wish to record it that I do not find that the company or the directors have in any case deliberately departed from what was expressed in the prospectus, and it is only by reason of their being unable to carry it out further, that in my opinion the case must be decided in favour of the plaintiffs (the Foreign American, &c., Co.).

Then the question remains as to what is to be done. The right of the persons who have charges on the fund is not in dispute, but there is another matter to be considered, namely, the position of the obligation-holders as a body, having regard to the security they have upon the works as they stand. The statement of claim in the Foreign, &c., Co.'s action only asks for a return of the money and a distribution of the remaining fund, but I do not think I should discharge my duty in this case if I were merely to make a declaration that the parties were entitled to a return of the funds without going on further to deal with the whole matter, including the security, and particularly so for this reason, that I am not satisfied that the obligation-holders, who are the plaintiffs in the first action, would have a right to have their funds returned, except subject to an application of such part of it as ought properly to be applied for preventing the security from becoming wholly and absolutely useless. Let me put an illustration by way of showing my meaning, though the case is not the same. Supposing the line had been nearly completed, and that the money in the hands of the commissioners was sufficient to complete it, but that the company themselves, who saw no benefit whatever coming to them out of the transaction, threw it up and said that the obligation-holders might have their money back, what would be the position of the obligation-holders in that case? I think they would have a right to say, and even any minority of them, not a nominal but a substantial minority that is, would have a right to say, as against a greater number, that the subscription and deposit of their money in order to complete the work which was their security for repayment, did involve an obligation as between themselves that would not enable some of them to throw the undertaking or security over without doing what was necessary to realize in the best way that could be done for the whole, what was depreciated by common misfortune, in other words, that some of the obligation-holders in that case would have a right to say against the wishes of the others, We will have the rest of the money subscribed applied in completing the security to obtain which we advanced our money. That case differs from this one in this way. In that case I am assuming the money would be sufficient to complete the security contemplated. In the present case the whole fund would not suffice; but I think that the obligation-holders are entitled to say there is such a mutuality of interest in the common fund subscribed for the common purpose that they are entitled to have whatever part of the fund may be necessary applied to make the loss by non-completion less than it otherwise would be. I do not mean that they could enter into a different speculation, and say, Let us complete the section to Alcaniz, and have that for our money; but, on the other hand, they are entitled to say, Let us have that usefully laid out under the trust that can be laid out, in order to utilize what has been spent so far as possible in reducing the loss we might otherwise sustain. It might be (I only put this by way of illustration) that the best way of utilizing what has been spent would be to complete the line to Alcaniz, not because it is completing part of the undertaking, but because such an expenditure might produce for the common benefit the best result out of money otherwise almost entirely thrown away.

[His lordship then said that, without expressing it in technical terms, there must be a declaration to the effect that the plaintiffs, the Foreign, &c., Co. (Limited), were substantially right, that the works could not be carried on, and that the said plaintiffs were entitled to have their money back, subject to all charges and liabilities attaching to the fund, and subject also to a consideration of how the money could be best applied, if it could be usefully applied, in order to realize the security; and that the costs of all parties must come out of the fund, including the trial of the actions.]

Minutes of judgment:—Declare that the trusts constituted by the contracts of the 16th of June, 1888, and the 13th of February, 1889, and by the resolutions of the Saragossa Railway Co. passed on the 13th of February, 1889, and by the prospectus issued by the defendant company in May, 1889, all in the pleadings mentioned, ought, so far as they can be performed, to be carried into execution under the direction of the court. And declare that, subject to the payment of any charges on the funds subscribed by the plaintiffs and the other holders of 3 per cent. obligations issued by the Saragossa Co. and to any payments which may be certified to be properly payable thereout, and to the payment of any costs directed to be paid thereout, the said fund is (in the events which have happened) divisible rateably amongst such of the holders of the said obligations as are entitled to the benefit of the same; and that no part of the said fund is to be applied in payment of any such obligation-holders in priority except in respect of obligations which have already been drawn but have not been paid, and interest which has already accrued due and become payable, but has not been paid. And declare that the plaintiffs and the other holders of the said obligations are entitled to a charge on the railways and property comprised in or charged by the said obligations, and the trust deed dated the 6th of October, 1887, for securing the same. Tax the costs of the plaintiffs and defendants of the above actions. And let the defendants Sloper, Robinson, & Wilde pay and retain such costs out of the funds in their hands. And let the following inquiries be made, viz:—(i.) An inquiry what obligations have been issued by the Saragossa Co., and which of them are now outstanding and entitled to the benefit of the trust constituted as aforesaid. (ii.) An inquiry what sums have come to the hands of the defendants, Sloper, Robinson, & Wilde, or any of them, representing moneys subscribed in respect of the said obligations, and what portions of such sums are now in their hands, and let the defendants, Sloper, Robinson, & Wilde, in answering such last mentioned inquiry, make a statement to be verified by affidavit of all disbursements made by them; and any of the parties are to be at liberty to apply with respect to any sum appearing to have been received by the said defendants or any of them, and not now in their hands. (iii.) An inquiry of what particulars the sums subscribed in respect of the said obligations, which have not been received by the said last mentioned defendants, now consist, and whether any and what steps ought to be taken to recover any part thereof which may appear to be outstanding. (iv.) An inquiry what charges or incumbrances, other than the said obligations, affect the railways and property of the Saragossa Co. comprised in or charged by the said obligations or the said deed, including any property acquired for the purpose of the railways which has been or ought to be paid for by means of the funds

subscribed by the plaintiffs and the other holders of the said obligations. (v.) An inquiry whether any and what steps should be taken for the purpose of realizing, for the benefit of the plaintiffs and the other holders of the said obligations, the railways, works, lands, rolling stock and other materials acquired for the purpose thereof, and in prosecuting this inquiry regard is to be had to the question whether any further expenditure should be made out of the said fund in completing and equipping the first section of the said railways or any part thereof. (vi.) An inquiry whether any other and what sums are properly payable out of the said fund. Reserve further consideration.

Solicitors for the plaintiffs in *Collingham* v. *Sloper*, *Huxham & Rawlinson*.

Solicitors for the plaintiffs in other actions, *Slaughter & May*.

Solicitors for the Saragossa Co., *Francis & Johnson*.

Solicitors for two commissioners, *Norton, Rose, Norton, & Co.*

Solicitors for the other commissioners, *Wilkins, Blyth, & Co.*

Solicitors for other parties, *Bompass, Bischoff, & Co.*

Chan. Div. Stirling, J. } Feb. 18.

READ v. WOTTON. (a.)

Practice—Action for recovery of possession of premises for breach of covenant—Claim for injunction—Joinder of separate causes of action—Leave of court—R. S. C., ord. 18, *r.* 2; *ord.* 36, *r.* 58.

A writ was issued claiming (1) *recovery of possession of premises,* (2) *arrears of rent and mesne profits,* (3) *an injunction to restrain nuisance or damage,* (4) *damages, and* (5) *costs. The defendants entered an appearance and served notice of motion asking that the writ might be set aside, on the ground that the leave of the court had not been obtained for the joinder of the two causes of action relating* (1) *to the injunction, and* (2) *to the recovery of possession of the premises.*

Held, that, though a perpetual injunction might be relief inconsistent with the terms of ord. 18, *r.* 2, *yet an interlocutory injunction was within the terms of the rule, being a substitute for damages which might be assessed for the continuing breach between the issue of the writ and the trial of the action.*

Motion.

This was a motion by the plaintiff asking for an injunction to restrain the defendants until the trial of the action from doing anything on their premises which might be or become a nuisance to the plaintiff, contrary to the provisions of the lease from the plaintiff to the defendants, and from continuing a waxworks exhibition thereon.

The defendants having entered an appearance and demanded the delivery of a statement of claim, which had not been delivered, served a cross-notice of motion asking that the writ might be set aside, on the ground that the plaintiff had failed to obtain the leave of the court before the issue of the writ for the joinder of the cause of action relating to the injunction with the cause of action for the recovery of possession of the premises, and took this preliminary objection on the hearing of the plaintiff's motion.

The writ was indorsed as follows:—

1. To recover possession of the house, shop, and premises, No. 5, The Parade, London-road, Croydon, Surrey.
2. And for arrears of rent and mesne profits.
3. For an injunction to restrain the defendants, their or either of their servants, agents, undertenants, occupiers, and workmen, from doing or suffering to be done upon the said house and shop and premises, or any part thereof, any act or thing whatsoever which may be or become an annoyance, nuisance, or damage to the plaintiff or any of her tenants in the neighbourhood contrary to the provisions of the lease granted by the plaintiff to the defendants dated the 31st of August, 1886.
4. Damages.
5. Costs.

Keary, for the defendants, argued that there were two distinct causes of action disclosed by the writ: (1) breach of covenant before action brought, which was the ground of the action for recovery of possession, arrears of rent, and damages; and (2) continuing breach after action brought, which was the foundation of the claim for an injunction.—As the requisite leave of the court had not been obtained for the joinder of the two causes of action the writ ought to be set aside: R. S. C., ord. 18, r. 2; *Hambling* v. *Wallani*, W. N., 1889, p. 133.

Beddall, for the plaintiff.—In that case there was no claim for damages. Here there is only one cause of action. We claim damages for breach of covenant, and ask for an injunction only as incidental relief: *Kendrick* v. *Roberts*, 30 W. R. 365; *Gledhill* v. *Hunter*, 28 W. R. 530, 14 Ch. D. 492. In any case the defendants have waived their objection by entering an appearance and demanding a statement of claim.

Keary, in reply.—Damages in ord. 18, r. 2, means damages which have accrued before action brought.

STIRLING, J.—This is an application to set aside the writ in the action, on the ground that it is not in conformity with ord. 18, r. 2, which provides that "no cause of action shall, unless by leave of the court or a judge, be joined with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent or double value in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same, or any part thereof, are held, or for any wrong or injury to the premises claimed." Now it is to be observed that in this case there is no statement of claim, and I have to refer simply to the writ. [His lordship read the indorsement on the writ, as above set out, and continued:—] I am called upon to say that that writ is not in conformity with the rules. It appears to me that in the absence of a statement of claim it will fall within the express words of the rule, for it allows to be joined in an action for the recovery of land claims "in respect of mesne profits or arrears of rent or double value in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same, or any part thereof, are held." There is in this writ a claim for damages, and under ord. 36, r. 58, "Where damages are to be assessed in respect of any continuing cause of action they shall be assessed down to the time of the assessment." Consequently if it is proved at the trial that there has been a breach of the contract under which the premises are held before action brought, continuing at the time when the action is brought and down to the trial, damages may be assessed, not only down to the issue of the writ, but to the time of assessment. What is claimed is an injunction. If there were a statement of claim

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

there might be relief asked inconsistent with the rule. A perpetual injunction might be inconsistent; but it seems to me that an interlocutory injunction is within the terms of the rule, for it is a mere substitute for the damages which might be assessed for the continuing breach between the issue of the writ and the trial of the action. The claim for an injunction is made "in respect of damages for the breach of any contract under which the premises are held." The writ so understood falls within the terms of the rule, and the preliminary objection therefore fails. The motion to set aside the writ must be dismissed, with costs, to be the plaintiff's costs in any event.

The plaintiff's motion was then heard, and his lordship granted an interlocutory injunction.

Defendants' cross-motion dismissed, with costs.

Solicitor for the plaintiff, *J. R. Pakeman.*

Solicitor for the defendants, *H. Letts.*

Q. B. Div.
(Pollock, B., and Kennedy, J.) May 8, 9, 11.

MOORE v. HIGH BAILIFF OF BROMPTON COUNTY COURT. (*a.*)

County court—High bailiff—Execution—Implements of trade—Seizure and sale of by high bailiff—Error of judgment by high bailiff—No guilty intent—Liability of high bailiff in summary way as for "misconduct"—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 50.

The seizure and sale of the implements of an execution debtor's trade by a high bailiff of a county court, in the carrying of an execution under the judgment of the court, even though done recklessly and under a serious error of judgment, but not with any wrongful intent, is not "misconduct" within the meaning of section 50 *of the County Courts Act,* 1888.

Appeal by the high bailiff of the Brompton County Court from an order made by his Honour Judge Bacnor, sitting at Brompton County Court, by which order the high bailiff was ordered to pay to the present respondent, Mr. Moore, the sum of £22 10s. for damages in respect of "misconduct" in seizing, removing, and selling the implements of the respondent's trade.

The sole question of appeal now was whether the wrongful seizure and sale of trade implements by the high bailiff, in executing a judgment of the court, is "misconduct" within the meaning of the 50th section of the County Courts Act, 1888.

The learned county court judge took time to consider his judgment, and he delivered a written judgment, holding that such seizure and sale of implements of trade was "misconduct" within the meaning of section 50, although there was no wrongful intent, only a serious error of judgment.

A judgment had been recovered against the respondent, Mr. Moore, and an execution under the judgment was levied at his residence on the 25th of July, 1892. Claims were put forward by two claimants to the goods seized, and interpleader proceedings followed. The goods seized on such levy were removed and warehoused by the high bailiff on the 29th of July under circumstances which formed the ground of complaint in the present case. The claims were admitted by the plaintiff, and were allowed by the learned judge, and so disposed of.

Reported by Sir SHERSTON BAKER, Barrister-at-Law.

It was then stated to the judge on behalf of the execution debtor, the present respondent, that an application would be made against the high bailiff, under the 50th section of the County Courts Act, 1888, by the execution debtor for misconduct in the course of the proceedings. By direction of the judge the applicant, Mr. Moore, was ordered to furnish particulars of the misconduct alleged, and five heads of misconduct were furnished. Upon the inquiry, four of these charges were found in favour of the high bailiff, so far as the application under the 50th section was concerned, the judge being of opinion that, although the man in possession was guilty of misconduct, it was not "misconduct" for which the high bailiff would be personally liable under the 50th section. These charges being thus disposed of are not now material.

Upon the fifth charge the learned judge found against the high bailiff, and this was the charge now in question upon this appeal.

The particulars of this charge furnished by the applicant were "that the high bailiff illegally and unlawfully broke into the defendant's dwelling-house on the 29th of July, 1892, and removed the whole of the furniture and effects, including the tools and implements of trade in the said dwelling-house, contrary to sections 147 and 154 of the County Courts Act, 1888."

The judge, in his written judgment, was of opinion that the bailiff had a legal right to remove the whole of the goods, exclusive of the tools in trade, and that the 154th section only prohibits a sale, and not the removal, of goods for five days, and, as to the trade goods or implements of the applicant, that there was an illegal removal and an illegal sale of the same.

The applicant, that is, the present respondent, was a civil engineer and an inventor of patents, but for some time, being crippled and unable to walk, he had supported himself and family by an ingenious patent for making pipe-cleaners, in the manufacture of which he uses a considerable number of small deal boards, two or three feet in length, which must be saturated in oil for a considerable time before they are of use; and eighty-seven of these deal boards were seized by the bailiff and sold for the sum of eight shillings. One of the questions of the present appeal was, whether these deal boards were implements of trade within the meaning of section 147 of the Act, and the learned judge found as a fact that they were implements of trade within the meaning of that section.

The learned judge, in dealing with the question whether the act of misconduct now in question came within section 50, said:—"There can be no doubt that the natural and ordinary meaning of the word 'misconduct' must be restricted by the provisions of the Act generally, and probably by the terms employed in conjunction with it in the same section. It must be restricted, at all events, to acts or omissions in the performance of the duties of the high bailiff under the provisions of this Act, whether performed by himself or his subordinates, in like manner as the same term has been restricted in the construction of the 28th section of the Bankruptcy Act, 1883, as to the discharge of the bankrupt to acts done by him 'relevant to his bankruptcy.' It also appears to me, after much consideration, that the word 'misconduct' is further restricted in the 50th section, by the terms employed in conjunction with it, to such acts of omission or commission only as are *ejusdem generis* or *in pari materiâ* with the wrongful acts specified by such terms, and especially to the term 'extortion,' which precedes it. But I think that the act of selling the trade implements of the applicant after due notice and under all the circumstances was a wrongful act

in the nature of extortion or oppression, or at all events *ejusdem generis* therewith, especially having regard to the fact that the high bailiff was interested in the profits of the sale in respect of his fees. The following definition of extortion seems to me almost literally to include the present case: 'Extortion is an abuse of the public which consists in any officer's unlawfully taking by colour of his office from any man any money or thing of value that is not due, or before it is due' (Blackstone, bk. 4, ch. 1). I think that the act in question was an act of 'misconduct' in the nature of extortion contemplated by the 50th section. I regard the act of the high bailiff only as an error of judgment, though a serious one. The question of damages has, therefore, to be considered, and I think that a jury, upon the evidence before me, would rightly assess them at £22 10s."

The high bailiff appealed.

Section 50 of the Act says: "If any registrar, bailiff, or officer of any court, acting under colour or pretence of process of the said court, shall be not charged with extortion or misconduct, or with duly paying or accounting for any money levied by him, it shall be lawful for the judge to inquire into such matter in a summary way . . . and to make such order thereupon for the repayment of any money extorted . . . and for the payment of such damages and costs as he shall think just, and also, if he shall think fit, to impose such fine, not exceeding ten pounds for each offence, as he shall deem adequate," &c.

E. Morten, for the high bailiff.—The first point is that these deal boards were not 'implements of trade' within the meaning of section 147, but were rather in the nature of plant. In the next place, even if they were implements of trade, the act of seizing and selling them was not an act of 'misconduct' within the meaning of section 50. There are two words in that section on which I rely, "extortion" and "offence," and both have recently been construed judicially under a section analogous to the present section—section 29 of the Sheriffs Act, 1887. These cases are *Shoppee* v. *Nathan & Co.*, [1892] 1 Q. B. 245, 40 W. R. Dig 233; *Lee* v. *Dangar*, 40 W. R. 469, [1892] 2 Q. B. 337; *Bagge* v. *Whitehead*, 40 W. R. 472, [1892] 2 Q. B. 355. According to these cases there can be no "misconduct" unless there be *mens rea*, a guilty mind, or an intention to do wrong. Here there was no guilty intent, as the judge found that there was merely an error of judgment on the part of the high bailiff. There is no "misconduct," therefore, within the meaning of the section.

Atherley Jones, for the respondent.

POLLOCK, B.—This case comes before us by way of appeal from the decision of the learned county court judge, who had thought that the present respondent should recover against the high bailiff a sum for damages in respect of misconduct in seizing and removing and selling the trade implements of the applicant; and the decision is founded upon section 50 of the County Courts Act, 1888. The first question is, Are we content to support the finding of the county court judge because it is a mere finding of fact? The learned judge has taken the greatest pains in endeavouring, as fairly as he could, to carry out what he believes to be the object of this section, and he has expressed his judgment in language so clear that I have not the slightest difficulty in eliminating those parts of his judgment which are findings in point of fact from those which are findings in point of law. There were several charges of misconduct, and the charge which this appeal refers to is in these words: "That you illegally and unlawfully broke into the defendant's dwelling-house, and removed the whole of the furniture and effects, including the tools and implements of trade in the said dwelling-house, contrary to section 147 of the Act." The learned judge has gone very carefully into the question whether these were tools of trade or not, and he came to the conclusion that the goods seized were part of the defendant's tools of trade, and used for that purpose. I do not intend to say more as to this finding of fact by the learned judge, which is, as far as I can see, a perfectly correct finding of fact, and I assume that these things were implements of trade within the meaning of the section.

The next question is whether the act in question is an act of "misconduct" within the section. I should prefer to see language used in this section which would make, as far as possible, the county court judge master of the situation as to whether a wrongful or criminal act, or merely negligence on the part of the bailiff was involved. The section, to say the least, is of a penal character. [His lordship then read the section.] To my mind the words "misconduct" and "extortion," followed by the word "offence," show that this section was meant to deal with offences which were of a penal character; that is to say, acts of misconduct of such a character that they indicate an intentional abuse of the authority possessed by the high bailiff. It seems to me there is a difference between the conduct of a bailiff which is of an intentionally wrong kind, and the conduct of a bailiff which is merely that of negligence. There may be very often acts done which amount to what the learned judge has called "recklessness," but in no sense of the nature of a wrongful act done with any intention. That seems to me to be the proper construction to be put upon this section, and I do not propose to compare it at length with a similar section under which the sheriff's liability is established. I would only observe, as to the words of sub-section 2 of section 29 of the Sheriffs Act, 1887, that the provisions are really wider than the words of section 50 of this Act. The judgments in the case of *Lee* v. *Dangar* show that a mere innocent mistake cannot come within the section as "misconduct," but that there must be a wrong motive. All the words used by the learned judges in that case are equally applicable to the present case, which is a case where the Legislature has provided a special remedy.

It seems to me that both sides were carefully considered by the learned judge, and yet I think he has come to a wrong conclusion, and, that being so, our judgment must be to reverse his decision, and with costs.

KENNEDY, J., concurred.

Appeal allowed.

Solicitor for the high bailiff, *T. J. Robinson.*

Solicitors for the applicant, *Nokes & Stammers.*

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams, J.) April 28.

In re HOOD.

Ex parte BLANDFORD. (*a.*)

Bill of sale — Bankruptcy — Execution — Goods sold privately—Receipt given by sheriff—Bills of Sale Act 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 8, 10.

Goods seized by the sheriff under a writ of execution

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

were sold privately by leave of the court, and a receipt was given by the sheriff to the purchaser in the following form:—"Received from, &c., . . . the sum of £122 1s. 9d., being for the goods, chattels, and effects now in and upon the premises No. 471, Bethnal Green-road, which were seized by the sheriff of the county of London under and by virtue of a writ of fi. fa., and hereby sold as far as he lawfully can or may, without any warranty of title, and with the consent of the defendant, who is a builder, and under an order of the master." The goods were left by the purchaser in the possession of the debtor until the presentation of the bankruptcy petition.

Held, that the document was a bill of sale within the meaning of the Bills of Sale Act, 1878, *and, not being registered, must be declared void.*

Application by the trustee in the bankruptcy for an order declaring that he was entitled to certain plant and other property claimed by the respondent.

The debtor was a builder, and in July, 1891, an execution was put into his house.

On the 18th of July, 1891, the debtor's goods were sold by the sheriff to a Mr. Burgess, the respondent to the present application, a receipt being given in the following form:—"Received this 18th day of July, 1891, of Henry Brocklehurst Burgess, of No. 1, Bethnal Green-road, leather merchant, the sum of £122 1s. 9d., being for the goods, chattels, and effects now in and upon the premises No. 471, Bethnal Green-road, which were seized by the sheriff of the county of London under and by virtue of a writ of *fieri facias* issued in the above cause, and hereby sold as far as he lawfully can or may, without any warranty of title, and with the consent of the above-named defendant, who is a builder, and under an order of Master Wilberforce dated this 18th day of July, 1891."

The goods were left in the possession of the debtor until the 23rd of September, 1892, and were used by him in the way of his business.

On the 7th of October, 1892, a receiving order was made against the debtor on a petition presented on the 31st of August, 1892, and the goods were now claimed by the trustee on the ground (1) that the document of the 18th of July, 1891, was a bill of sale, and (2) that the goods had been left in the possession of the bankrupt within the reputed ownership section.

The question as to the document being a bill of sale was the only one argued.

Herbert Reed, Q.C., and *Wotton*, for the trustee.—It is now settled that although a mere receipt is not a bill of sale, yet where there is a receipt which assures the goods to the buyer, or where the contract is put into writing, it is within section 4 of the Bills of Sale Act, 1878, and requires registration. This is nothing more nor less than a bill of sale from the sheriff. A receipt may or may not be an assurance. In order to be a bill of sale it must be an assurance, but if the parties put their contract into a receipt, then it becomes an assurance.

They referred to *Marsden* v. *Meadows*, 29 W. R. 816, 7 Q. B. D. 80; *Newlove* v. *Shrewsbury*, 36 W. R. 835, 11 Q. B. D. 41; *Ex parte Cooper, In re Baum*, 27 W. R. 299, 10 Ch. D. 313; *Woodgate* v. *Godfrey*, 28 W. R. 88, 5 Ex. D. 24.

Shearman, for the respondent.—The question is whether this receipt can be said to operate as a contract. If the receipt is not intended by the parties to be a reduction into writing of the contract, it is not a bill of sale. Here it was a purely verbal contract, and in no way depended on the receipt. Under ordinary circumstances a sheriff's receipt for the goods cannot be intended by the parties to be the actual contract of sale.

VAUGHAN WILLIAMS, J.—I have arrived reluctantly at the conclusion that the contention of the trustee is right. I say reluctantly, because I do not believe myself that the transaction here is really within the mischief aimed at by the statute. The transaction here was in fact a real transaction. The sheriff did seize the goods, and he seized them under a real execution. It was not a collusive execution at all, and having seized the goods under a real execution he really did sell them, and they were paid for. According to my view that transaction might have been quite as well carried out without any such receipt as was given in this case. The giving of such a receipt was not in any sense essential to the transaction which took place, and it is plain that the sheriff did sell, and that Mr. Burgess did buy and pay for the goods.

The question I have to decide is whether or not that receipt is a bill of sale within the meaning of the Act of 1878, so that the non-registration of it, coupled with the want of possession by the grantee, avoids the bill of sale and the transaction.

Now it is plain, without going through the decisions, that although in section 4 of the Act of 1878 receipts with or without inventories are referred to, it is not every receipt which amounts to a bill of sale. A receipt does not amount to a bill of sale unless it is an assurance. That conclusion has been arrived at because of the words, "other assurances," which appear in the section. That being so, the question is whether this receipt is an assurance. It is plain that it is not a legal assurance. It does not purport to be a transfer, conveyance, or assignment, or anything of that kind. But then it seems to me from various decisions, and particularly from that of the *North Central Wagon Co.* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, 35 W. R. 447, 35 Ch. D. 191, that an assurance may be an assurance within the Act of Parliament although it is not a legal assurance. It is an assurance within the Act of Parliament if it is such a document as would enable the recipient of it in a court of equity to rely on it as being an assurance of title as evidencing such a contract to assign as would entitle him in equity to insist on an assignment or to treat the document as an assignment.

That being so, I have to say whether this document is such an assurance, and it is plain that if the document in question, although in form a receipt, is really an embodiment of the contract made by the sheriff with Mr. Burgess, and was intended by the parties as such, then it is an equitable assurance. It occurred to me that one way of testing whether this receipt is an embodiment of the agreement between the parties is to ask oneself the question whether, if this document had been placed in the hands of a judge at *nisi prius*, he would have allowed parol evidence to be given of the terms of the contract after this receipt had been given. It seems to me that the judge would have been bound to reject any parol evidence at all. I was at first inclined to come to the contrary conclusion, because all that which is stated about the terms was really not for the purpose of determining what was the bargain between the parties, but to justify the course the sheriff took as an officer of the law. But the words which prevent me from coming to the contrary conclusion are the words, "and hereby sold." In the presence of those words I cannot help coming to the conclusion that the receipt was intended to embody the terms of the bargain between the parties, and, that being so, I have reluctantly come to the conclusion that the document is a bill of sale

and not being registered must be declared void. I should have been glad if I could have found any evidence that there was a complete contract before the receipt was given at all. But there is no evidence of such complete oral contract on the affidavits, and the words "and hereby sold," on the face of the receipt make it difficult to infer that there was any prior contract.

I wish to make one more observation as to this particular case. I am somewhat strengthened in my view in the matter by an admission which was made that there was a schedule which, if not attached to the receipt, was handed over with it. If that is so, it goes to prove that the intention of Mr. Burgess in taking the receipt was really to get an assurance or record of the transaction which would enable him to prove his title.

Application allowed.

Solicitor for the trustee, *A. Syrett.*

Solicitors for the respondent, *Learoyd, James, & Mellor.*

Prob. Div. & Adm. Div. } Feb. 7.
Divorce. }

MIDWINTER *v.* MIDWINTER. (*a.*)

Divorce—Settlement—Guilty wife—Leasehold property of wife—Restraint on anticipation—Amount settled variable or fixed—Allowance to children for life—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 45.

On a husband's petition, under section 45 *of the Matrimonial Causes Act,* 1857, *for settlement of property to which the wife, who had been found guilty of adultery, was entitled, the registrar reported that the husband's annual income was* £350, *derived from his business, whilst the wife's income was* £1,140, *principally arising from leasehold property, but settled without power of anticipation. The registrar recommended that during the respondent's life* £250 *a year should be settled on the husband, and* £60 *on each of five children in the custody of the husband, the sixth child, an infant, having been left in the custody of the respondent.*

The court confirmed the registrar's report, and refused to make the allowance variable to meet a possible fall in the respondent's income, or to limit the husband's receipt of his allowance to such time as he should be unmarried, or to limit the allowance to the children to the time when they should be under sixteen years of age.

The settlement was executed by the respondent on a subsequent day immediately after the decree for dissolution of the marriage was made absolute.

Motion to confirm the registrar's report as to the settlement of the property of the wife, against whom a decree *nisi* for the dissolution of the marriage on the ground of her adultery was pronounced on the 19th of June, 1890.

The husband originally presented a petition for the settlement of the wife's property before the decree *nisi* was made absolute, and the court (Jeune, P.), in the absence of evidence that the wife intended to defeat the order of the court on motion, refused to depart from the ordinary practice of making any order on petition after final decree, or to take any proceedings in anticipation of such decree. The Court of Appeal, [1892] P. 28, reversed this decision, and referred it back to the registrar, who now reported that the petitioner had an income of £350 a year from his business as a furniture dealer, and that the respondent had a life interest under the will of her father in certain leasehold houses producing an annual income of about £1,100, and was also entitled by a post-nuptial settlement to an annual income of £40 arising from the investment of accumulations under her father's will. Both amounts were settled without power of anticipation. The registrar recommended that the respondent be ordered to settle and assign to trustees an annuity of £550 during her life, of which £250 should be for the benefit of the petitioner and £60 for the benefit of each of the five children of the marriage of whom the petitioner had custody—there was a sixth child which, being an infant at the date of the decree *nisi*, was left in the custody of the respondent—and that these terms should be embodied in a deed on the usual terms.

Inderwick, Q.C. (*Priestley* with him), on behalf of the petitioner, moved for confirmation of the registrar's report.

Searle, for the respondent.—Before any order is made debts of the respondent, which amount to £1,000, ought to be paid or secured: *Wigney* v. *Wigney*, 30 W. R. 722, 31 *Ib.* 140, 7 P. D. 177, 228. The first substantial objection is that the respondent's income is variable, and the registrar has awarded a fixed sum; next, the court has no power to order maintenance for children beyond the age of sixteen, though under a different section (35) of the Divorce Act, 1857, the principle in *Blandford* v. *Blandford*, [1892] P. 148, 40 W. R. Dig. 80, applies; lastly, the husband should not retain his income under this settlement if he marries again.

Inderwick, Q.C., in reply.—The registrar took into consideration the variableness of the wife's income: *Benyon* v. *Benyon and O'Callaghan*, 15 P. D. 29, 54, 38 W. R. Dig. 71. In *Blandford* v. *Blandford* there was an appeal, but an arrangement was come to, and it never came before the Court of Appeal. That decision was, however, based on *Webster* v. *Webster*, 11 W. R. 86; that decision has, however, been misapprehended. I have an office copy of the minutes. There were two daughters, and an order was made for permanent alimony for the wife and £50 per annum for each daughter. One was married at the age of nineteen, and a summons was taken out and an order made by consent to reduce the amount to £25, and when the other daughter came of age in 1879 a summons was taken out to vary and reduce the amount payable to her, which the court refused. In *Bacon* v. *Bacon*, 8 W. R. 552, 2 Sw. & Tr. 86, a settlement on children was made of property which came to the wife by will: see also *Seatel* v. *Seatel*, 4 Sw. & Tr. 230, 9 W. R. Div. Dig. 18; *March* v. *March and Palumbo*, 15 W. R. 799, L. R. 1 P. & D. 440.

JEUNE, P.—I can now decide all the points in this case except one, relating to the debts, which should in some way be secured to the creditors or some allowance made to the wife, but I have not sufficient information to determine that point, and I therefore pass it by for the present.

The income of the wife seems to be about £1,140 and that of the husband £350. The wife's income arises principally under her father's will, by which the property is left subject to restraint on anticipation. The registrar recommends that she should settle £250 a year for the benefit of the husband and £60 for each of the five children who are in the father's keeping, £550 in all, and leaving her £590 roughly speaking a half of her income. The first point sought to be made is that the sum allowed ought not to be fixed, but variable. I confess I was tempted to make some such order as that the wife

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

should retain a certain proportion of her income but one amongst the objections urged to this was, that no such order had ever been previously made; there is also the fact that the income may go up as well as down, and that the husband's income is also variable, and I cannot therefore depart from the usual practice. I pass over the suggestion to restrict the receipt of the income by the husband to the time of his remaining unmarried, because the principle of a *dum sola* clause is inapplicable.

The more serious question arises as to the children. The question is whether the receipt of income should be limited to the age of sixteen or be for life. It is suggested that since the case of *Blandford* v. *Blandford* under section 35 of the Matrimonial Causes Act, 1857, no child should take any benefit after the age of sixteen. It is pointed out that if that be the law a guilty husband is not bound to support his children after the age of sixteen, yet a guilty wife is bound to support them for life. It may be that the result of the two sections is to create an anomaly. I must assume *Blandford* v. *Blandford* to be good law, but looking at the two sections it does not follow that whatever construction is put upon section 35 that a similar construction must be put on section 45. Under section 35 the argument is that the charge for custody is limited to the age of sixteen because that is the limit of the common law liability, and that it must be understood from the words of the section that the charge for maintenance and education are limited to the same period, and, therefore, they are not to be taken as extending the common law liability. But there is nothing in section 45 pointing to any limitation, for inasmuch as property can under it be dealt with for the benefit of the husband during the whole of his life, so by analogy property may be dealt with for the benefit of the children during the whole of their life. The case of *Bacon* v. *Bacon* is directly in point, *Seatel* v. *Seatel* not so much so; the other cases deal more with the amount of the provision. The words of section 5 of the Matrimonial Causes Act, 1859, are almost the same as at the end of section 45 of the 1857 Act. The authority, therefore, of *Bacon* v. *Bacon* is sufficient to say there is no authority for limiting the provision to the age of sixteen. As to the amount of the provision, every case must stand on its own merits, but *March* v. *March and Palumbo* and *Bacon* v. *Bacon* do seem to me to warrant the amount given by the registrar in this case, and I see no reason for differing from his view. On the assumption that no allowance is made for debts, as to them I want to know how they were incurred, their amount, and when; till I have that information I cannot finally deal with the report. I refer it back to the registrar to make these inquiries and report to me, he will also inquire into all the costs.

March 7.—On further application by the parties the court withdrew the reference to the registrar to inquire as to debts, and approved of a draft arrangement agreed upon by the parties.

March 14.—The decree *nisi* for dissolution of the marriage was made absolute, whereupon the respondent, Mrs. Midwinter, executed the power of appointment and the settlement as approved on the 7th of March.

Solicitor for the petitioner, *W. W. Palmer*.

Solicitors for the respondent, *Webster & Webster*.

Court of Appeal.

From Prob.-Div. & Adm. Div. (Lord Esher, M.R., and Bowen and Kay, L.JJ.) — June 19.

"THE RECEPTA." (*a*.)

County court—Prohibition—Appeal—Refusal to grant writ of prohibition—Jurisdiction of Court of Appeal—Jurisdiction of judge of the Admiralty Division—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 132.

By section 132 *of the County Courts Act*, 1888, "*When the High Court, or a judge thereof, shall have refused to grant a writ of* certiorari *or prohibition to a court, . . . no other court or judge shall grant such writ, but nothing herein shall affect the right of appealing from the decision of the judge of the High Court to the High Court itself.*"

Held, that this section only applied to proceedings in the High Court, and did not prevent an appeal to the Court of Appeal from the refusal of the High Court to grant a writ of prohibition to a county court.

A judge of the Admiralty Division has jurisdiction to grant a writ of prohibition; and, therefore, where a judge of that division, while sitting in chambers in vacation to hear applications from all divisions of the High Court, refused to grant a writ of prohibition to a county court in an admiralty cause, the court held that he was acting as a judge of the Admiralty Division, and that, therefore, upon his certifying that he did not desire to hear further argument in court, an appeal lay direct to the Court of Appeal, and not to a Divisional Court of the Queen's Bench Division.

Appeal from an order of Barnes, J., in chambers* refusing to grant a writ of prohibition to the City of London Court in an admiralty cause. It appeared that the application was made to the learned judge in vacation when he was sitting in chambers to hear applications from all divisions of the High Court. Two preliminary objections were taken on behalf of the respondents—first, that by section 132 of the County Courts Act, 1888, no appeal lay to the Court of Appeal from the refusal to grant a writ of prohibition; and, secondly, that the appeal ought to have been brought to a divisional court of the Queen's Bench Division.

By section 132 of 51 & 52 Vict. c. 43: "When the High Court, or a judge thereof, shall have refused to grant a writ of *certiorari* or prohibition to a court, or any such order as in the last preceding section mentioned, no other court or judge shall grant such writ or order; but nothing herein shall affect the right of appealing from the decision of the judge of the High Court to the High Court itself, or prevent a second application being made for such writ or order to the High Court, or a judge thereof, on grounds different from those on which the first application was founded."

Cranstoun, for the respondents.—No appeal lies to the Court of Appeal. By section 132 of the County Courts Act, 1888, when the "High Court" has refused to grant a writ of prohibition, "no other court" shall grant it. The "other court" must mean the Court of Appeal, as it is contrasted with the "High Court." Therefore, no appeal lies.

* It was assumed by the court that the learned judge had certified that he did not wish to hear further argument in court: see *Rigg* v. *Hughes*, 32 W. R. 355, 9 P. D. 68.

[(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Secondly, Barnes, J., when he refused the writ of prohibition, was acting as a judge of the Queen's Bench Division, and therefore the appeal should have been brought to a divisional court of the Queen's Bench Division. The old Admiralty Court had no power to issue a writ of prohibition. It was itself liable to be prohibited, and an inferior court could not have issued the writ. By section 34 of the Judicature Act, 1873, there is transferred to the Admiralty Division all matters within the exclusive cognizance of the Court of Admiralty. The power to grant writs of prohibition is not one of these matters. The practice in prohibition belongs to the Crown side of the Queen's Bench Division, and is a Crown office matter: *Mulleneisen* v. *Coulson*, 36 W. R. 811, 21 Q. B. D. 3.

Jones v. *Slee*, 34 W. R. 692, 32 Ch. D. 585, was also referred to.

Butler Aspinall, for the respondents.—The object of section 132 of the County Courts Act, 1888, was to put an end to the old practice of applicants going from one judge to another when the writ of prohibition had been refused. That was the sole object of the section, and it did not mean to interfere with the ordinary right of appeal given by section 19 of the Judicature Act, 1873. Secondly, sections 3, 5, and 16 of the Judicature Act, 1873, make the Court of Admiralty part of the High Court of Justice, and gives all the judges of the High Court equal power, authority, and jurisdiction. Therefore, Barnes, J., had jurisdiction, as judge of the Admiralty Division, to deal with the application for a writ of prohibition, and the appeal lies direct to the Court of Appeal: *Rigg* v. *Hughes*, 32 W. R. 355, 9 P. D. 68.

He also referred to sections 127 and 128 of the County Courts Act, 1888.

Lord ESHER, M.R.—The decision upon the first point taken, depends upon the true construction of section 132 of the County Courts Acts, 1888. When one calls to mind the former practice with regard to applications for writs of prohibition in the old courts, the object and intention of section 132 becomes plain. In old days a person might move for a writ of prohibition in each court successively, and I believe in the chancery courts also, and before each judge, and the Legislature wished to put an end to such an unnecessary multiplication of applications. The object of section 132 was to put an end to that practice. The different courts have now been merged into one court, and I therefore read that section to mean that if a person has applied for a writ of prohibition to a judge or a divisional court of the High Court, and it has been refused, he cannot then apply to another judge or another divisional court of the High Court. Taking that to be the meaning of the section it is clear that it does not interfere with the general right of appeal to this court given by section 19 of the Judicature Act, 1873. It might, however, have been said that the first part of section 132 did away with an appeal from the judge to the Divisional Court, and so the second part of the section was inserted. The whole section deals with the High Court alone, and does not touch the Court of Appeal.

With regard to the other objection, Barnes, J., was sitting as a judge of the High Court, and was exercising jurisdiction as a judge of all the divisions of the High Court. When a case involving admiralty jurisdiction came before him he naturally acted as a judge of the Admiralty Division. The Judicature Acts have given him as such judge all the powers of a judge of the High Court, and therefore the power to grant a writ of prohibition. The appeal from his decision therefore lies here, and this objection also fails.

BOWEN, L.J.—I am of the same opinion. I shall take the second objection first. It is said that Barnes, J., when he heard this application, was sitting as a judge of the Queen's Bench Division, and not as a judge of the Admiralty Division; and that consequently the appeal does not lie here, but to a divisional court of the Queen's Bench Division. That contention is based on a misconception of the Judicature Act. The object of that Act was to prevent suitors being bandied about from one court to another, and so courts of common law were clothed with the powers of the Court of Chancery, and in the same way the Court of Chancery was clothed with the powers of courts of common law, and so also with other branches of the High Court. That was the object of the Judicature Acts, and accordingly it was held by Jessel, M.R., in *Hedley* v. *Bates*, 28 W. R. 365, 13 Ch. D. 498, that the Chancery Division had power to grant writs of prohibition; and in *Jones* v. *Slee* this court dealt with the matter as being within the jurisdiction of the Chancery Division. Why should we deal differently with the Admiralty Division, and drive this unhappy suitor to another court which knows less about the particular question in dispute than the Admiralty Court? It is said that the practice in prohibition cases is Crown practice, and that this shows that it is Queen's Bench Division business. That seems to me to be quite a mistake. In old days an application for a writ of prohibition might have been made in the Court of Common Pleas, and nothing shows better how old things have passed away and been forgotten than the present contention that the practice in prohibition is Crown practice. It is not Crown practice, and there is nothing inherent in the matter of writs of prohibition or in the practice which makes it Crown practice.

Then comes the other point, which seems to me a little more difficult—namely, whether there is any right of appeal to this court. We must assume that Barnes, J., did not desire the matter to be reargued before him in court, and so we must take it as if this appeal comes from his decision in open court. Whether an appeal lies depends upon the true construction of section 132 of the County Courts Act, 1888. I think that the true way to deal with the section is to apply to it the broad line of reasoning stated by the Master of the Rolls. The Judicature Act, 1873, by section 19, has given an appeal from any judgment or order of the High Court, and we must look and see if that general right of appeal has been taken away. The words of section 132 are not such as one could expect to find if an appeal were intended to be taken away. Under the old practice an applicant could go from one court to another in order to try and get a writ of prohibition. Every court in turn might be applied to. The Judicature Act merged all the courts into one court. When one reads the words in section 132, "no other court" shall grant such writ, one naturally asks what other court can be intended except the Court of Appeal? But I think that the inaptitude of the expression used by the Legislature cannot drive us to that conclusion. The Legislature was thinking of divisional courts of the High Court, and its intention was that where one division or divisional court refused to grant the writ no other division or divisional court should grant it, leaving an appeal to the Court of Appeal untouched. That seems to me to be the true meaning of the words. If the arm of this court is to be shortened, it must be done by some clearer words than these. I only desire to add that section 132 is apparently a mere re-enactment of section 44 of the County Courts Act, 1856, substituting the words "High Court" for "superior court" wherever they occur, and as in 1856 there was more than one superior court, what the Legislature

must have meant by the words "no other court" becomes more apparent.

KAY, L.J.—I am of the same opinion. The effect of the Judicature Act was to alter the position of the Court of Admiralty by making it a superior court of co-ordinate authority with the other divisions of the High Court, and giving it the same powers and jurisdiction. It is clear, therefore, that the Admiralty Court, being a branch of the High Court, has jurisdiction to grant writs of prohibition. Admiralty jurisdiction to a limited extent has been conferred upon county courts, and the natural and proper division of the High Court to issue writs of prohibition to county courts in admiralty cases would be the Admiralty Division, though I do not in the least mean to say that other divisions would not have jurisdiction also in the matter. Therefore I think that Barnes, J., had power to deal with this application as a judge of the Admiralty Division, and the appeal, if there is one, lies here.

That brings me to the question whether there is any appeal at all. That depends upon section 132 of the County Courts Act, 1888. I agree with what has been said by my learned brothers that the meaning and purpose of the section is to prevent, when an application for a writ of prohibition has been refused by one division of the court or a judge of the court, another application being made to another division of the court or to another judge of the court. I admit that there is a difficulty in the wording of the section. The words "no other court," read in their largest sense, would include the Court of Appeal. But, notwithstanding that, I think it right to read the section in accordance with what must have been the intention of the framers of the Act, and in the case of *Lister* v. *Wood*, 37 W. R. 738, 23 Q. B. D. 229, I see that this court did entertain an appeal from a refusal of the Divisional Court to grant a prohibition. The appeal therefore lies.

Objection overruled.

Solicitors for the appellants, *Botterell & Roche.*

Solicitors for the respondents, *Keene, Marsland, & Bryden.*

Q. B. Div.
(Lord Esher, M.R., and A. L. Smith, L.J.) May 31.

ST. GOBAIN, CHANNY, AND CIREY CO. v. HOYERMANN'S AGENCY. (a.)

Practice—Writ—Service—"Person carrying on business within the jurisdiction in a name or style other than his own name"—Foreigner resident abroad—Service on manager at place of business within the jurisdiction—R. S. C., 1883, *ord.* 48a, *r.* 11.

The defendant was a foreigner residing and carrying on business abroad, but also "carrying on business within the jurisdiction in a name or style other than his own name."

Held, that, on the authority of Russell *v.* Cambefort, 37 *W. R.* 701, 23 *Q. B. D.* 526, *ord.* 48a, *r.* 11, *did not apply to a foreigner resident abroad; and therefore the writ could not be served, under rule* 3, *on the defendant's manager at his place of business within the jurisdiction.*

Appeal from an order of a divisional court setting aside service of a writ of summons.

The plaintiffs were a French firm carrying on business in Paris. The defendant was G. Hoyermann, a German, who carried on business as a manufacturer of chemicals in Hanover, where he resided. The defendant had an office in Mark-lane, in the City of London, where he carried on business through an agent named Wiskemann, who was authorized by him to enter into contracts for the sale of chemicals, and who managed his business for him in London. The defendant was the sole proprietor of his business, and the business in London was carried on under the name of Hoyermann's Agency.

The action was brought to recover damages for breach of a contract to manufacture and deliver to the plaintiffs 400 tons of sulphate of ammonia.

The writ was served on Wiskemann at the office in Mark-lane. On the application of the defendant a judge at chambers made an order setting aside service of the writ; and this order was affirmed by the Divisional Court (Wills and Charles, JJ.).

By ord. 48*a*, r. 1, "Any two or more persons claiming or being liable as co-partners and carrying on business within the jurisdiction may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action."

By rule 3, "Where persons are sued as partners in the name of their firm under rule 1, the writ shall be served either upon any one or more of the partners or at the principal place, within the jurisdiction, of the business of the partnership upon any person having at the time of service the control or management of the partnership business there; and, subject to these rules, such service shall be deemed good service upon the firm so sued, whether any of the members thereof are out of the jurisdiction or not, and no leave to issue a writ against them shall be necessary."

By rule 11, "Any person carrying on business within the jurisdiction in a name or style other than his own name may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules relating to proceedings against firms shall apply."

The plaintiffs appealed.

Vennell, for the plaintiffs.—The affidavits show that the defendant carries on business in England. He is therefore a person to whom rule 11 applies, and he can properly be sued in the name in which he carries on business within the jurisdiction, and if he is so sued, service of the writ may be effected in the way provided in rule 3, which is what was done in this case. Rule 11 applies to a foreigner as well as to a British subject, if he carries on business within the jurisdiction, and does so in a name or style other than his own name. Rules 1 and 11 are intended to apply to all persons, whether subjects or foreigners, who carry on their business in England and so enjoy for their business the protection of the English law. In *Russell* v. *Cambefort*, 37 W. R. 701, 23 Q. B. D. 526, it was held that ord. 9, r. 6, which is now superseded by ord. 48*a*, r. 3, did not apply to the case of a foreign firm carrying on business in this country the members of which were foreigners resident abroad. In *Grant* v. *Anderson*, [1892] 1 Q. B. 108, 40 W. R. Dig. 190, the Divisional Court held that the decision in *Russell* v. *Cambefort* applied to the new rules; but the Court of appeal expressly left that question open. The new rules show an intention to do away with the decision in *Russell* v. *Cambefort*. The rule which is now superseded by ord. 48*a*, r. 1, was ord. 16, r. 14, which did not contain the words "and carrying on business within the jurisdiction." The object of introducing those words in ord. 48*a*, r. 1, was to make the new rule applicable to all persons, whether foreigners or not, who carry on business in partnership within the jurisdiction. The words, occurring as they do in rule

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

1, must be taken to govern the whole order; and rule 3 contains words which clearly show the same intention. Rule 11 must, therefore, be held to be applicable to every individual, whether a foreigner or not, who carries on business within the jurisdiction in a name or style other than his own name. The result is that *O'Neil* v. *Clason*, 46 L. J. Q. B. 191, 25 W. R. Dig. 208, is still law. See also *Shepherd* v. *Hirsch*, 38 W. R. 745, 45 Ch. D. 231; *Pollexfen* v. *Sibson*, 34 W. R. 534, 16 Q. B. D. 792; and *Haggin* v. *Comptoir D'Escompte de Paris*, 37 W. R. 703, 23 Q. B. D. 519.

Scrutton, for the defendant.—It may be admitted that the defendant, in a sense, carries on business in England. But he resides in Hanover, and is the owner of a manufactory there. It cannot be suggested that if he carried on the English part of his business in his own name he could be sued here, except by leave under order 11; and the plaintiff has, in fact, tried to get leave under that order, and has failed. But it is suggested that if he puts "& Co." after his name he can be sued here under ord. 48*a*, r. 11, and served under rule 3. Rule 3 is a reproduction of ord. 9, r. 6, with the additional provision that service under the rule shall be deemed good service upon the firm, "whether any of the members thereof are out of the jurisdiction or not." The object of introducing these words was to get rid of the decision of *Indigo Co.* v. *Ogilvy*, 39 W. R. 646, [1891] 2 Ch. 31. But there was no intention in framing the new rules to do away with the principle laid down in *Russell* v. *Cambefort*. In accordance with that principle the present case cannot be within rule 11, because that rule makes no reference to foreigners. *Russell* v. *Cambefort* has been followed in *Western National Bank of City of New York* v. *Perez, Triana, & Co.* 39 W. R. 245, [1891] 1 Q. B. 304, and *Heinemann* v. *Hale*, 39 W. R. 485, [1891] 2 Q. B. 83.

Lord ESHER, M.R,—In this case I think it is clearly made out that the defendant carries on business in England. He is a manufacturer of chemicals in Germany, but he manufactures chemicals for the purpose of selling them, and the selling of them is his business. He has an office in England where contracts for the sale of the chemicals are made, and he has an agent at that office who makes such contracts on his behalf, having a general authority from him to accept orders without reference to him in each case. He therefore carries on business, perhaps the best part of his business, in England.

This action is brought against him in respect of a contract made by him in the course of that business, which he carries on under the name of Hoyermann's Agency. And the defendant being the only owner of that business, and being a foreigner resident abroad, and not domiciled in England, the action is brought against him, not in his own name, but in the name in which he carries on business in England. If he were an English subject, no doubt this could be done, for he would be within ord. 48*a*, r. 11. But if he were an English subject he would not be within rule 1; for he is not a co-partnership, neither is he one of two or more persons carrying on business together. It is clear that he is not within rule 1 at all. If he is within any of the rules of this order he must be within rule 11.

The question is whether he is within rule 11. That rule applies to "any person carrying on business within the jurisdiction in a name or style other than his own name." The words in themselves are large enough to include a foreigner living abroad who has never been in England at all, but is merely carrying on business by his agents in England. But ought the court so to construe the rule as to include such a person? If the rule had expressly included foreigners the court would have been bound to give effect to it. But where the Legislature uses words which are capable of either including foreigners or being limited to English subjects, in my opinion we ought to adopt that construction which will avoid the result of our legislation disregarding principles of international law.

That is the rule which was laid down in *Russell* v. *Cambefort*, which was a decision on ord. 9, r. 6, which is now superseded by ord. 48*a*, r. 3. There Cotton, L.J., laid down the canon of construction to be followed. He said: "No doubt the rule in question is made under the authority of an Act of Parliament, and that has been relied on as giving it as great an effect as an Act of Parliament; but although an Act of Parliament can give jurisdiction to the court against British subjects, as to foreigners Parliament has not, and does not assume to have, jurisdiction against those who are residing abroad, and have not submitted to the jurisdiction of the English courts. . . . Looking at it in that view, I do not think the rule applies to firms consisting of foreigners who have in no way become subject to the English Parliament. . . . It may be that the defendants can be served under order 11, but on that I give no opinion. What I say is that they cannot be served under ord. 9, r. 6, and that they cannot be served as within the jurisdiction. . . . In my opinion we ought not to construe the rule so as to bring within the jurisdiction persons who neither by nationality nor by residence are capable of being made subject to the jurisdiction." That decision seems to me necessarily to involve this, that supposing the case of a single foreigner resident abroad, and supposing such a rule as that which we now have to construe—viz., rule 11 of order 48*a*—such a rule would not apply to such a foreigner, though he carried on business within the jurisdiction under a name other than his own name. That decision overruled two cases—viz., *O'Neil* v. *Clason* and *Pollexfen* v. *Sibson*—and it has itself never been overruled, but has been recognized in *Western National Bank of City of New York* v. *Perez, Triana, & Co.*, and also, since the coming into operation of the new rules, by the Divisional Court in *Grant* v. *Anderson*.

Then it is said that new words have been introduced in rule 1 which did not occur in ord. 16, r. 14—viz., "carrying on business within the jurisdiction"; and it is suggested that the object of the alteration is to include any co-partners, whether foreigners or British subjects, provided they carry on business within the jurisdiction. And the argument is that the rules of this order ought to be so construed as to make a similar extension in the case dealt with by rule 11—viz., the case of a person trading alone. In my opinion, the alteration in rule 1 has no effect on the application of *Russell* v. *Cambefort* to rule 11. We need not give any opinion, on rule 1, as to a firm of two or more foreigners carrying on business in England. We decide that where there is one person, a foreigner resident abroad, but carrying on business in England under a firm name, such a case is not within rule 11.

It was suggested that, looking at rule 1 as part of a scheme for getting at the business assets of a firm, the object of the introduction of the new words was to enable a plaintiff who had obtained judgment against a foreign firm to levy execution against the partnership assets in England though he could not touch the personal estates of the partners. But such a suggestion cannot be applicable to rule 11; the latter words of the section could not have any such effect. In fact, if the construction which we are asked to put upon these rules were to prevail, the result would be that a foreigner carrying on business

in England by himself would be more hardly dealt with than a foreign firm of several partners so carrying on business; for the foreign firm could only be made liable to the extent of their partnership assets, whereas, in the case of the single foreigner, there would be no similar limit to his liability. This case is not within rule 11 or rule 3, and the defendant cannot be served with the writ or brought within the jurisdiction of the English court.

A. L. SMITH, L.J.—The question is whether this case is within ord. 48*a*, r. 11. It is said that under order 48*a* a new jurisdiction is given over foreigners. We are not called upon to decide whether a foreign firm of more than one partner can be brought into the English court under the rules of this order, though I think that they could not. This is the case of a foreigner carrying on business by himself. Ord. 9, r. 7, was the old rule dealing with the case of a single person carrying on business under a firm name, and that rule is now replaced by rules 11 and 3 of order 48*a*. That old rule was in force when *Russell* v. *Camberfort* was decided, and it is clear from that decision that that rule would not apply to a foreigner: see further the judgment of Bowen, L.J., in *Western National Bank of City of New York* v. *Perez, Triana, & Co.* I think that that settles this case.

It is said that since then, an alteration has been made by adding the words "and carrying on business within the jurisdiction" to rule 1, and that so the decision in *Russell* v. *Cambefort* has been done away with. I do not think so. The reason for the change seems to me to be obvious. An alteration was made in rule 3, and it was necessary to make a corresponding alteration in rule 1. But that alteration cannot affect rule 11. I am therefore of opinion that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *Poole & Robinson.*

Solicitors for the defendant, *McDiarmid & Teather.*

(1894) 1 Q.B. 755.

From Q. B. Div. (Lord Esher, M.R., and Lopes and A. L. Smith, L.JJ.) — April 13, 14, 17.

TEMPERTON *v.* RUSSELL. (*a.*)

Conspiracy—Trade union—Procuring breach of contract—Contract in way of trade—Intention to injure plaintiff—Malice—Combination to induce persons not to contract with plaintiff—Damage.

The plaintiff, who was a mason and builder, refused to conform to certain rules laid down by three trade unions connected with the building trade. The defendants, who were members of a joint committee of the three trade unions, with the intention of injuring the plaintiff, and so forcing him to conform to the said rules, induced and procured certain persons, who had, as the defendants knew, entered into contracts with him in the way of trade, to break those contracts, in consequence whereof the plaintiff sustained damage. The defendants also, with the like intention, conspired to induce, and did induce, certain persons not to enter into contracts with the plaintiff, in consequence whereof the plaintiff's business fell off.

Held, that the plaintiff was entitled to maintain an action against the defendants, both for the procuring breaches of contract and also for the conspiracy to induce persons not to enter into contracts with the plaintiff.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Application by the defendants for a new trial or judgment.

The plaintiff, Joseph Temperton, was a mason and builder carrying on business at Hull; the defendants were members and officers of the Hull branches of certain associations of workmen—viz., the Operative Bricklayers' Society, the Bricklayers' Labourers' Society, and the Operative Plasterers' Society, and of a joint committee thereof.

The plaintiff complained that the defendants maliciously and wrongfully, and with intent to injure the plaintiff, procured and induced certain persons who had entered into contracts with the plaintiff to break such contracts; and that the defendants maliciously and wrongfully, and with intent to injure the plaintiff, intimidated and coerced the said persons to break their said contracts with the plaintiff, and not to enter into new contracts with the plaintiff; and that the defendants unlawfully and maliciously conspired to do the acts aforesaid.

The plaintiff claimed damages and an injunction.

At the trial of the action, which took place before Collins, J., with a jury, the following facts were proved:—

There were in Hull three trade unions consisting of persons employed in the three branches of labour connected with the building trade—viz., the Operative Bricklayers' Society, the Bricklayers' Labourers' Society, and the Operative Plasterers' Society. There was also a joint committee consisting of representatives of these three trade unions. A set of rules was drawn up by these three unions, to which some of the master builders in Hull signified their assent.

Rule 9 was as follows:—"That no member of the Operative Bricklayers' Society shall be permitted under any circumstances to contract for or take by measurement, either in the whole or part, any kind of brickwork, brick pointing, or plastering that may have been contracted for or sub-contracted for under the original contract, nor to take any work of any master builder who is building property for himself; and that no member of this society shall be allowed to work on such jobs. That no member of these societies be allowed to work on any job where labour alone is contracted for."

The plaintiff was in the habit of supplying building materials to Messrs. Myers & Temperton, who were master builders, carrying on business at Hull, and one of whom was the plaintiff's brother. Myers & Temperton conducted their business in a way which was not in accordance with the rules of the unions. On the 6th of September, 1892, the joint committee passed the following resolution:—"That this committee advises the three societies to abstain from using any lime supplied by merchants who are supplying any builders that are working contrary to joint working rule No. 9. And, further, that they refrain from handling or fixing any artificial stonework made by any man who is working contrary to rule 9."

On the 20th of August, 1892, the plaintiff had entered into a contract with one Brentano, a builder, to supply him with certain building materials—viz., concrete heads and sills for fifteen houses. On the 11th of September Brentano, in accordance with a summons, appeared before the joint committee, when he was informed by the defendant Russell that the committee would not allow the men belonging to the unions to fix goods supplied by the plaintiff.

On the 12th of September the committee of the Operative Bricklayers' Society passed the following resolution: "That all the members of the society refuse to use any material that may have been supplied by any builder who is not conforming to rule 9, and that any member using or handling any material,

either lime, bricks, or artificial stone will be dealt with by the society in accordance with rule 9." At the same meeting Russell was appointed to act as delegate during the dispute *re* Myers & Temperton. On the 19th of September Brentano again appeared before the joint committee and answered questions which were put to him with regard to his contract with the plaintiff. He stated that he would not want any of the heads or sills which the plaintiff had contracted to supply him with for a fortnight, and promised not to use any of them until notified by the committee. Subsequently Russell made arrangements with one Goode to supply Brentano with the materials which he required. Brentano thereupon refused to perform his contract with the plaintiff. Evidence was also given with regard to similar cases, in which the plaintiff had entered into contracts with other persons for the supply of building materials, among them being one Gibson, who stated that Russell had told him that the committee meant to bring the plaintiff to his knees before they had done with him, and that he would do no good till he had made his peace with them. The plaintiff gave evidence to show that he had sustained damage through the breaches of contract by Brentano and the others, and that his business had fallen off in consequence of the defendants' conduct.

The learned judge left two questions to the jury, which with the answers were as follows:—(1) Did the defendants, or any of them, maliciously induce the persons named or any of them to break their contracts with the plaintiff? Yes, all the defendants did so. (2) Did the defendants, or any two or more of them, maliciously conspire to induce the persons named and others not to enter into contracts with the plaintiff, and were such persons thereby induced not to make such contracts? Yes, all the defendants did so conspire. The jury gave the plaintiff £50 damages on the first count, and £200 damages on the second count. The learned judge gave judgment for the plaintiff for £250 and costs, and also granted an injunction to restrain the defendants from endeavouring to induce anybody to break contracts with the plaintiff or endeavouring to prevent persons entering into contracts with the plaintiff.

The defendants moved for judgment or a new trial. The grounds of motion were that there was no evidence against the defendants of any facts constituting a cause of action against them, that the learned judge misdirected the jury, and that the verdict was against the weight of evidence.

Tindal Atkinson, Q.C., Robson, Q.C., T. W. Chitty, and *H. T. Kemp* (*F. G. Newbolt* with them), for the defendants.—There is no evidence that the breaches of contract on the part of Brentano and the others were in consequence of anything said or done by the defendants. The natural inference is that they were in consequence of the determination of the members of the unions not to work on the plaintiff's materials. The members were quite within their legal rights in coming to this determination. Russell merely communicated to Brentano and the others the intention of the workmen to do what they were entitled to do. There is no evidence that the defendants acted maliciously, so as to come within the principle laid down in *Lumley* v. *Gye*, 1 W. R. 432, 2 E. & B. 216, and *Bowen* v. *Hall*, 29 W. R. 367, 6 Q. B. D. 333. Moreover, that principle only applies to contracts for personal services. As to the second part of the case, there is no authority which shows that an action lies for conspiring to induce persons not to enter into contracts with another.

Lawson Walton, Q.C., and *Montague Lush*, for the plaintiff.—There was abundant evidence to justify the finding of the jury that the defendants procured Brentano and the others to break their contracts. And inasmuch as they did this with the object of injuring the plaintiff in his business, they did it maliciously within the rule laid down in *Lumley* v. *Gye* and *Bowen* v. *Hall*. In *Bowen* v. *Hall* the court extended the principle, holding that it was not confined to cases of master and servant or cases of personal service. The judgments of the House of Lords in *Mogul Steamship Co.* v. *McGregor, Gow, & Co.*, 40 W. R. 337, [1892] A. C. 25, seem to imply that in that case the action would have been maintainable if the defendants had procured breaches of contract. As to the second question, it is actionable to conspire to induce persons not to enter into contracts with another if actual damage results therefrom: *Gregory* v. *Duke of Brunswick*, 6 M. & G. 953; *Mogul Steamship Co.* v. *McGregor, Gow, & Co.*

Lord ESHER, M.R.—I propose first to state the facts of the case according to the evidence, and then to consider the law applicable to those facts. The first thing that happened was the formation of certain trade unions in the building trade at Hull. Three unions were formed in the three trades which make up the building trade. A trade union means an agreement between a number of persons to become members of a society on certain terms. The members agree to subscribe certain moneys, in return for which they may receive certain benefits, and in consideration of each so agreeing with the others they all agree to subject themselves to certain liabilities. Every member who so enters into the agreement in the hope of partaking of the benefits of the society undertakes to comply with certain conditions; and the main condition is that each individual member, when called upon to do certain things by those in authority, shall obey, and that, if he refuses to obey, he shall forfeit all claim to those benefits. This probably is a description of all trade unions; at any rate, the evidence in this case shows it to be a description of these unions.

These three unions came to the conclusion that it would be for the benefit of the building trade that a certain course of business should be adopted by all persons connected with the building trade in Hull; and, in order to enforce conformity with this policy, they formed a joint committee, who were to act on behalf of the unions and every member of the unions, and were to have authority to determine with regard to the trade how individual members should act. The joint committee had power to delegate their authority to one or more individuals; and in the present instance they delegated it to Russell. Russell became the delegate of the committee, and so the agent of each of the unions, and in a sense the agent of each individual member. He was the person whose business it was to direct the workmen to do or not to do certain things. Now, there having arisen a system of building in Hull which the committee thought inconvenient and contrary to their policy, they drew up a set of rules to meet the difficulty, including rule 9. They had a perfect right to do this so as to bind their own members, they had a right to insist on obedience to their rules from their members, but they had no right to impose on other persons outside the unions obedience to such rules. The firm of Myers & Temperton were a firm of builders in Hull, who had, of course, a right quite independently of the unions of carrying on their business as they pleased, and they carried on their business in a way which was not in conformity with the rules of the joint committee. The committee resolved to coerce Myers & Temperton into complying with their rules; they attempted to induce them to

do so, but failed, as Myers & Temperton refused to alter their course of business. The committee then thought they could coerce Myers & Temperton in an indirect way by coercing persons who dealt with them, and who supplied them with the means of carrying on their business. They tried to induce the plaintiff, Joseph Temperton, who was in the habit of doing business with his brother's firm, not to have any further dealings with them. The plaintiff replied as Myers & Temperton had done, refusing to accede to the committee's proposals. They thereupon determined to coerce him into ceasing to do business with his brother's firm by giving him to understand that if any persons connected with the building trade in Hull dealt with him for materials the members of the unions would refuse to work for such persons on any goods supplied by him. The effect of this would be that the plaintiff's business would come to an end. Accordingly they passed a resolution affecting the plaintiff, and began to act upon Brentano and Gibson and other persons who had dealings with the plaintiff. Russell and the committee knew that Brentano had entered into contracts with the plaintiff, and would enter into further contracts with him; and, knowing this, Russell communicated the resolution to Brentano, and let him know that if he went on dealing with the plaintiff harm would come to him in his business, because no workman who was a member of the unions would touch materials supplied by the plaintiff. The object of this was not to hurt Brentano, but to injure the plaintiff in his business so as to force him to comply with the union rules. It is argued that this did not amount to an order to the workmen, but was only a piece of advice or a notice, and that they might do as they liked. That is not the truth. It was an order, an order which the workmen were bound by their undertaking to obey; and they knew that if they did not obey it they would be expelled from the union. It was an order to these workmen that, if Brentano took any goods from the plaintiff, they were to cease working for Brentano. The meaning was that if Brentano carried out his contracts with the plaintiff, or made any further contracts with him, the plaintiff's business would be destroyed and Brentano's also. The intention was to injure the plaintiff in his business and so force him to obey the unions. There is evidence that all the defendants authorized what was done by Russell. The case with regard to Gibson is the same. In each case the defendants acted with the intention of injuring the plaintiff in his trade, and so compelling him to act in accordance with their policy, which they had no right to force upon him.

As to the law applicable to these facts, *Bowen* v. *Hall* does away with the notion that there is any difference between the case of master and servant and other cases. There the majority of the Court of Appeal agreed with the majority of the court in *Lumley* v. *Gye*. We tried to state the rule of law, and we said that though merely to persuade a person to break his contract may not be wrongful in law or act, yet "if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it. We think that it cannot be doubted that a malicious act such as is above described is a wrongful act in law and in fact. The act complained of in such a case as *Lumley* v. *Gye*, and which is complained of in the present case, is, therefore, because malicious, wrongful. That act is a persuasion by the defendant of a third person to break a contract existing between such third person and the plaintiff. It cannot be maintained that it is not a natural and probable consequence of that act of persuasion that the third person will break his contract. It is not only the natural and probable consequence, but by the terms of the proposition which involves the success of the persuasion it is the actual consequence." That proposition is quite applicable to this case, where people have been forced, not by violence, but by means of the conditions under which they carry on their business, to break their contracts.

Is there, as has been argued on behalf of the defendants, a difference between the case of forcing a person to break an existing contract and the case of forcing a person not to enter into a contract? I can see no difference. Practically it comes to this: You have a contract with A. B., and to-morrow you are going to enter into another contract with him; if you carry out the one I will destroy your business, and if you enter into another I will do the same. In each case there is the same wrongful intent, and the same effect of doing injury. Is there any authority for drawing a distinction between the two cases? I think that *Gregory* v. *Duke of Brunswick* is an authority the other way. That case shows that where persons combine to do an act so as to injure another an action may lie, though it would not be so if the act were done by one person. In *Mogul Steamship Co.* v. *McGregor, Gow, & Co.* the House of Lords did not draw any distinction such as that suggested on behalf of the defendants. The judgments in that case seem to show that such a combination, if followed by injury to the plaintiff, is actionable. Lord Bramwell seems to recognize the doctrine that if there is an agreement amounting to a conspiracy to do that which is unlawful, and that conspiracy causes injury to the plaintiff, an action will lie in respect of such conspiracy. And that doctrine appears to me to be equally applicable to the case of persuading persons to break contracts already made with the plaintiff, and to the case of inducing persons not to enter into further contracts with the plaintiff in the future. I am of opinion that in this case there was evidence on which the jury might find that people were prevented from making contracts with the plaintiff by the pressure which was exercised by the defendants, and that the plaintiff's business had fallen off. And the natural inference for the jury to draw was that that pressure was the cause of the falling off of the plaintiff's business. There was, therefore, evidence to go to the jury on both counts, and the jury clearly meant to find in the plaintiff's favour on both counts. I think that there was no misdirection on the part of the learned judge, and that this application must be refused.

LOPES, L.J.—In *Bowen* v. *Hall* the broad principle is laid down that if a man induces one of two parties to a contract to break that contract, with the intent to injure the other party or to do himself a benefit, he thereby commits an actionable wrong. In this case the jury, in answer to the first question put to them, found that the defendants did maliciously induce persons who had entered into contracts with the plaintiff to break those contracts. I think there was abundant evidence to support that finding. The second question in the case is as to inducing persons not to enter into new contracts with the plaintiff. The jury were asked whether the defendants maliciously conspired to induce persons not to enter into contracts with the plaintiff, and whether such persons were thereby induced not to enter into such contracts; and they answered in the affirmative. Does that answer amount to a finding of an actionable wrong? I think that it does. The law appears to me to be that a combination by two or more persons to induce others not to deal with a particular

individual or enter into contracts with him, if it is done with an intent to injure that individual, and if he is thereby injured, is an actionable wrong. In my opinion there was sufficient evidence in this case to support the second finding of the jury. I therefore think that the verdict must stand, and that this application must be dismissed.

A. L. SMITH, L.J.—The plaintiff in this case is a master mason and builder at Hull, who in the course of his business supplies building materials by contract to other persons. He sues the defendants, who are members of a joint committee of the Operative Bricklayers', of the Operative Plasterers', and of the Operative Labourers' societies in that town, firstly, for having unlawfully and maliciously procured certain persons to break their contracts with him; and, secondly, for having maliciously conspired to induce certain persons not to enter into contracts with him, by reason of which acts he was damnified. The jury have found against the defendants upon each of those alleged causes of action, and have awarded £50 damages upon the first and £200 damages upon the second. A motion has been made to us to set aside the verdict, and to enter it for the defendants, upon the ground that there was no evidence to fix any of the defendants with liability for the acts complained of, and that the learned judge at the trial misdirected the jury in point of law. The question he left to the jury as to the first alleged cause of action was, whether the defendants or any of them maliciously induced the persons named to break their contracts with the plaintiff; and he fully explained what was the meaning of the word "maliciously" in this question. He said, "Now, in my judgment, it is perfectly clear law that to induce a person who has made a contract with another to break that contract, in order to hurt the person with whom it has been made, to hamper him in his trade, or to put undue pressure upon him, or to procure some indirect advantage for the person himself—to induce another to break a contract for any of those motives—is in point of law to do it maliciously; therefore, if in this particular case you are of opinion that the plaintiff has satisfied you that any one of the defendants had induced—I will take one particular instance—Brentano, because he comes first, to break his contract with the plaintiff, of the existence of which he was aware, in order to hurt the plaintiff in his trade, . . . and, if his object in doing that was, by hurting him in his trade, to compel him to do something which he did not want to do, . . . that would be 'maliciously' in point of law, and a cause of action would be established." Nothing could be clearer than this direction, and that it is correct in point of law will be seen upon examining the opinion delivered by Crompton, Wightman, and Erle, JJ., in *Lumley* v. *Gye*, and the judgment of this court (Lord Selborne, L.C., and Brett, L.J., Lord Coleridge, C.J., dissenting) in *Bowen* v. *Hall*.

It is not necessary, in my opinion, in this case to decide the point whether this cause of action will apply if there is no contract in existence, and I reserve that point for decision hereafter.

But it is said that there was no evidence to support the cause of action in the present case. Now, evidence was given in support of the following facts. [The Lord Justice here stated the effect of the material portions of the evidence in detail, so far as it bore upon the dealings of the defendants with Brentano, and then proceeded as follows:—] It was argued for the defendants that the above constituted no evidence that the defendants (who were all members of the joint committee of the three societies, which Russell admitted he represented) had, with knowledge of the existence of any contract, and with the intention of injuring the plaintiff and of crippling him in his trade, induced Brentano to break his contract with him; and it was said that all that the defendants had done was what was done in every strike, *i.e.*, call out the men, and that this was legal. If this had been all, I should have agreed, for it cannot be doubted that, at any rate since the passing of 38 & 39 Vict. c. 86, in 1875, if not from 1871, strikes *per se*, subject to the exceptions mentioned in sections 4 and 5 of that Act, are legal.

It was argued that, if the defendants were to be held liable in damages in this case, no trade union could hereafter call out their men, for it might be held that by so doing they were inducing the breach of a contract to the injury of one of the contracting parties, if there happened to be one. I do not agree that a strike is analogous to the present case; for, to maintain the cause of action sued on, there must be evidence that the defendant, with knowledge of the existence of a contract, had induced and succeeded in inducing one of the contracting parties to break his contract to the injury of the other contracting party, and there must also be evidence that the intention of the inducer was, by such breach, to do harm to the other contracting party, or, to use Lord Hannen's words in *Mogul Steamship Co.* v. *McGregor, Gow, & Co.*, that the "real object was to injure the individual." The present is a very different case to that suggested, viz., the merely calling out men on strike, though it does appear to me that, if a strike were used for the purpose and with the intent above mentioned, an action would lie.

In my judgment there is evidence in this case: (1) That the defendants intended to coerce the builders, Myers & Temperton, to obey their edicts; and, to bring this about, they determined to cut off from them the supply of all materials they might require for their trade, and also the supply of men. (2) That, inasmuch as the plaintiff would not fall in with their commands, the defendants then determined to cripple and injure him in his trade by inducing Brentano (together with others who were under contract with the plaintiff) to break the contract which they well knew he had with the plaintiff, so that by those means he might be coerced into obedience. It will be remembered that the defendants Russell and Stephenson in their answer to interrogatories stated that the plaintiff had broken no rules. (3) That the defendants did induce Brentano to break his contract to the loss and injury of the plaintiff. It was, however, insisted that there was no evidence that the defendants knew that Brentano was under contract with the plaintiff; but I do not think that this can be maintained, having regard to the facts that, at the meeting of the joint committee on or about the 11th of September, 1892, the defendant Russell introduced Brentano to the meeting as having a contract with the plaintiff, that the minutes of the meeting of the 19th of September state that Brentano attended to give evidence with regard to a contract made between himself and the plaintiff, and that the defendant Russell in his letter to Goode stated that Brentano had signed a contract with a firm who were in dispute with the building trade—*i.e.*, the plaintiff—and gave the Bricklayers' Society's guarantee to Goode, who was the person they had found to supply materials to Brentano in the place of the plaintiff under his contract with him, Brentano having been induced, or rather forced, to break his contract with the plaintiff. As before pointed out, there was ample evidence that Russell was deputed by the defendants to carry out, if he could, their common intent. In my judgment, not only was there good evidence against the defendants upon

this case of Brentano, but I go further, and say that, if the jury had found for the defendants upon this, they would have been wrong. I do not propose to discuss the evidence at length as to the other contractors, who, the jury have found, had been induced to break their contracts with the plaintiff by the action of the defendants; I will only call attention to the evidence of Gibson, whose contract with the plaintiff, it will be noticed, was produced at the meeting of the 19th of September, at which all the defendants were present. He stated that, at the interview which he had with Russell, the latter said that they meant to bring Temperton to his knees before they had done with him, and he would do no good till he had made his peace with them. This expression was very significant as to what the real intentions of the defendants were towards the plaintiff. Upon the first cause of action, in my judgment it is impossible to hold that there was not evidence to support the verdict of the jury.

As regards the second cause of action—*i.e.*, the count for conspiracy—I agree with what has been said by the other members of the court. I think that the direction of the learned judge on that head was correct, as being in accordance with what was said in *Bowen* v. *Hall* and *Mogul Steamship Co.* v. *McGregor, Gow, & Co.*, and that there was evidence to support the verdict of the jury.

Application dismissed.

Solicitors for the plaintiff, *Bell, Brodrick, & Gray*, for *J. T. & H. Woodhouse*, Hull.

Solicitors for the defendants, *Shaen, Roscoe, Massey, & Co.; Collyer-Bristow, Russell, & Hill*, for *Laverack & Son*, Hull.

High Court of Justice.

Chan. Div. North, J. — Feb. 10.

ROBSON v. EDWARDES. (a.)

Light—Ancient lights—Prescription Act (2 & 3 *Will.* 4, *c.* 71), *s.* 3—*Landlord and tenant—Same landlord—Adjoining tenements.*

Plaintiff, having obtained the assignment of a twenty-one years' lease, which had been granted in 1862, *of certain houses, just before its expiration, in* 1882, *agreed with his landlord for a further lease of twelve years, under which he was in possession, no formal lease having been executed. In* 1887 *the same landlord granted a lease of adjoining premises, which was assigned to the defendant. On motion to restrain interference by the defendant with the plaintiff's lights,*

Held, that the fact that the plaintiff's houses had not been continuously occupied by the same tenant was immaterial, and that an absolute and indefeasible right to light had attached to the houses in 1882 *by virtue of the Prescription Act, s.* 3.

Held also that the fact that the plaintiff was in possession under agreement only, was not material.

In 1862 the plaintiff's father became lessee of certain houses for a term of twenty-one years expiring at Christmas, 1882. In 1880 the plaintiff succeeded his father in possession of the property and the lease was assigned to him. A few days before the expiration of his tenancy plaintiff entered into a written agreement with his landlord for a renewal of the lease for a further term of twelve years expiring in 1894, under which agreement he was still in possession, no formal lease having been prepared. In 1887 the same landlord granted a lease of property opposite to the plaintiff's houses, which in 1891 was assigned to the defendant. Defendant was now building on the said property. This was a motion in the action to restrain the defendant from building in such a manner as to interfere with the light of certain of the plaintiff's windows.

Cozens-Hardy, Q.C., and *Bethell*, for the plaintiff, relied on section 3 of the Prescription Act, and cited *Frewen* v. *Philipps*, 9 W. R. 786, 11 C. B. N. S. 449, and *Mitchell* v. *Cantrill*, 36 W. R. 229, 37 Ch. D. 56.

S. Hall, Q.C., and *Cave*, for the defendant.—The plaintiff could not during his original lease acquire a prescriptive right as against his landlord in respect of the reversion on which his agreement for a further lease was founded. The landlord could not derogate from his grant and interfere with the defendant's holdings, and neither can the plaintiff, his tenant. [They cited *Coutts* v. *Gorham*, 1 Moody & Malk. 396; *Booth* v. *Alcock*, 21 W. R. 743, L. R. 8 Ch. App. 663; *Gayford* v. *Moffatt*, L. R. 4 Ch. App. 133, 17 W. R. Dig. 42.] The defendant is in possession of the legal estate in his lease as a purchaser for value without notice of any easement claimed by the plaintiff, whose right, as it rests on agreement only, is merely equitable.

They cited *Allen* v. *Seckham*, 11 Ch. D. 790, 27 W. R. Dig. 118.

NORTH, J., in stating the facts above set out, said that with regard to the plaintiff's tenancy the parties had allowed it to rest in agreement. No actual lease had been prepared, but the rent had been paid upon the footing of the agreement, and the mere fact that a formal parchment deed had not taken the place of the agreement for a lease was, in his opinion, immaterial, and continued:—The question is, What are the legal rights of these parties? Assuming there was no legal right, either actual or inchoate in 1862—because that is the point at which I must begin, as I cannot fix any definite time earlier at which these houses were existing—assuming that there was no right to light in 1862, at any rate when the plaintiff's father went into occupation, a right by statute to have the light coming to these houses over the adjoining lands began to run, and at the end of twenty years from that time that right became absolute and indefeasible under the 3rd section of the Prescription Act. The fact that the premises have not been in the occupation of the same person all along is clearly immaterial. It does not matter what the number of tenants may have been, because the Act says when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed throughout for the full period of twenty years without interruption the right thereto shall be deemed absolute and indefeasible unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing. There is no evidence whatever in this case of anything which brings it within the exception. There is no evidence that it was enjoyed by any consent or by any agreement either expressly or otherwise, made relating to it by deed or writing. Therefore the right at the end of twenty years became absolute and indefeasible. The lease granted in 1862 expired on the 25th of December, 1882. At that time, therefore, when that lease expired the twenty years had run, and the right had become absolute and indefeasible to that house

(a.) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

as it was then occupied by the plaintiff. What difference does it make that, that lease coming to an end, the ground landlord renewed the lease or agreed to renew the lease to the same tenant? In my opinion it does not make any difference. The contention is that it put an end to the right to light acquired by the twenty years which had expired before Christmas, 1882, and it is said that because that lease ended and a new one was granted no time had run and you must begin to count the twenty years afresh. In my opinion, that is not the law. When twenty years had run the right was acquired absolute and indefeasible in respect of the access of light to that house; and when the house was leased afterwards the right given by law passed with it, not by reason of the lease, though no doubt the person who became tenant went in under the lease, but he did not get the grant to the light by the lease in any sense. He got the house by the lease, and the law gave the tenant, the occupier of the house, the right to the enjoyment of that light at that time.

Then it is said that by reason of the lease of 1887 to the defendant or to the defendant's predecessor something was done which interfered with that. I cannot follow that in the least, because I cannot see how the making of the lease in 1887 could have any effect upon a prior demise by the same landlord as far back as the year 1882, for, as I have said, the agreement to lease, coupled with the possession and the payment of rent under it, come to exactly the same thing as if a formal parchment lease had actually been signed.

The plaintiff, therefore, is, in my opinion, clearly right on the question of law. [His lordship then said that on the evidence the plaintiff was entitled to an injunction, but, on the defendant's undertaking to abide by any order the court might make at the trial as to pulling down, dismissed the motion.]

Solicitor for the plaintiff, *Jameson*.

Solicitors for the defendant, *Slack & Metcalfe*.

Chan. Div.
Vaugan Williams, J. } May 17.

In re OCEAN QUEEN STEAMSHIP CO. (*a*.)

Company — Reduction of capital—Jurisdiction — Confirmation of reduction—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *ss.* 9, 11, 12—*Companies* (*Winding-up*) *Act*, 1890 (53 & 54 *Vict. c.* 63), *ss.* 1, 2, 32 (*sub-section* (2)), 33—*Order of the Lord Chancellor, March* 26, 1892.

The judge to whom the jurisdiction of the High Court in the winding up of companies has been assigned by the order of the Lord Chancellor of the 26th of March, 1892, *has jurisdiction to confirm a reduction of the capital in the case of a company which may be wound up in the High Court under the Companies* (*Winding-up*) *Act*, 1890.

The above-named company was incorporated in 1887 under the Companies Acts, 1862 to 1886, as a company limited by shares. By a special resolution confirmed on the 3rd of May, 1893, it was resolved that the capital of the company should be reduced from £25,000 to £8,000, divided into 1,000 shares of £8 each, and that such reduction should be effected by cancelling capital which had been lost or was unrepresented by available assets to the extent of £17 per share upon each of the 424 shares which had been issued and were then outstanding, and by reducing the nominal amount of all the shares in the company's capital from £25 to £8. At the date of the resolution the paid-up capital of the company exceeded £10,000. On the 16th of May, 1893, the company presented a petition to the High Court of Justice, intituled as follows: "In the High Court of Justice, Chancery Division, Mr. Justice Vaughan Williams.—In the matter of the Companies Act, 1867, and in the matter of the Companies Act, 1877, and in the matter of the Ocean Queen Steamship Co., Limited and reduced," praying that the special resolution, and the reduction to be effected thereby might be confirmed, and that the addition of the words "and reduced" to the company's name might be dispensed with.

B. B. Swan, for the petition.

VAUGHAN WILLIAMS, J.—I have already considered the question of jurisdiction in the recent case of *In re Mining Shares Investment Co.*, *ante*, p. 376, and have satisfied myself that I have jurisdiction to make the order. The company must use the words "and reduced" as part of its name for one calendar month, and the usual advertisements must be issued.

Solicitor, *Charles E. Harvey*.

(*a*.) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

Q. B. Div.
(Pollock, B., and Kennedy, J.) } May 8.

COOLE, *Appellant*.
LOVEGROVE, *Respondent*. (*a*.)

Metropolis—Buildings—Commencement of new building —Notice to district surveyor—Building "used for the purposes of" a canal — Exemption — Metropolitan Building Act, 1855 (18 & 19 *Vict. c.* 122), *ss.* 6, 38.

By section 38 *of the Metropolitan Building Act*, 1855, *two days before any building is commenced notice in writing, stating certain particulars, is required to be given by the builder to the district surveyor.*

By section 6, "*buildings belonging to any canal, dock, or railway company, and used for the purposes of such canal, dock, or railway under the provisions of any Act of Parliament,*" *are exempt from the operation of the first part of the Act* (*including section* 38).

A canal company, under their statutory powers, erected a building upon one of their wharves and let it to tenants who used it, in the course of their business, as a place for chopping up firewood. The company were not carriers, but received tolls in respect of the passage of barges over their canal; and it was arranged between them and the tenants that all the wood to be chopped in the building should be carried to the wharf in barges along the canal.

Held, that the building was not "used for the purposes of the canal" within the meaning of section 6 *of the Metropolitan Building Act*, 1855, *and that it was the duty of the builder to give notice to the district surveyor before commencing to build.*

Case stated by a metropolitan police magistrate.

The appellant appeared before the magistrate at the Clerkenwell Police Court on the 22nd of November 1892, upon a summons which charged that the appellant, being the builder engaged in erecting a building at No. 38, Graham-street, in the parish of St. Mary, Islington, in the county of London and within the metropolitan police district and within the limits of the Metropolitan Building Act, 1855, and in the district of South Islington, did neglect to give to the

(*a*.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

respondent, the district surveyor, two days before such building was commenced, due notice in writing stating the situation, area, height, and intended use of the building about to be commenced, and other the particulars of such proposed work, and stating his name and address, but did execute such work before giving any such notice, contrary to the statute.

The appellant was the secretary of the North Metropolitan Railway and Canal Co., a corporation created by statute and carrying on business under the statute 45 & 46 Vict. c. cclxii. for the purposes therein mentioned. By that statute the company acquired the undertaking of the company of Proprietors of the Regent's Canal which was incorporated by statute 52 Geo. 3, c. cxcv., which statute together with the statute 59 Geo. 3, c. lxvi. and subsequent statutes relating to the canal remain in full force and apply to the North Metropolitan Railway and Canal Co. except in so far as they are by the said statute 45 & 46 Vict. c. cclxii. expressed to be varied or repealed.

At No. 38, Graham-street was a wharf belonging to the company and used by them for the purposes of their said business, having been constructed by them under the above-mentioned statute of 59 Geo. 3, c. lxvi. in 1820 upon land acquired for the purposes of the company under that Act. The building complained of was built upon a part of the wharf. It was a wooden erection about sixty feet long without any concrete floor, and was, in the opinion of the respondent, dangerous to the public. It was commenced on the 16th of August, 1892, and on its completion was on the 15th of September, 1892, let at a rent to the Philanthropic Firewood Institution, and occupied by that institution as a place for chopping firewood. The blocks of wood of which the firewood was made were conveyed over the company's canal in barges in the ordinary way of the company's business, an arrangement having been made with the Institution that the canal only should be used for the conveyance of the wood to the building. The company received tolls for the passage of barges over their canal, but was not a carrying company.

No notice under section 38 of the Metropolitan Building Act, 1855, of their intention to erect the building in question was given by the company. That section imposes upon the builder the duty of giving to the district surveyor two days before a building is commenced a notice in writing, stating the particulars mentioned in the section, and by section 41 the builder is made liable to a penalty if he neglects to give such notice. Section 6 exempts from the operation of the first part of the Act (which comprises sections 6-68) "the buildings belonging to any canal, dock, or railway company and used for the purposes of such canal, dock, or railway under the provisions of any Act of Parliament."

The appellants contended before the magistrate that the building in question was not within the provisions of section 38 of the Metropolitan Building Act, 1855, but was exempted therefrom by section 6. The magistrate held that the building, not being occupied directly by the canal company and not being used for the purposes of the canal itself, did not come within the exemption in section 6, and, therefore, that notice should have been given under sections 38 and 40 of the Act. He therefore convicted and fined the appellant. The question for the court was whether the conviction was right in law.

C. Mathews, for the appellant.—This building is exempt from the provisions of section 38 of the Metropolitan Building Act, 1855. It is "used for the purposes of the canal" within the meaning of section 6. Although the canal company do not themselves occupy it, it enables them to earn increased tolls by means of the carriage of the wood to the building along the company's canal: these tolls would not accrue to the company if they had not erected the building. The object of section 38 is to insure that buildings shall be erected under the supervision of a competent architect. This company have statutory powers to appoint their own architect and engineer (52 Geo. 3, c. cxcv., s. 42), and the building was erected under the supervision of those officers and under the powers of the company, contained in their special Acts, of making their wharves more commodious (59 Geo. 3, c. lxvi., s. 2).

He cited *North Kent Railway Co.* v. *Badger*, 6 W. R. 246, 27 L. J. M. C. 106.

R. Cunningham Glen, for the respondent, was not called upon to argue.

POLLOCK, B.—This case raises a question of some importance, and was very properly brought before the court, but I have no doubt that the decision of the magistrate was right. By section 38 of the Metropolitan Building Act, 1855, notice is required to be given to the district surveyor before a building is commenced or altered to any important extent. That, of course, is a provision which is intended to insure that buildings shall be safely and properly built. There are certain buildings to which this provision does not apply. The object and intention of the Act is clear. It is that where Parliament has assigned certain areas of land to public companies for public purposes those companies ought to be allowed to deal with those areas for the purposes of their Act and of their business without being subject to the restrictions which the Metropolitan Building Act would impose upon them. By section 2 of 59 Geo. 3, c. lxvi., the canal company were empowered to make and build "quays, wharves, warehouses, erections, sheds, buildings, and other conveniences adjoining thereto, and also such other works as may be necessary and requisite for rendering the same commodious for the use of such locks and basins, and for the accommodation and convenience of persons resorting with barges and other vessels thereto." The intention there is not to enable the company to act as carriers themselves but to give them power to make quays and other conveniences without which their waterway would be comparatively useless. If we turn to the Metropolitan Building Act, 1855, we find that the words used are almost correlative, because the exemption applies to "the buildings belonging to any canal . . . company and used for the purposes of such canal."

In this case the wood which is chopped up in this building is carried to it along the canal; but it does not follow from that that the building is used for the purposes of the canal. What often happens in these cases is this: the land which was originally acquired for a wharf upon which to unload goods is found to be more than is necessary for the purposes of the canal, and then an advantageous offer is made to the company for the use of the land, and they grant a lease of it and erect buildings upon it in order that a profit may be made in the first instance, at all events by the lessees, who use the land and the buildings upon it for their own purposes. In the present case this philanthropic Institution use the wharf and the building for chopping wood, and they have incidentally made an arrangement which in effect gives the company a monopoly in respect of the carriage of the wood. That being so, although the existence of the building does no doubt bring gain to the company, it cannot be said to be "used for the purposes of the canal." Although in this case the business carried on

by the Institution is small, and the increased value which is put upon the wood after it is brought to the building is not great, the case is the same as if a large manufactory had been built upon this wharf with expensive machinery making products of great value, such as pianos or artistic pottery; in that case it certainly could not be said that the manufactory was "used for the purposes of the canal," although the company would make a profit by means of the goods which passed along their canal. I think that the magistrate took a correct view of this case, and that we should give judgment for the respondent.

KENNEDY, J.—I agree. I do not think that a building upon the bank of a canal which is used for purposes of manufacture is used for the purposes of the canal company's business simply because materials will certainly or probably be carried to the manufactory along the company's canal.

Judgment for the respondent.

Solicitors for the appellant, *Hollams, Son, Coward, & Hawkesley.*

Solicitors for the respondent, *W. A. Blaxland*, solicitor to the London County Council.

Prob. Div. & Adm. Div. Admiralty. } March 22.

"THE ALNE HOLME." (a.)

Charter-party—Demurrage—Strike clause—Strike of labourers preventing discharge of all lighters available for lighterage of cargo.

The plaintiffs' ship was chartered to carry a cargo of timber to Sharpness and there deliver the same under a charter-party by which it was provided that the cargo should be discharged with the customary steamer discharge of the port, any time lost by reason of strikes, lock-outs, or combinations of workmen, whether partial or general, not to count as part of the aforesaid discharging time, and that if, through any default of the merchants or charterers, who were to observe the usual custom of the wood trade, the vessel be longer detained, demurrage to be paid at the rate of fivepence per gross register ton per like day, and pro rata *per hour for any part of the last of such days. The vessel arrived at Sharpness, which is within the port of Gloucester, at a time when there was a strike in the port of Gloucester amongst the labourers in the shipping trade, and owing to the continuance of such strike all the timber lighters which would otherwise have been available to take on board the cargo and take it up the canal to Gloucester were detained at Gloucester with the loads of timber they had last taken up the canal still laden on board them, so that nothing could have been done to discharge the plaintiffs' ship until the strike had come to an end. After the strike had come to an end the discharge of the plaintiffs' ship duly commenced, and was completed with all reasonable despatch, except on one day, when the discharge was delayed by matters bearing no reference to the strike. The plaintiffs, as the owners of the ship, instituted an action in a county court having admiralty jurisdiction against the charterers to recover for over five days' demurrage for the alleged detention of the ship at Sharpness; but the county court judge, being of opinion that the strike clause in the charter-party operated to free the defendants from liability for demurrage during the continuance of the strike above mentioned, gave the plaintiffs judgment for demurrage only in respect of the day the delay on which had had no relation to the strike. The defendants appealed.*

(a.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

Held, on appeal, that, as four days and twenty-two hours out of the entire number of days and hours in respect of which the plaintiffs had claimed demurrage had been lost by the strike, the judgment of the court below was right, and must be affirmed.

This was an appeal from a county court having admiralty jurisdiction.

By the decree appealed from the judge of the county court of Glamorganshire, holden at Cardiff, had, in an action arising out of an agreement made in relation to the use or hire of the steamship *Alne Holme*, and in relation to the carriage of goods therein, and in which action Messrs. Hine Brothers, the owners of *The Alne Holme*, were plaintiffs, and claimed £127 5s. 11d. damages by way of demurrage, and Messrs. Thomas Adams & Sons, the charterers of the said vessel, were defendants, given judgment in favour of the plaintiffs for £22 5s. 10d., with costs, that is, for one day's demurrage and costs ordered to be paid under the judgment as due to the plaintiffs as damages to which they were entitled under a charter-party of *The Alne Holme*, entered into between the plaintiffs and the defendants on the 15th of July, 1890, and in which were the following material provisions:—

"It is this day mutually agreed between Messrs. Hine Brothers, owners of the . . . . steamship . . . *Alne Holme* . . . and Thomas Adams & Sons, of Birmingham and Gloucester, merchants, that the said ship . . . shall proceed to Tornea . . . and there load . . . a full and complete cargo . . . to consist of deals battens, and not exceeding one-fourth of cargo loaded . . . and being so loaded shall therewith proceed to Sharpness (thence to such dock and berth as may be ordered by the charterers or their agents after receiving notice of arrival) . . . and deliver the same always afloat. . . . Cargo to be loaded and discharged with the customary steamer despatch of the port and in the ordinary working hours thereof. Vessel to work at night if required by . . . receivers of cargo. Sundays, general holidays, Bank holidays, any time lost by reason of strikes, lock outs, combinations of workmen—whether partial or general—not to count as part of the aforesaid . . . discharging time. If through any fault of the merchants or charterers the vessel be longer delayed, demurrage to be paid at the rate of 5d. per gross register ton per like day, and *pro rata* per hour for any part of the last of such days. . . . The usual custom of the wood trade of each port is to be observed by each party in cases where not specially expressed."

The defendants in the court below appealed to this court on the ground that the above-mentioned decree was against the evidence, and was wrong in law, the judge of the court below having given judgment for one day's demurrage, whereas they contended that he ought to have given judgment for the full amount of the plaintiffs' claim for five days and twenty-two hours' demurrage, the vessel having been delayed for four days and twenty-two hours by reason of the being for that time after her arrival at Sharpness no lighters in attendance on her in which her cargo could have been discharged.

March 7.—The appeal was now heard before a divisional court of the Admiralty Division (Jeune, P., and Barnes, J.).

Brynmor Jones, Q.C., and *Holman*, for the appellants.

Aspinall, Q.C., and *Batten*, for the respondents.

Cur. adv. vult.

March 22.—BARNES, J., delivered the following

judgment on behalf of JEUNE, P., and himself:—This is an appeal from the decision of his Honour Judge Owen, the judge of the Glamorganshire County Court, holden at Cardiff, in an action brought by the owners of the steamship *Alne Holme*, a vessel of 1,070 tons gross register, against the charterers of that vessel to recover £127 5s. 11d. for five days, twenty-two hours' demurrage at the rate of £22 5s. 10d. per day for the alleged detention of the vessel at Sharpness. The county court judge gave judgment for the plaintiffs for £22 5s. 10d., that is, for only one day's demurrage with costs. The appellants contend that they are entitled to judgment for the whole five days claimed. The claim in this case arises under a charter-party dated the 15th of July, 1890, made between the plaintiffs and the defendants for the carriage of a cargo of timber by *The Alne Holme* from Tornea in Finland to Sharpness. The learned county court judge, upon an intimation from us that it would assist us if he would furnish us with a copy of his judgment, has been good enough to send us a copy thereof, from which it appears that he found that *The Alne Holme* arrived at Sharpness on Wednesday, the 13th of August at 10 a.m.; that the discharge of the cargo began on Saturday, the 16th of August, and was finished on Tuesday, the 26th of August; that at the time when the vessel arrived at Sharpness there was a strike in the port of Gloucester amongst the labourers in the shipping trade, which strike had been in existence for several weeks; that the strike came to an end on the evening of the 15th of August, and the men began work on the following morning; that the customary mode of discharging timber vessels at Sharpness is to discharge them into timber lighters, by which the timber is taken up the canal to Gloucester; and that by reason of the long continuance of the strike of the labourers whose business it was to discharge the loaded lighters all the timber lighters were at Gloucester loaded with timber, and the consignees could not get them unloaded there; that according to the customary steamer discharge the vessel could have been discharged but for the strike in four and a half days; that nothing could have been done as to discharging the vessel until the strike had come to an end; and that after the strike had come to an end the defendants, except on one day, that is on the 20th of August, did all that could have been reasonably expected to discharge the vessel. He also found that occasionally timber vessels were discharged at Sharpness on to the bank, and their cargo then taken away by railway, but that this is only done when the vessel so discharging has a quay berth; that no quay berth was available for the vessel; and that she was moored to a buoy in the dock, with her stern to the quay wall at one end of the dock in a place between the dock entrance and a graving dock, which was unfitted for the discharge of cargo, and at which the discharge of cargo is never allowed and could not be made. He also held on the evidence that Sharpness is within the port of Gloucester, and on this point referred to *Nielsen* v. *Wait*, 14 Q. B. D. 516, 33 W. R. Dig. 199. With reference to the suggestion that the cargo might have been discharged where the vessel lay, or rafted, he observed that the plaintiffs have no evidence that the suggested mode of discharge on the bank could have been followed, or would have been allowed, and that the defendants' evidence satisfied him that this was not a customary mode of discharge, and that it would not have been allowed in this case by the dock authorities; and that no evidence was given that rafting was a customary mode of discharging timber vessels at this port, or that it could have been done with this cargo. It is to be noticed that one witness said the cargo would have been spoilt by rafting, and that he had never known such a cargo to have been rafted.

We see no reason to take a different view of the facts from that adopted by the learned county court judge, who had the witnesses before him.

The main point urged by Mr. Brynmor Jones, who argued very ably for the appellants, was that, even if the facts were taken as above stated, the case fell within the decisions of *Kay* v. *Field*, 8 Q. B. D. 594, 30 W. R. Dig. 192; 31 W. R. 332, 10 Q. B. D. 241, and *Grant* v. *Coverdale*, 8 Q. B. D. 600, 30 W. R. Dig. 191; 11 Q. B. D. 543, 31 W. R. Dig. 177; 32 W. R. 881, 9 App. Cas. 470, and that as the strike only prevented lighters from being discharged at Gloucester, it did not prevent the discharge of the ship at Sharpness within the meaning of the charter-party. On the other hand, Mr. Aspinall, for the respondents, argued that the case was one of a similar nature to that of *Hudson* v. *Ede*, 15 W. R. 1,111, 16 *Ib.* 940; L. R. 2 Q. B. 566, 3 *Ib.* 412.

It is unnecessary to discuss at any length the distinction between the two former cases and the latter, because that has been fully done in the judgments of the Court of Appeal, who reversed the decision of Pollock, B., and also in the judgment delivered in the House of Lords in *Grant* v. *Coverdale*. It is sufficient to note that in the two former cases the place of loading was the East Bute Dock, and that there were several distinct modes of loading, one of which was interrupted by frost, and thus affected the particular charterer, but would not have affected most of the shippers who used the East Bute Docks, whereas in the latter case the only way in which cargo could have been brought to the vessel was interrupted by ice. The late Kelly, C.B., in delivering judgment in *Hudson* v. *Ede*, said: "My brother Willes has observed, and we agree with him in opinion, that whenever there was no access to the ship by reason of ice from any one of the storing places from which merchandise was conveyed direct to the ship, the exception in the charter-party would apply." And Lord Selborne's judgment in *Grant* v. *Coverdale* has the following passage:—"The case of *Hudson* v. *Ede* was referred to. I understand that case as proceeding upon the same principles, but as containing an admission of this distinction, that where there is in a proved state of facts an inevitable necessity that something should be done in order that there should be a loading at the place agreed upon, as, for instance, that the goods should be brought down part of a river from the only place from which they can be brought, even though that place is a considerable distance off, yet it being practically, according to known mercantile usage, the only place to which they can be brought to be loaded, the parties must be held to have contemplated that the goods should be loaded from that place in the usual manner unless there was an unavoidable impediment."

In the present case the only customary mode of discharge of such a cargo as that of *The Alne Holme* was by lighters, in which the timber is lightered to Gloucester, and it is clear to us that the parties contemplated that the discharge should take place in that manner; and, in fact, it was the only possible way in which it could be done. There is no question that the discharge in this manner was delayed by the strike, and for this delay the charterers, in our opinion, are not responsible. It was urged upon us that the vessel might have been sooner discharged at Sharpness; but this could only have been done, if at all, in one of four ways—first, by lighters, which, under the circumstances, was impossible, owing to the strike; secondly, by rafting, but this, if possible, was not a customary mode of discharging a cargo,

and would have spoilt the cargo; thirdly, it was said it might have been put ashore, but this again was not customary, and could not have been done; and, fourthly, that the vessel might have discharged at a quay at Sharpness, but the charter provided that she should be discharged at a dock and berth as might be ordered by the charterers or by their agents, after receiving notice of arrival, or so near thereto as she might safely get, and, if ordered to a quay, there was no quay berth available, and the vessel could not have got to the quay probably without longer delay than she experienced, according to the evidence; and discharge of timber on to the quay was not a customary mode of discharge. In truth, it was never contemplated that she should discharge at a quay berth, and the discharge into lighters was the mode of discharge accepted by both parties.

Applying the principles of the cases cited to the present case, we are of opinion that the loss of time was caused by the strike within the meaning of the charter-party, and that the charterers are excused.

A further point was made for the defendants that the clause in this charter-party, "to be discharged with the customary steamer dispatch of the port," was substantially the same as that in the case of *Castlegate Steamship Co.* v. *Dempsey*, 40 W. R. 533, [1892] 1 Q. B. D. 854. In that case the charter-party provided that the cargo was "to be discharged with all despatch as customary, and ten days on demurrage, over and above the said laying days, at 6d. per net. register ton per day." By the custom of the port of discharge a dock company undertook the work of discharging cargo, and by reason of a strike of dock labourers the discharge of the cargo was delayed. It was held that the effect of the charter-party was not to fix any definite time within which the cargo must be discharged, but to provide that it should be discharged with all reasonable despatch, having regard to the circumstances and the manner of discharging cargo customary to the port of discharge; and, therefore, that, the charterers were not liable to the shipowners in respect of the delay which occurred in discharging the cargo. The language in the charter, in the present case, is slightly different from that in the charter in the case just referred to, and the latter charter had no strike clause. The Master of the Rolls and Lopes, L.J., both point out that in the case before them the dock company did both the shipowners' and charterers' work, though it is suggested that it would have made no difference had it been otherwise. As, however, there is a strike clause in the present case, it is unnecessary to give any decision as to what would have been the case had it been omitted.

The plaintiffs further alleged that after the strike was over the defendants ought to have sent more lighters to the vessel than they did; but the judge has found, as a fact, that after the strike had come to an end they did all that they could reasonably have been expected to do to discharge the vessel, except on one day, the 20th, and there is nothing to show that he has improperly found this fact.

The appeal must, therefore, be dismissed with costs.

Counsel for the respondents invited us to allow him to prosecute a cross-appeal against the judgment for one day's demurrage; but as the only ground upon which he could question the judgment on this point was admitted by him to depend upon a question of fact, and the amount was under £50, no appeal against the judgment lies in favour of the defendants. It was said, however, that as the plaintiffs had chosen to bring the case before the court, the court had power, upon the plaintiffs' appeal, to alter the judgment adversely to the plaintiffs. No authority was cited for any such proposition, and, as this court has only an appellate jurisdiction, the only question before it is whether or not the plaintiffs' appeal is to succeed or fail, and we do not consider that we can entertain what is really a cross-appeal by the defendants, when they have no right to originate an appeal.

Solicitors for the plaintiffs, *Downing, Holman & Co.*

Solicitors for the defendants, *Thorneycroft & Willis.*

Privy Council.

Feb. 17.

HUNTINGTON v. ATTRILL. (a.)

(*On appeal from the Supreme Court of Appeal for Ontario.*)

International law—Penal and private actions—Foreign judgment.

No proceeding which has for its object the enforcement by the State of punishment for breaches of its laws will be enforced by a foreign tribunal when the penalties attached to them are recoverable at the instance of the State, or of a member of the public as a common informer; but it is otherwise where an individual as such has a remedy for an infraction of the municipal law. It is, moreover, the duty of the tribunal, when a penalty of this nature is sought to be enforced through its instrumentality, to decide whether the foreign judgment which imposes the fine or other obligation is or is not penal in the sense of international law above stated.

This was an appeal from the Supreme Court of Appeal for Ontario, dismissing the appellant's action. The various sections considered of the Act of the New York State Laws, 1875, c. 611, the facts, and the whole course of the proceedings will be found stated in their lordships' judgment.

Sir H. Davey, Q.C., Finlay, Q.C., and *Pollard*, for the appellant.

Sir R. Webster, Q.C., Gore, and Askwith, for the respondent.

The judgment of their lordships (Lord HERSCHELL, L.C., Lord WATSON, Lord BRAMWELL, Lord HOBHOUSE, Lord MORRIS, Lord SHAND) was delivered by

Lord WATSON.—The appellant, in June, 1880, became a creditor for money lent to the Rockaway Beach Improvement Co. (Limited), which carried on business in the State of New York, being incorporated pursuant to chapter 611 of the State Laws of 1875. Section 21 of the Act provides that "if any certificate or report made, or public notice given, by the officers of any such corporation, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof."

The respondent was, in June, 1880, a director and in that capacity an officer of the company within the meaning of the statute. On the 30th of that month he, along with other officers of the company, signed and verified on oath, as prescribed by section 37, a certificate setting forth that the whole capital stock had, at its date, been paid up in cash.

(a.) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

In the year 1883 the appellant instituted a suit against the respondent before the Supreme Court of New York State for the unpaid balance of his loan to the company, alleging that the certificate contained representations which were material and false, and that the respondent had incurred personal responsibility for the debt as provided by section 21. The respondent defended the action, but, a verdict having been found against him, the court, on the 15th of June, 1886, gave final judgment, ordering him to pay to the appellant the sum of 100,240 dollars.

Having failed to recover payment the appellant, in September, 1886, brought an action upon his decree in the Common Pleas Division of the High Court of Justice for the Province of Ontario, where the respondent resided. The only plea stated in defence was to the effect that the judgment sued on was for a penalty inflicted by the municipal law of New York; and that the action being one of a penal character ought not to be entertained by the courts of a foreign state.

Street, J., who tried the case, being of opinion that the enactments of section 21 were strictly punitive and not remedial, dismissed the action with costs. The judges of the Appeal Court were equally divided in opinion, the result being that the appeal taken from his decision was dismissed. The Chief Justice (Hagarty) and Osler, J., were of opinion that the statutory remedy given to the appellant, as a creditor of the company, being civil only, and not enforceable by the State or by the public, was not a penal matter in the sense of international law. Burton, J., was of the same opinion, but held himself precluded from giving effect to it for reasons which he thus explains: "The courts of the State of New York have placed an interpretation upon this particular statute in which we should not have agreed, but those decisions are the law of the State of New York, and with that we are bound. I am of opinion, therefore, that on that uncontested expert testimony this is a penal statue there, and the judgment obtained upon it cannot be enforced here." In the conclusion thus stated Maclennan, J., expressed his concurrence. But the learned judge, in that respect agreeing with the court of first instance and differing from the other members of the Court of Appeal, held that the enactment was in itself undoubtedly penal, inasmuch as it was "passed in the public interest, providing a punishment for an offence," and that "it makes no difference that what exacts from the offender is given to persons who are ordinary creditors of a company in payment of their respective debts."

Their lordships cannot assent to the proposition that, considering whether the present action was penal in such sense as to oust their jurisdiction, the courts of Ontario were bound to pay absolute deference to the interpretation which might have been put upon the statute of 1875 in the State of New York. They think to construe and apply an international rule, which is a matter of law entirely within the cognizance of a foreign court whose jurisdiction is invoked, judicial decisions in the State where the cause of action arose are not precedents which must be followed, although the reasoning upon which they are based must always receive careful consideration, may be conclusive. The court appealed to must examine for itself, in the first place, the substance of the right sought to be enforced; and, in the second place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law of another State. Were any other principle to guide its decision, a court might find itself in the position of giving effect in one case and denying effect in another, to laws of the same character, in consequence of the causes of action having arisen in different countries; or in the predicament of being constrained to give effect to laws which were, in its own judgment, strictly penal.

The general law upon this point has been correctly stated by Story, J., in his Conflict of Laws and by other text writers; but their lordships do not think it necessary to quote from these authorities in explanation of the reasons which have induced courts of justice to decline jurisdiction in suits somewhat loosely described as penal, when these have their origin in a foreign country. The rule has its foundation in the well-recognized principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State Government, or of someone representing the public, are local in this sense, that they are only cognizable and punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the *lex fori*, ought to be admitted in the courts of any other country.

Their lordships have already indicated that, in their opinion, the phrase "penal actions," which is so frequently used to designate that class of actions which, by the law of nations, are exclusively assigned to their domestic *forum*, does not afford an accurate definition. In its ordinary acceptation the word "penal" may embrace penaties for infractions of general law which do not constitute offences against the State; it may for many legal purposes be applied with perfect propriety to penalties created by contract; and it therefore, when taken by itself, fails to mark that distinction between civil rights and criminal wrongs which is the very essence of the international rule. The phrase was used by Lord Loughborough and Buller, J., in a well-known case (*Folliott* v. *Ogden*, 1 H. B., at p. 135, and *Ogden* v. *Folliott*, 3 T. R. 734), and also by Marshall, C.J., who in *The Antelope*, 10 Wheaton, 123, thus stated the rule with no less brevity than force: "The courts of no country execute the penal laws of another." Read in the light of the context, the language used by these eminent lawyers is quite intelligible, because they were dealing with the consequences of violations of public law and order, which were unmistakably of a criminal complexion. But the expressions "penal" and "penalty," when employed without any qualification, express or implied, are calculated to mislead, because they are capable of being construed so as to extend the rule to all proceedings for the recovery of penalties, whether exigible by the State in the interest of the community, or by private persons in their own interest.

The Supreme Court of the United States had occasion to consider the international rule in *Wisconsin* v. *The Pelican Insurance Co.*, 127 U. S. (20 Davis) 265. By the statute law of the State of Wisconsin a pecuniary penalty was imposed upon corporations carrying on business under it who failed to comply with one of its enactments. The penalty was recoverable by the Commissioner of Insurance, an official intrusted with the administration of the Act in the public interest, one half of it being payable into the State Treasury, and the other to the commissioner, who was to defray the costs of prosecution. It was held that the penalty could not be enforced by the Federal Court, or the judiciary of any other State. In delivering the judgment of the bench, Gray, J., after referring to the text-books, and the *dictum* by Marshall, C.J., already cited, went on to say: "The rule that the courts of no country execute the law of another applies not only to

prosecutions and sentences for crimes and misdemeanours, but to all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties."

Their lordships do not hesitate to accept that exposition of the law, which, in their opinion, discloses the proper test for ascertaining whether an action is penal within the meaning of the rule. A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favour of the State whose law has been infringed. All the provisions of municipal statutes for the regulation of trade and trading companies are presumably enacted in the interest and for the benefit of the community at large; and persons who violate these provisions are, in a certain sense, offenders against the State law, as well as against individuals who may be injured by their misconduct. But foreign tribunals do not regard these violations of statute law as offences against the State, unless their vindication rests with the State itself, or with the community which it represents. Penalties may be attached to them, but that circumstance will not bring them within the rule, except in cases where these penalties are recoverable at the instance of the State, or of an official duly authorized to prosecute on its behalf, or of a member of the public in the character of a common informer. An action by the latter is regarded as an *actio popularis* pursued, not in his individual interest, but in the interest of the whole community.

The New York Statute of 1875 provides for the organization and regulation of corporations formed for the purpose of carrying on all kinds of lawful business with the exception of certain branches therein specified. It confers rights and privileges upon persons who choose to form a trading association, and to become incorporated under its provisions, with full or with limited liability; and, in either case, it varies and limits the rights and remedies which, under the common law, would have been available to creditors of the association, as against its individual members. On the other hand, for the protection of those members of the public who may deal with the corporation, the Act imposes upon its directors and officers various stringent obligations, the plain object of which is to make known, from time to time, to all concerned, the true condition of its finances. Thus they are required (section 18) to publish an annual report, stating the amount of capital, the proportion actually paid in, the amount and nature of existing assets and debts, the names of the shareholders and the dividends, if any, declared since last report; and (section 37) to certify the amount of capital stock paid in within thirty days after payment of the last instalment. In both cases the consequence of the report or certificate being false in any material representation is, that every director or officer who vouched its accuracy becomes, under section 21, liable personally for all the debts of the corporation contracted during his period of office.

The provisions of section 21 are in striking contrast to the enactments of section 34, which inflicts a penalty of 100 dols. upon every director or officer of a corporation with limited liability who authorizes or permits the omission of the word "limited" from its seal, official publications, or business documents. In that case the penalty is recoverable "in the name of the people of the State of New York by the district attorney of the county in which the principal office of such corporation is located, and the amounts recovered shall be paid over to the proper authorities for the support of the poor of such county." It does not admit of doubt that an action by the district attorney would be a suit in favour of the State, and that neither the penalty nor the decree of a New York court for its amount could be enforced in a foreign country.

In one aspect of them, the provisions of section 21 are penal in the wider sense in which the term is used. They impose heavy liabilities upon directors in respect of failure to observe statutory regulations for the protection of persons who have become or may become creditors of the corporation. But, in so far as they concern creditors, these provisions are in their nature protective and remedial. To use the language of Osler, J., they give "a civil remedy only to creditors whose rights the conduct of the company's officers may have been calculated to injure, and which is not enforceable by the State or the public." In the opinion of their lordships these enactments are simply conditions upon which the Legislature permits associations to trade with corporate privileges, and constitute an implied term of every contract between the corporation and its creditors.

A number of American authorities were cited in the course of the argument, which may be briefly noticed, seeing that they were made the subject of comment in both courts below. With one exception they do not appear to their lordships to have a direct or material bearing upon the point raised in this appeal.

In *Steam Engine Co.* v. *Hubbard*, 101 U. S. (11 Otto) 188, the facts were these. The law of Connecticut, in the event of the president and secretary of a corporation intentionally neglecting to issue a certain certificate, made them jointly and severally liable "for all debts contracted during the period of such neglect." Under that provision an action was brought by a creditor of the corporation against its president, for a debt contracted before the period of neglect began, which remained unpaid during its continuance. There was no question as to enforcing the claim in another State. The Supreme Court of the States held that the enactment was penal, and therefore to be strictly construed; and also that the president was not liable, inasmuch as the debt was not contracted during the period of his default. The decision appears to be absolutely right; but their lordships apprehend that the canon of construction applied in that case would be equally applicable to the case of a penalty stipulated by bond, or in a mercantile contract.

Flash v. *Conn*, 109 U. S. (2 Davis) 371, another decision of the Supreme Federal Court, was relied on by the appellant. In that case a New York Statute of 1848 had provided that, until the whole capital stock of the corporation was paid up, every stockholder should be liable to its creditors to an amount equal to the amount of stock held by them. It was decided that the claim of a creditor under that provision was contractual and not penal, and might therefore be enforced by an action at law. The result appears to be inevitable, because the liability was not imposed in respect of failure to perform any duty prescribed by the Act; but it throws no light upon the present question.

The respondent, in his argument, placed great reliance upon *Merchants' Bank* v. *Bliss*, 35 N. Y. (8 Tiffany) 412, which was decided in 1866. The statute of 1848, already referred to, required the trustees of the corporation to make a report at a stated time, and, in the event of their failure to do so, rendered them jointly and severally liable for all its debts then existing, or which might be contracted before the report was actually made. The suit was by a creditor against a defaulting trustee, and the only question raised was this—whether the action was for a "liability created by statute, other than

penalty or forfeiture," within the meaning of the Statute of Limitations, or "for a penalty or forfeiture, when action is given to the party aggrieved"? The Supreme Court of New York decided that the liability belonged to the second category, and that suit was consequently barred by the lapse of three years. In another case—*Wiles* v. *Suydam*, 64 N. Y. 173—the same court held that a similar claim by a creditor, being for a statutory penalty or forfeiture, could not be joined in a declaration with a claim upon contract. Their lordships see no reason to question the propriety of these decisions, but it is hardly necessary to say that a delict may give rise to a purely civil remedy, as well as to criminal punishment. Although a right of action is given to the party aggrieved, it does not follow that the law of nations must regard his action as a suit in favour of the State.

Attrill v. *Huntington*, 70 Maryland, 191, is, however, an authority upon the very point raised in this appeal. During the dependence of the present action the appellant preferred a bill in equity, before the Supreme Court of the State of Maryland, to set aside certain transfers of stock by the respondent, upon the allegation that they were fraudulently made in order to defeat his claims under the decree of June, 1886. The primary judge granted the relief craved, but the Court of Appeal, by a majority of five judges against two, reversed his decision and dismissed the bill, holding that the decree, being for a penalty, could not be enforced beyond the limits of the State of New York. Their lordships are constrained to differ from the reasons assigned by Bryan, J., in delivering the judgment of the majority, which do not appear to them sufficiently to recognize the distinction, from an international point of view, between a suit for penalty by a private individual in his own interest, and a suit brought by the Government or people of a State for the vindication of public law. The distinction is clearly pointed out in the opinion of the dissentient judges as expressed by Stone, J., in whose reasoning their lordships concur.

Being of opinion that the present action is not, in the sense of international law, penal, or, in other words, an action on behalf of the Government or community of the State of New York for punishment of an offence against their municipal law, their lordships will humbly advise Her Majesty to reverse the judgments appealed from, and to give decree in favour of the appellant, with costs in both courts below. The appellant must have the costs of this appeal.

Solicitors for the appellant, *Freshfield & Williams.*

Solicitors for the respondent, *Harrison & Powell.*

Court of Appeal.

From Chan. Div. (Lindley, Lopes, and A. L. Smith, L.JJ.) June 14.

In re MILLARD'S SETTLED ESTATES. (*a.*)

Settled land—Tenant for life—Improvements—Scheme approved by trustees—Payment—Capital money arising under the Act—No capital money in hands of trustees—Prospective authorization of payment out of money to arise in the future—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 26.

Under section 26 *of the Settled Land Act*, 1882, *the court has no power to prospectively authorize payment for improvements out of capital money to arise in the future, when the trustees have no capital money in their hands at the time.*

Decision of Kekewich, J., *affirmed.*

Appeal from a decision of Kekewich, J., at chambers.

Certain persons, who together constituted the tenant for life of settled land under a settlement (created by the will and three codicils dated respectively the 31st of October, 1876, the 17th of January, 1881, the 27th of September, 1884, and the 21st of October, 1884, of Charles Paul Millard, who died on the 2nd of April, 1885), took out an originating summons asking that two persons, who were the trustees of the settlement for the purposes of the Settled Land Acts, 1882 to 1890, might be at liberty to apply the sums thereinafter mentioned out of the capital money arising under the said Acts in or to come to their hands subject to the settlement in payment of the works thereinafter mentioned (*i.e.*, roads and sewers), being improvements to be executed upon the settled land pursuant to two schemes which had been approved by the trustees.

The trustees had no capital money arising under the Acts in their hands, and the application was prospective upon money being realized by a sale of the property upon which the improvements were to be made. There was evidence that the improvements, if carried out, would greatly enhance the selling value of the property, and it was proposed to pay for the improvements out of the moneys to be received on the sale. It was intended that, if the court should allow the application, the money should be advanced, in the first instance, by one or others of the tenants for life, and be afterwards recouped to them out of the proceeds of sale. There appeared to be no prospect of the trustees being able to get the required money by sale of any portion of the property, as it was heavily mortgaged.

Kekewich, J., dismissed the summons, being of opinion that no such payment as was asked for should be sanctioned where the trustees had no capital moneys in their hands or immediately coming to their hands.

The applicants appealed.

Cozens-Hardy, Q.C., and *Eve*, for the appellants.—The question is whether the trustees must have capital money in their hands before it is competent to the court to authorize the expenditure. If they must, the matter is brought to a deadlock, so far as the Settled Land Acts are concerned, if the doubt expressed by the court in *In re Hotchkin's Settled Estates*, 35 W. R. 463, 35 Ch. D. 41, to the effect that the expense of improvements on lands which have been sold cannot be afterwards paid out of capital money is a valid one; for they have no money to pay for the improvements without selling the land first. [LINDLEY, L.J.—If that is so, they can borrow the money they want under the Settled Estates Act.] The words "is in the hands of trustees," in sub-section 2 of section 26, mean "in their hands at the time when the money shall be called for." *Round* v. *Turner*, W. N., 1889, p. 38, is against the appellants, but that was an application under a different section (sub-section 10 of section 21), and was perhaps a little misconceived; it was a very speculative matter to find out how much would be required to carry on a farm for eight months. It is true the object in the present instance could be attained by borrowing under the Settled Estates Act, but that only shows that it is not contrary to the general scope of legislation on this subject to give what is now asked for.

(*a.*) Reported by ARTHUR LAWRENCE, Esq., Barrister-at-Law.

Willoughby Williams, for the trustees, was not called upon to argue.

LINDLEY, L.J.—I do not think it would be right for the court to accede to this application. It is asked to authorize, prospectively, the trustees to expend capital money when they get it in the future. The appellants' counsel have not been able to produce a single case in which what we are asked to do has ever been done. The registrar informs us that he has never seen such an order as we are asked to make, and Kay, L.J., whose opinion we have consulted, and who has had great experience in these matters, says he thinks the court has no authority to make it. The position of the trustees is that they cannot get the money to do the improvements by selling a part of the property. Have we power, then, to make this prospective order? Section 21 says, "Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one or partly in one and partly in another or others of the following modes," one of those modes being "(iii.) in payment for any improvement authorized by this Act"; and then section 25 says that among the "improvements authorized by this Act" is "the making or execution on or in connection with and for the benefit of settled land of" *inter alia*, roads and sewers. What we have to construe is section 26: that section says, "(1) Where the tenant for life is desirous that capital money arising under this Act shall be applied in or towards payment for an improvement authorized by this Act, he may submit for approval to the trustees of the settlement"—that has been done here—"or to the court, as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon. (2) Where the capital money to be expended is in the hands of trustees, then after a scheme has been approved by them"—as it has been here—"the trustees may apply that money in or towards payment for the whole or part of any work or works or operation comprised in the improvement, on (i.) a certificate of the Land Commissioners certifying that the work or operation, or some specified part of it, has been properly executed, and what amount is properly payable by the trustees in respect thereof; . . . or on (ii.) a like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the commissioners or by the court; or on (iii.) an order of the court directing or authorizing the trustees to so apply a specified portion of the capital money." When you look at these provisions, you see that the certificates referred to in sub-clauses (i.) and (ii.) cannot be prospective, they must certify not prospectively, but that the work *has been* properly done. Then on what evidence ought the court to make the order referred to in sub-clause (iii.)? I do not think the court ought to make it prospectively any more than the certificates are to be prospective. I cannot find in the Act anything which authorizes the court to make a prospective order as is here asked for, and, addressing my mind to the general aspect of the Act, I think the court ought not to make it. The appeal must therefore, in my opinion, be dismissed.

LOPES, L.J.—I agree. We are asked to make an order for the expenditure of money when it shall be received. I do not think we have any jurisdiction to make the order. The words "when received" in section 21 seem to me very strong in favour of the view I take, and then again the words "in the hands of trustees" in section 26. This seems to me to mean that capital money which is to be authorized to be expended must be in their hands at the time. How are you to tell whether the money is properly payable or whether the work is properly done, prospectively? I think there is no jurisdiction to make the order.

A. L. SMITH, L.J.—I agree, and have nothing to add.

Appeal dismissed.

Solicitors, *Gush, Phillips, Walters, & Williams.*

From Q. B. Div. (Lord Esher, M.R., and Bowen and Kay, L.JJ.) — June 13.

MILLER v. HANCOCK. (*a*.)

Landlord and tenant—Negligence—House let in flats—Staircase in occupation and control of landlord—No covenant to keep stairs in repair—Personal injury caused by stairs being out of repair—Liability of landlord.

The defendant, who was the owner of certain premises in the City of London, let the different floors as offices to separate tenants. The only mode of access to the offices was by means of a staircase, which was not let to the tenants, but which remained in the occupation and control of the defendant. The leases to the tenants contained no covenant by the defendant to keep the staircase in repair. The plaintiff went to the office occupied by one of the tenants on business, and, when coming down the stairs, fell and was injured owing to the stairs being out of repair.

Held, that there was a duty on the defendant, both towards the tenants and towards those persons who came to the premises on business with them, to keep the stairs in a reasonably safe state of repair; and that, therefore, the defendant was liable to the plaintiff.

Application by the defendant for judgment or a new trial in an action tried before Lawrance, J., and a jury.

The defendant was the owner of certain premises in the City of London, consisting of a first and second floor, let out in separate tenements as offices, and one room on the third floor, and also a staircase leading from the entrance on the ground floor to the floors above. This staircase was the only mode of access to the offices on the first and second floors. The offices on the first and second floors were let to two separate tenants, but the leases contained no covenant by the defendant to keep the staircase in repair, nor was any reference made to the staircase in the leases.* A caretaker, who was selected and paid by the tenants, looked after the staircase, and the defendant allowed her to occupy the room on the third floor rent free. The defendant did not reside or carry on business on the premises.

The plaintiff, who was a collector in the employment of a railway company, was in the habit of calling once a month upon the tenant of the offices on the second floor for the purpose of collecting the account due to the company, and upon the occasion in question, while coming down the stairs after having called for the account, he fell and was injured.

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* The court, as will be seen from the judgments, came to the conclusion that the staircase was left in the occupation and control of the defendant.

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

The plaintiff, alleging that the stairs were out of repair, and that the accident was caused thereby, brought an action against the defendant to recover damages for personal injuries.

It was admitted that when the lease was granted to the tenant of the second floor offices the stairs were in good repair.

The jury found a verdict for the plaintiff, and the learned judge entered judgment accordingly.

R. M. Bray, for the defendant.—The defendant is not liable to the plaintiff. The defendant has not covenanted with his tenants to repair or keep in repair the staircase. He was, therefore, under no obligation to the tenants to repair the staircase, and would not be liable to them. A stranger like the plaintiff can stand in no better position than the tenants. The defendant impliedly granted an easement over the staircase to the tenants, and there is no obligation imposed by law upon the owner of the servient tenement to repair. The owner of the dominant tenement may himself repair: Gale on Easements, 5th ed., pp. 528, 529.

He cited *Smith* v. *London and St. Katharine Docks Co.*, 16 W. R. 728, L. R. 3 C. P. 326; *Colebeck* v. *Girdlers' Co.*, 24 W. R. 577, 1 Q. B. D. 234; *Ford* v. *Metropolitan Railway Co.*, 34 W. R. 426, 17 Q. B. D. 12.

Moyses, for the plaintiff, was not called upon.

Lord ESHER, M.R.—The defendant is the owner of a building in the City, consisting of certain storeys, each floor being let out as a separate tenement to different tenants. He did not let the staircase so as to make it part of the tenants' premises. The staircase was the only way by which the tenants had access to their premises. Under these circumstances the first question is, In whose possession and control was the staircase? In my opinion it was in the possession and control of the landlord. The whole house was his, and therefore the parts which he did not let he kept in his possession and control.

The next question is, What were his duties towards his tenants under those circumstances? The right which the tenants had to the use of the staircase was an easement granted by him of such a kind that he was bound to keep the staircase in a reasonably safe condition as the means of access to each tenement. There was an implied obligation to keep the access to the tenements in reasonably safe repair, otherwise the enjoyment of the tenements would be of no value; for instance, if the staircase were allowed to fall into ruin, the means of access to the tenements would be gone. Further, the landlord must know that the tenements which he has so let will be of no use to business people unless persons with whom the tenants have business have access to the tenements. The landlord must know that those persons would go up and down the stairs. He has, therefore, a duty towards those persons. That duty is to keep the staircase, which he knows they will use, in a reasonably safe state of repair. The case of *Smith* v. *London and St. Katharine Docks Co.* is a clear authority on the point. The ship there came into the defendants' docks under a contract with the shipowner. The ship was laid alongside another ship which was lying alongside the quay. The ordinary way of getting off and on the ship was by means of a gangway. The gangway was placed there, not only for the use of the passengers and crew, but also for the use of all persons having business with the ship. The judges there said that the dock company must have known that, and that that knowledge imposed a duty upon them to keep the gangway reasonably safe. Precisely the same reasoning applies here, and renders this defendant liable to this plaintiff. The appeal must therefore be dismissed.

BOWEN, L.J.—I am of the same opinion. The defendant is the owner of premises let out in flats. The plaintiff is the collector in the employment of a railway company, who in the course of his duty had to call upon the tenant of one of the flats on business. While coming down the stairs he slipped and broke his leg. The duties and liabilities seem to me to be perfectly clear both upon reason and upon authority. The defendant let the flats to tenants. It was clear that the staircase leading to the flats remained in the occupation and control of the defendant as owner of the house. The fact that the caretaker who looked after the stairs was paid by the tenants is immaterial. Once it is clear that the staircase remained in the occupation and control of the defendant we know his duties towards his tenants with regard thereto. The tenants could only use the flats by using the staircase. The defendant granted the tenants an easement over the staircase for the purpose of the reasonable enjoyment of the flats.

Under such circumstances we must see what is the law as to the liability to repair the staircase. It was argued that the person who has the enjoyment of the easement may repair the subject-matter himself, but cannot call upon the grantor of the easement to do the repairs. That seems to be true generally, but there can be no doubt that the grantor may bind himself to repair. Once we recollect the facts, and the way in which alone the flats could be enjoyed, it is obvious that both parties must have intended that the landlord should keep the staircase in a reasonably safe state of repair, both for the tenants and also for those persons who go to the flats on business with the tenants. One cannot imagine a lease of this sort having any real validity or efficacy, or otherwise than as futile and absurd, unless the landlord were to keep the staircase in repair so as to make it reasonably safe for use. What is that but an implied contract to repair? It shows that the grantor of an easement may bind himself to repair. The landlord has given the tenants the right to use the staircase, and he knows that persons will come upon the premises for the purposes of business with the tenants, and those persons know that they will be shielded from carelessness as to the condition of the premises by the responsibility of the person upon whose shoulder rests the duty of doing the repairs. The case accordingly falls within the principle of *Smith* v. *London and St. Katharine Docks Co.* The present plaintiff came upon the premises on business with the tenant of the second floor, and that being so the law imposed a liability upon the defendant towards the plaintiff in respect of the unsafe condition of the staircase.

KAY, L.J.—I am of the same opinion. The question is whether, under the circumstances of this case, the duty of keeping the staircase in a reasonably safe state of repair lies upon the landlord. It is clear that the staircase was not let, but was retained in the possession of the landlord. The tenant had a right to use the staircase, and it may be that to preserve the easement the tenant could repair the staircase if the landlord did not. But that does not touch the question whether it was not the duty of the landlord as between himself and the tenant, and as between himself and persons using the staircase on business with the tenants, to keep the staircase in a condition in which it might safely be used by them. I shall only say that under the peculiar circumstances there was such a duty on the landlord as between himself and the persons I have named, and, that duty not

having been fulfilled, the defendant is liable to the plaintiff.

Appeal dismissed.

Solicitors for the plaintiff, *Lovett & Co.*

Solicitors for the defendant, *Sandilands & Co.*

From Q. B. Div.
(Lord Esher, M.R., and Lopes and A. L. Smith, L.JJ.) May 12, 16.

FERRAND *v.* HALLAS LAND AND BUILDING CO. (*a.*)

Local Government—Sewer—Vesting in local authority—Sewer not made by a person for his own profit—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 13—*Pollution of stream—Rivers Pollution Act,* 1876 (39 & 40 *Vict. c.* 75), *s.* 3.

The defendants, who were not the local sanitary authority, made a sewer into which, by means of house drains, the ordinary sewage of sixty-nine cottages belonging to the defendants was, with the sanction of the sanitary authority, conveyed and discharged into a stream. The plaintiff, the owner of land on both sides of the stream below the out fall from the sewer, brought an action against the defendants for an injunction to restrain them from polluting the stream.

Held, that the sewer, being made for the ordinary purpose of draining the cottages, was not a sewer made by any person for his own profit, or by any company for the profit of the shareholders, within the meaning of section 13 *of the Public Health Act,* 1875; *that it was, under that section, therefore, vested in and under the control of the local authority; and that the defendants were not liable.*

Per curiam.—*Assuming that the value of the premises was enhanced to the owners by the construction by them of the sewer, that was not the kind of "profit" contemplated by the exception in section* 13.

Appeal by the defendants from a judgment of Bruce, J., at the trial of the action without a jury at the Leeds Assizes.

The action was for an injunction to restrain the defendants from causing or allowing sewage to pass from their cottages into a stream called Cullingworth Beck so as to pollute it.

The plaintiff was the owner of an estate consisting of a mansion and farm lands, which latter, used mainly for the purpose of pasturing cattle, were situate on the banks of Cullingworth Beck.

The defendants were the owners of land in the neighbourhood of and higher up the same stream, and had erected upon it, in 1891, sixty-nine cottages. Each of these cottages was drained separately by a house-drain, which discharged into a long sewer running the whole length of the cottages and finally emptying the sewage into the above-mentioned stream. The whole of these drainage works had been constructed by the defendants. Previous to their construction certain plans were submitted to the local authority, and were signed by the chairman as approved by that body.

By section 13 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), it is provided as follows:—"All existing and future sewers within the district of a local authority, together with all buildings, works, materials, and things belonging thereto . . . . except (1) sewers made by any person for his own profit, or by any company for the profit of the shareholders . . . shall vest in and be under the control of the local authority."

By section 3 of the Rivers Pollution Act, 1876, "every person who causes to fall or flow, or knowingly permits to fall or flow, into any stream any sewage matter, shall be deemed to have committed an offence against this Act. . . . A person other than a sanitary authority shall not be guilty of an offence under this section in respect of the passing of sewage matter into any sewer belonging to or under the control of any sanitary authority, provided he has the sanction of the sanitary authority for so doing."

The learned judge found as a fact that the stream was polluted by the defendants, and held that the sewer in question had been constructed by the defendants for their own profit within the meaning of the exception in section 13 of the Public Health Act, that it was consequently not vested in or under the control of the local authority, and that the defendants were, therefore, liable for the pollution. He also held on the facts that the defendants had not obtained the sanction of the local authority for the scheme carried out, that they were not, therefore, protected by the proviso in section 3 of the Rivers Pollution Acts, and had committed a breach of the provisions of that section; and he entered judgment for the plaintiff for a perpetual injunction.

The defendants appealed.

Forbes, Q.C., and *C. M. Atkinson,* for the defendants.—The only question of law is whether the judge was right in holding that the sewer in question was made by the defendants for their own "profit," so as to bring it within the exception in section 13 of the Public Health Act, 1875. If the construction put upon the section by the learned judge were correct, it would reduce the Act to a practical absurdity, for it is based upon the idea that the value of houses is enhanced by their being drained, and that the drains are therefore made for a "profit." But if that were the sense in which the Legislature used the word in the exception no house would be within the rule. You might have in this case some sixty different owners, and it would lead to enormous difficulties. The intention was to make an accessible body responsible, so that any grievance could be dealt with without confusion or difficulty. If the primary purpose of the use of the sewer is the making of a private profit apart from the ordinary drainage of premises, then it would be within the exception. [Lord ESHER, M.R.—I am disposed to think that it is not the primary but the substantial purpose that must be looked at.] In any case the substantial, and, in fact, only, purpose here was the getting rid of the ordinary sewage of those premises, which was not, therefore, a purpose of "profit" within the section. The learned judge therefore was wrong in holding that the defendants were responsible under the Public Health Act, and also on the facts, in holding that they did not come within the proviso in section 3 of the Rivers Pollution Act.

They cited *Bonella* v. *Twickenham Local Board,* 35 W. R. 578, 36 *Ib.* 50; 18 Q. B. D. 577, 20 *Ib.* 63.

Tindal Atkinson, Q.C., and *Kershaw,* for the plaintiff.—The injunction was rightly granted. If a sewer is made for the use of the owner's houses only it increases their value and his profits, and it is intended that he should be responsible for them under the Public Health Act. If he allows the sewage of other people's premises to drain into his sewer, his position, no doubt, is different, but profit does not mean "pecuniary" profit merely. Assuming that the sewer is here vested in the local authority, the

(*a.*) Reported by JOHN P. MELLOR, Esq., Barrister-at-Law.

defendants, nevertheless, are liable, as they were the constructors of the sewer, and it is their act which continues to send the sewage into it, and so into the river. Further, they are liable at common law even if the works were, in fact, sanctioned by the local authority, which, it is contended, they were not, and that liability is not excluded by the statute.

Cur. adv. vult.

May 16. — Lord ESHER, M.R.—In this case the question is whether or not the learned judge at the trial ought to have granted the injunction which the plaintiff asked for. That question depends largely on facts. But when the reasonable inference which is to be deduced from the facts is ascertained it becomes a question of law whether the injunction ought to be granted.

The defendants, being owners of land near a stream called the Cullingworth Beck, built a row of sixty-nine workmen's cottages. Before doing so they established the means of draining the cottages, by laying sewers and drains, of which they laid plans before the proper local authority. Some question was raised in argument as to what these plans showed, and as to whether they were really approved by the authority, but they bore the signature of the proper officer, and it must be taken that they were approved by the local authority as showing the system of draining these cottages, which was by means of drains from each cottage joining the long drain or sewer, which went the whole length of the cottages, and finally emptied the sewage into the Cullingworth Beck. The position, therefore, is that the defendants have laid two kinds of drains on their own land, approved of by the local authority, and the question is, What is the effect of the provisions of the Public Health Act upon that state of things?

Now, under that Act there are two kinds of drains, for, according to the definition, a drain means a drain for the purpose of draining one house only, and communicating with a sewer or a cesspool, and a "sewer" includes drains of every description except drains to which the definition of "drain" in the Act applies. Now the long drain laid by defendants is not one to which the definition of "drain" applies, and it is, therefore, a sewer. What, then, is the effect of this state of things? The answer to that question depends upon the true construction of the 13th section of the Act, which provides that all existing and future sewers within the district of a local authority, together with all buildings, works, materials, and things belonging thereto, shall vest in and be under the control of the local authority, with certain exceptions, amongst which are "sewers made by any person for his own profit or by any company for the profit of the shareholders."

The question of law, therefore, is, whether this sewer of the defendants was made by them for their own profit, and so came within the exception in the Act. In the first place it was made for the purpose of draining their own cottages, and no others. Does that constitute it a sewer made for "profit"? It is said it does, because it enhances the value of the cottages, which on sale would fetch more, or would let for a higher rent, by reason of their being drained, than they would if they were not. Both these things may be open to doubt. If there are large works in the neighbourhood, contiguity to which may be of importance to working men, it might make very little difference. But assume that it would; does that give the kind of profit which is meant by the exception? If it were so, then every house in the country is in that predicament, and every sewer is within the exception, and beyond the control of the local authority. The local authority could, however, then, say this, "You have made a good drain, but it is not made according to our ideas, and as we have a right in our discretion to have it so made, you must lay another alongside according to our satisfaction."

In my opinion that reduces the Act to nonsense, and therefore it seems to me that it is not the true construction of the section. We must hold, therefore, that when there is a sewer such as this one in question here, which takes the drainage from these cottages and carries it away, and which has been acceded to by the local authority, it is not within the exception, but is within the substantive part of the section, and is vested in and under the control of the local authority. What is the result of that view in this case? Why, the moment the sewage has passed from the house drains into the sewer, the owner of the drains has lost all property in it and all control over it, he cannot stop it nor can he then divert it. It would, therefore, be beyond all reason to grant an injunction against him to prevent it going into the Cullingworth Beck; that would not be possible. Therefore, on the facts, I am of opinion that the learned judge ought to have held that the facts gave rise to a state of law on which he could not grant an injunction. The appeal must therefore be allowed.

LOPES, L.J., delivered the following written judgment:—It is admitted that the injunction granted in this case is right, if the plaintiff has any cause of action against the defendants. But it is said the defendants are not liable.

The plaintiff is owner of lands on both sides of the Cullingworth Beck. The defendants have erected sixty-nine cottages on lands of theirs near the Beck, and constructed the drains of the cottages in such a manner as to drain sewage from the cottages into the Beck, whereby the water of the Beck was polluted, and the plaintiff, as riparian owner, injured. So far a strong *primâ facie* case is made against the defendants both at common law and under section 3 of the Rivers Pollution Act, 1876, which says: [the Lord Justice read the section, and continued:—] The defendants relied on the last paragraph of this section, and said the sewage matter complained of passed along a drain communicating with a sewer belonging to, and under the control of, the sanitary authority of the district, and that they had the sanction of the sanitary authority for its so doing. I think this was made out. The plans had been approved by the sanitary authority; those plans clearly indicated the nature and direction of the drainage, and I doubt not that all that, was done under the supervision and with the knowledge of the surveyor of the authority. The sewage passed along a drain used for the drainage of more than one building, and which was, therefore, within the definition of "sewer" contained in the definition section of the Public Health Act, 1875. Section 13 of that Act says: "All existing and future sewers within the district of a local authority, together with all buildings, works, materials, and things belonging thereto, shall vest in and be under the control of the local authority"; except, amongst other sewers, "sewers made by any person for his own profit or by any company for the profit of their shareholders."

The plaintiff contended that the sewer in question was made by the defendant company for their own profit or for the profit of their shareholders.

This is the material question in this case. I am of opinion that the sewer was not made by the company for their own profit or for the profit of their shareholders. A sewer made for profit, in my opinion, means, not a sewer made for the mere purpose of drainage, not a sewer made for the mere purpose of discharging matter not to be in any way utilized but which it was essential to get rid of for sani-

tary purposes; but a sewer made for the purpose of realizing a profit above and beyond and independently of any sanitary purpose. Such, for instance, as a sewer made to collect feculent matter with a view of utilizing it for manure.

It was said that all drainage to buildings was made for a profit, because the value of the buildings was enhanced thereby. Such a construction would make it almost impossible for any sewer to vest in the local authority, because all buildings would have as necessary incidents of their existence drainage attached to them, and the exception in section 13 of the Public Health Act, 1875, would be almost a nullity, as an exception—more cases would fall within the exception than the rule.

I presume the Legislature thought that all sewers dealing with mere drainage and disposing of it for mere sanitary purposes ought to vest in and be under the control of the sanitary authority, and be maintained at the expense of the ratepayers; but directly a sewer was made for the profit of the individuals or individual such a burden ought not to rest upon the ratepayers at large. The Public Heath Act, 1875, was "an Act for consolidating and amending the Acts relating to public health" and had nothing to do with private enterprize. The same construction was put upon the words "sewer made for profit" by Kay, L.J., in the case of *Acton Local Board* v. *Batten*, 28 Ch. D. 283, 33 W. R. Dig. 128, with which case I entirely agree. It was also the view adopted by the Divisional Court in *Bonella* v. *Twickenham Board of Health*, 18 Q. B. D. 783, a case subsequently affirmed in the Appeal Court in 20 Q. B. D. 63, and Lord Esher, at p. 66, says: We are of opinion that that sewer" (a sewer made by the owners of a building estate for the drainage of their houses in the street) "did not come within the exception in section 43 of the Public Health Act, 1848, or that in section 13 of the present Act (that is the Public Health Act, 1875), not being a sewer made by any person for his own profit or by any company for the profit of their shareholders."

I am unable to distinguish that case from the one before me. No injunction in these circumstances can, therefore, go against the defendants, and the appeal must be allowed.

A. L. SMITH, L.J., also delivered a written judgment as follows:—The plaintiff is a riparian owner upon the Cullingworth Beck, and the defendants are a building society who have recently built sixty-nine cottages for mill hands, together with a sewer which passes down Parkside-road and Victoria-street into the Beck. Into the sewer the defendants pass the sewage from the cottages by means of house drains and thence it passes down the sewer into the Beck. The plaintiff seeks an injunction to restrain the defendants from passing the sewage into this sewer and thence into the Beck. There was a claim for nominal damages for the pass, but this was not insisted upon. The defendants in answer allege that the sewer is not their property, that it is vested in the Wilden Local Authority by section 13 of the Public Health Act, 1875; that by section 21 of that Act they are entitled to drain their cottages into the sewer; and that section 3 of the Rivers Pollution Prevention Act, 1876, does not apply to this case because they have the sanction of the local authority for doing what they have done, which distinguishes their case from that of the *Kirkheaton Local Board* v. *Ainley*, *ante*, p. 99, [1892] 2 Q. B. 274, in which case the defendants had obtained no such sanction.

It appears to me that if the sewer be vested in the local authority, and the defendants have the sanction of the authority to do what they have done, then this action is not maintainable against them; for if it were, every householder whose house is drained into a sewer which is vested in, and is under, the control of a local authority, would be liable to be proceded against for what the local authority might do with the sewage which flowed out of the mouth of the sewer, although the householder is unable to direct as to how and in what way such sewage is to be dealt with. It is immaterial who orginally constructed the sewer. When once the sewer was vested in the local authority they are the persons liable for injury caused by the effluent from the sewer, and not the persons who drain into the sewer, as they are entitled to do by reason of the provisions of the Public Health Act, 1875.

Section 13 of the Act of 1875 enacts that "all existing and future sewers within the district of a local authority, . . . except, amongst others, sewers made by any person for his own profit and by any company for the profit of the shareholders, shall vest in and be under the control of the local authority." Now, what is the meaning of this exception? It is not disputed that but for this exception the sewer would have vested in the local authority.

The making of a sewer by a person wherein to drain his house might well be said to be for his own use and for his own benefit or advantage, but these are not the words; the words are a "sewer made for his own profit." It seems to me that the true meaning of the words is "a sewer out of which profit can be made by the person making it," and the true fact that a house may become enhanced in value by reason of having a sewer instead of a cesspool into which to drain, is not the true meaning of the exception. Huddleston, B., in the case of *Bonella* v. *Twickenham Local Board of Health*, gave, by way of example as to what he thought would be a sewer made by a person for his own profit, the case of a person making a sewer for the purpose of collecting and carrying the sewage to his sewage farm, or for the purpose of collecting and conveying sewage to be converted into manure at some particular place. I will give an instance. It will be noticed that a sewer need not necessarily convey sewage matter to constitute it a sewer. It would be none the less a sewer within the Act of 1875 if it conveyed rain or surface-water. The draining off of rain or surface-water collected from different premises by different feeders into one main drain would constitute the main drain a sewer within the meaning of the Act. In some manufacturing districts this is done, and the water is collected and passed on and distributed upon payment among different receivers. A sewer made for this purpose would, in my opinion, be within the exception.

It is, however, not necessary to speculate as to what would or would not be a sewer made by a person for his own profit, for I am clearly of opinion that a sewer made merely for the purpose of draining premises and for no other purpose (as in the present case) is not a sewer made for profit within the meaning of the exception; firstly, because it does not come within the ordinary meaning of the words used, and, secondly, as was pointed out by Kay, J., in *The Acton Local Board* v. *Batten*, 28 Ch. D., at p. 285, and by Fry, L.J., in *Bonella* v. *Twickenham Local Board of Health*, 20 Q. B. D., at p. 65, if it did, the exception would in reality eat up the rule. Lord Esher in that case held that a sewer made for the purpose of draining houses in a street was not within the exception, and in this I agree. This case was not cited to my brother Bruce, though the case of *The Acton Local Board* v. *Batten* was attempted to be distinguished.

In my judgment this sewer is not within the exception, and, consequently, did vest in the local authority.

As to whether the defendants had the sanction of the local authority for doing what they did, matters stood thus: It was proved that the defendants submitted plans to the local authority, that those plans showed the proposed sewer running down the centre of Park Side-road and Victoria-street, and that some discharge communications were to be made from the proposed cottages to the sewer, and that their plans were signed by the chairman of the local authority, and were passed by the board approving of the plans. It was not disputed by Mr. Atkinson for the plaintiff, and, even if not admitted, it is clear, that the proposed new sewer, as set out upon the approved ground plan, showed that this sewer was to debouch, as it in fact does, into Cullingworth Beck; and I cannot doubt, taking the elevation plans (also approved) in conjunction with the ground plan, that the true inference is that the local authority sanctioned the defendant draining these houses into the proposed new sewer; and the suggestion now made by the plaintiff that the local authority thought that the houses were going to be drained into cesspools is without foundation, for, if so, why was the sewer to be made? The local authority sanctioned the sewer which has been made, and it is not true to say that they did not know what the sewer was for when they constructed it. Section 3 of the Pollution of Rivers Prevention Act does not, therefore, apply to the defendants.

The plaintiff, in my opinion, has sued the wrong defendants. In my judgment, for the reasons I have given, this appeal must be allowed, and judgment entered for the defendant, with costs here and below.

Appeal allowed.

Solicitors for the defendants, *Brook, Freeman, & Batley.*

Solicitors for the plaintiff, *Wrensted & Sharp.*

High Court of Justice.

Chan. Div. Chitty, J. June 13, 14.

In re RICHERSON.
SCALES *v.* HEYHOE. (*a.*)

Practice—Parties—Deceased person—No legal personal representative—Proceeding in absence—R. S. C., 1883, *ord.* 16, *r.* 46.

On the true construction of ord. 16, *r.* 46, *it is necessary, in order to bind the estate of a deceased person who has no legal personal representative, that the order of the court should state that the judge has proceeded in the absence of any person representing or entitled to represent the estate of the deceased person, or has appointed some person to represent such estate.*

Action.

A testator bequeathed his residuary personal estate to trustees upon trust, after the decease of the survivor of his wife and his sister, Sarah Scales, to pay one moiety of the annual interest to his nephew, William Scales, during his life, and the other moiety of such interest to his niece, Susan Scales, during her life. And in case the said William Scales or the said Susan Scales should leave any lawful issue him or her surviving, then the testator directed that all such residuary personal estate should after the decease of the survivor of them, the said William Scales and Susan Scales be equally divided between and amongst such lawful issue in equal shares and proportions; but in case neither of them should have any lawful issue him or her surviving, then the testator directed that all such residuary personal estate should be equally divided between and amongst all his next of kin that might be living at the decease of the survivor of them, the said William Scales and Susan Scales, according to the statute for the distribution of the estates and effects of persons dying intestate.

This will was construed in *In re Richerson, Scales* v. *Heyhoe*, 40 W. R. 233, [1892] 1 Ch. 379.

The testator died in 1864, leaving his sister, Sarah Scales, his heiress-at-law and sole next of kin. Sarah Scales survived the testator's wife and died in 1872 intestate, leaving her daughter, the said Susan Scales, her son, the said William Scales, and her grandchild, the plaintiff, Sarah Jane Scales, the daughter of a deceased son, her sole next of kin.

Susan Scales died in 1879, and by an order made in August, 1890, on an originating summons to which the present trustees of the will were plaintiffs and William Scales defendant it was declared that the said William Scales was entitled as from the death of the said Susan Scales by implication during his life to the moiety of the income of the testator's residuary personal estate bequeathed to the said Susan Scales during her life as well as to the other moiety of such income. It appeared on the statement of facts that Sarah Scales had no legal personal representative. The said Sarah Jane Scales was not made a party to the summons, though the trustees had notice that she had some claim.

In July, 1890, Sarah Jane Scales commenced the present action for the administration of the testator's estate. In February, 1892, she took out administration to the estate of Sarah Scales, and, having amended her writ in April, 1892, she claimed a declaration that the order of August, 1890, was not binding on her either in her own right or in her representative capacity, and contended that there was an intestacy as to the income of the moiety of the said Susan Scales during the life of the said William Scales.

William Scales died in October, 1890.

Levett, Q.C., and *Sargant*, for the plaintiff.—The plaintiff is not bound by the order of August, 1890. It does not appear on the face of the order that the attention of the judge was called to her claim, and ord. 16, r. 46, cannot be relied on. On the construction there was an intestacy.

Farwell, Q.C., and *Kenyon Parker*, for the representatives of William Scales, relied on ord. 16, r. 46, and cited *Curtius* v. *Caledonian Fire and Life Assurance Co.*, 30 W. R. 125, 19 Ch. D. 534. They also contended that the order was right.

Byrne, Q.C., and *Marcy*, for the trustees.

CHITTY, J.—The plaintiff was not a party to the proceedings in chambers on the summons. No fault is to be imputed to the trustees on this account, for although they were aware that the plaintiff had some claim in the matter she did not insist on being made a party, and the summons was heard and disposed of in her absence.

The question is whether the plaintiff is bound by the order made on the summons. It is true that she had not at the date of the order on the summons clothed herself with the right as legal personal representative of her grandmother, Sarah Scales, the testator's sole next of kin, but it is the ordinary practice of the court to allow the person entitled to take out representation to be added as a party, and in the event of its being shown that the deceased's estate is

(*a.*) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

entitled to some interest the order does not go till letters of administration have been taken out. In my opinion the plaintiff is not bound by the order of the 11th of August, 1890.

On the true construction of rule 46 of order 16 it is necessary that the order of the court should state that the judge has proceeded in the absence of any person representing or entitled to represent the deceased's estate, or has appointed some person to represent it, and my opinion is founded on the language of the order itself. There need not be a separate order to this effect; but it must appear on the face of the order that the court dispensed with the representative. This is apparent from the terms of the rule. The words "the order so made and any order consequent thereon" apply, of course, to the case where the court appoints some person to represent the estate, and equally apply, in my opinion, where the court proceeds in the absence of a representative. But there must be a constat on the face of the order that the attention of the judge was called to the point and that he decided to proceed.

On a summons under order 55 the court is not bound to have before it all the persons whose interests may be affected by the order, as in an old suit in chancery. That is one of the advantages of the Order, and the decisions show plainly that where the court does not require other persons to be served with the summons under rule 6 of order 55, there is no necessity for the court to express this on the face of the order. But order 55 was subsequent in date to rule 46 of order 16, and it affords no ground for varying that rule. Under that rule I think the decision of the court to proceed must be shown on the face of the order.

It has been the constant practice to draw up orders either dispensing with the representative or appointing some person to represent the estate.* Although, therefore, I am deciding the point for the first time, my decision is not a new one, but is in accordance with the established practice.

On the question of the construction of the will the court adhered to the decision arrived at in chambers on the 11th of August, 1890, following *Armstrong* v. *Eldridge*, 3 Bro. C. C. 215, and *Pearce* v. *Edmeades*, 3 Y. & Coll. Eq. Ex. 246.

Solicitors, *Morgan, Price, & Mewburn; E. Robinson*, for *Grigson & Robinson*, Watton, Norfolk; *Barlow & James*, for *A. J. Winter*, Swaffham.

Chan. Div.
North, J. } June 7.

In re SAX.
BARNED *v.* SAX. (*a.*)

Will—Construction—Cease to carry on business—Sale of business to company—Managing directors.

A testator bequeathed his business, together with a leasehold messuage, to his sons. The will contained a proviso that, if the sons ceased to carry on the business, the leasehold messuage was to fall into residue. The sons sold the business to a limited company, of which they were appointed managing directors for life, and all the shares in which were held by them or their nominees.

Held, that the proviso was not repugnant to the gift, and that the testator's sons had ceased to carry on the business within the meaning of the proviso when they sold it to the company.

By his will dated the 13th of March, 1887, Julius Sax, who died on the 21st of August, 1890, bequeathed to his sons, M. B. Sax, A. L. Sax, and C. W. Sax, in equal shares the goodwill of his business of scientific instrument maker and the stock-in-trade, plant, and effects belonging thereto, including the lease of the business premises; and the testator declared that if his said sons should cease to carry on the said business, the said leasehold premises should thereupon fall into his residuary estate.

The testator left him surviving his said three sons. On the 7th of January, 1891, M. B. Sax assigned to his two brothers all his share of the business, including the said leasehold premises. In October, 1892, a company, called Julius Sax & Co. (Limited), with a capital of £20,000, was formed to take over and carry on the said business; and by an agreement dated the 15th of November, 1892, A. L. Sax and C. W. Sax assigned and transferred the said business and leasehold premises to the company, in consideration of £20,000, payable in 2,000 fully-paid shares of £10 each to the said defendants and their nominees. Under this agreement A. L. Sax and C. W. Sax were appointed managing directors of the company for life so long as they remained duly qualified.

This was an originating summons taken out by the trustees of the will of Julius Sax, to which A. L. Sax, C. W. Sax, and M. B. Sax were made defendants, to have it determined, *inter alia*, whether or not, under the circumstances, the defendants had ceased to carry on the said business within the meaning of the will, and whether the said leasehold premises had fallen into the testator's residuary estate.

The company and the debenture-holders appeared, and submitted to the jurisdiction of the court.

Alexander, Q.C., and *Jessel*, for the trustees of the will. — The defendants A. L. Sax and C. W. Sax have ceased to carry on the business.

They cited *Smith* v. *Anderson*, 29 W. R. 21, 15 Ch. D. 247; *In re Exchange Banking Co., Flitcroft's case*, 31 W. R. 174, 21 Ch. D. 519; *Farrar* v. *Farrar*, 37 W. R. 196, 40 Ch. D. 395.

Cozens-Hardy, Q.C., and *Bramwell Davis*, for A. L. Sax and C. W. Sax, the company, and the debenture holders.—The proviso that the leasehold premises should fall into the residue is repugnant to the gift, and therefore void: *In re Dugdale*, 36 W. R. 462, 38 Ch. D. 176. [NORTH, J., referred to *Adams* v. *Adams*, [1892] 1 Ch. 369, at p. 376.] Messrs. A. L. Sax and C. W. Sax are still carrying on the business as managing directors of the company.

Waley, for M. B. Sax.

NORTH, J., said that on the construction of the will the proviso was operative; the business was given coupled with a proviso which was not repugnant to the gift, but which was clear and consistent with it, and which must be construed with it; the proviso was, however, only to take effect if a time should come when no son at all was carrying on the business. His lordship then continued:—With regard to the other point, as to whether the two sons have ceased to carry on the business or not, in one sense, no doubt, they have not ceased, as they are still engaged in carrying on a business which is called after their father's name. But after having sold the business to the company as their successors, in my opinion they have ceased themselves to carry on the business. It is said they are technically carrying it on as managing directors, but suppose they were no longer able to act as managing directors, would the fact that they owned shares in the company make the business theirs? I do not think it would. Suppose they sold their shares, could it be said after that that they were

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* *Vide* Seton, p. 107, 5th edition.

(*a.*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

carrying on the business? It could not. Of course there are many degrees between selling all and selling some shares, but in my opinion they ceased to carry on the business when they handed it over to a company of which they are officials. If I were to say that they were now carrying on the business I cannot see any point at which I could subsequently say they had ceased to carry it on. In my opinion they ceased to carry on the business, within the meaning of the proviso in the will, when they sold it to a company to enable that company to carry it on as their successors.

Solicitors for the plaintiffs and M. B. Sax, *Emanuel & Simmonds.*

Solicitor for other parties, *W. B. Styer.*

Chan. Div. North. J. } May 18.

JENKINS *v.* RIDGLEY. (*a.*)

Mortgage—Foreclosure—Claim for possession after decree absolute—R. S. C., 1883, *ord.* 18, *r.* 2.

In a foreclosure action the plaintiff did not ask for possession in his originating summons. An order for foreclosure absolute having been made, the plaintiff applied for delivery of possession.

Held, that after foreclosure absolute the court could make such order.

The plaintiff as mortgagee took out an originating summons for foreclosure against the defendant, but did not in the summons claim delivery of possession. An order *nisi* was made on the 7th of June, 1892, and the foreclosure was made absolute on the 1st of February, 1893. The plaintiff afterwards offered the property for sale; but at the auction his right to sell was disputed, and the defendant, who continued in possession of the property, denied such right. The plaintiff then moved *ex parte* for an order for delivery of possession.

Mulligan, for the motion.—Under ord. 18, r. 2, we are entitled to an order for possession. This rule, which relates to the joining of any cause of action without the leave of the court in an action for the recovery of land, expressly exempts such a case as the present, and provides: "Nothing in this Act shall prevent any plaintiff in an action for foreclosure or redemption from asking for or obtaining an order for delivery of the possession of the mortgaged property to the plaintiff on or after the order absolute for foreclosure or redemption."

He referred to *Craven Bank* v. *Hartley*, W. N., 1886, p. 189; *Best* v. *Applegate*, 36 W. R. 397, 37 Ch. D. 42; *Keith* v. *Day*, 37 W. R. 242, 39 Ch. D. 452.

NORTH, J.—I do not think the cases cited exactly apply. I think, however, on the general principle which they cover, I can make the order as asked.

Solicitors, *Brooks & Jenkins.*

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

Chan. Div. Stirling, J. } April 13.

In re SUDBURY AND POYNTON ESTATES.
VERNON *v.* VERNON. (*a.*)

Settled Land—Improvements—Tenant for life—Obligation to make payments to sinking fund—Validity—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 25, 26, 33, 51, 56.

Under a settlement made in 1877 *trustees were enabled, at the request of the tenant for life, to raise certain sums of money for improvements which were, to a large extent, those authorized by the Settled Land Act*, 1882, *and to hand them over to him to be applied by him for such improvement purposes, without any liability on the part of the trustees to see to their application. The tenant for life was, according to the terms of the settlement, under an obligation to replace out of income the moneys so handed over to him by annual instalments of* 1-25*th of each sum handed over to him. He received moneys from the trustees, applied them for improvements, and paid several contributions to the sinking fund.*

Held, that the obligation to recoup did not in any way affect the right of the tenant for life to exercise any of the powers of the Settled Land Act, 1882, *and, consequently, did not contravene section* 51 *of that Act.*

Adjourned summons.

This was an originating summons taken out by the trustees of a settlement, dated the 14th of April, 1877, under section 56, sub-section 3, of the Settled Land Act, 1882, for the determination of, *inter alia*, the question whether there was any obligation on Lord Vernon, the tenant for life under the settlement, to contribute any further payments to a certain sinking fund directed to be formed by the settlement. By the settlement in question the Vernon family estates were settled in strict settlement, and the trustees were authorized, with the consent of the tenant for life, to mortgage the settled estates in fee or for a term in order to raise a sum of £40,000, £10,000 of which was applicable for agricultural improvements and £30,000 for colliery improvements. The improvements authorized by the settlement were, to a large extent, those authorized by the Settled Land Act, 1882. The trustees were to keep separate accounts of the moneys so raised under the titles of "Estate Improvement Fund" and "Colliery Improvement Fund," and they were to pay the moneys when so required by the tenant for life to him to be applied by him for the purposes for which they were applicable under the settlement without liability on the part of the trustees to see to the application thereof, or for any misapplication or non-application thereof. The settlement provided that the annual income of the settled estates was to stand charged for twenty-five years from the respective dates when any such moneys were raised with the payment to the trustees of annual sums equal to one twenty-fifth part of the money so raised, which were to form sinking funds, and in default of payment by the tenant for life the same were to be raised under a term of 500 years. Each addition to the sinking funds was to be invested by the trustees, and held by them as moneys arising under the general power of sale. The trustees were, until the sums of £10,000 and £30,000 were required for the authorized purposes, to hold them upon the trusts declared concerning the moneys to arise under the general power of sale in the settlement. Such moneys were, amongst other purposes, to be applied in the purchase of other lands to be settled in the same manner as

(*a.*) Reported by W. A. G. WOODS, Esq., Barrister-at-Law.

the estates originally settled. The powers of raising the £10,000 and £30,000 had been exercised, but not to the full extent, £4,200 having been raised for agricultural improvements and £22,100 for colliery improvements, and the money had been applied for such purposes at various dates between the 29th of November, 1883, and the 3rd of March, 1890. The sinking funds required by the settlement had been duly kept up, but did not as yet equal the amounts raised for the improvements.

L. Lopes, for the applicants.—The provision in the settlement which obliges the tenant for life to make payments to a sinking fund does not tend to prevent him from resorting to the Act of 1882, and is not void under section 51, which provides that any provision in a settlement which attempts in any manner to prohibit or prevent a tenant for life from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising any power under the Act is to be deemed void. Lord Vernon is, therefore, bound to continue to make the payments.

Hastings, Q.C., and *Maidlow*, for Lord Vernon.—The policy of the Act is that a tenant for life should have power to improve the estate at the cost of the estate, and not out of the income arising from it. The provision in the settlement is contrary to the scheme and intention of the Act, and is consequently void. The money, when raised, was, under section 33 of the Act, applicable as capital money arising under the Act, and the improvements are such as could, under section 25 of the Act, have been made with such capital money. Section 15 of the Settled Land Act, 1890, empowers the court in any case where it appears proper to authorize capital money to be applied for improvements authorized by the Act or the Act of 1882, notwithstanding that a scheme was not before the execution of the improvements submitted for approval, as required by the Act of 1882, to the trustees of the settlement or to the court. That section is retrospective as regards improvements executed after the passing of the Act of 1882: *In re Ormerod's Settled Estate*, 40 W. R. 490, [1892] 2 Ch. 318. [STIRLING, J.—That is a discretionary power, and before exercising it I should have to be satisfied that the money has been expended in a manner authorized by the Settled Land Acts and that the expenditure was for the benefit of the estate.] The present question is a much larger one, namely, whether the provision in the settlement is not, as we submit it is, wholly void as being contrary to the policy of the Act.

STIRLING, J.—As regards this question, I do not feel that in the way in which it has been put before me there is any great difficulty. [His lordship referred to the provisions of the settlement of the Vernon estates, and remarked that the sums of money raised under the powers in the settlement were, under section 33 of the Settled Land Act, 1882, capital moneys applicable as such under the Act. He continued:—] What has happened is this. These powers have to a certain extent been exercised, and sums of money raised have been dealt with, not in accordance with the provisions of the Settled Land Act, but in accordance with the provisions of the settlement.

The settlement gives the tenant for life power to request the trustees to hand these funds over to him to be applied for improvement purposes.

The scheme of the settlement is that the funds, when raised, are to be handed over to the tenant for life at his request, to be applied for these improvement purposes, the trustees not being bound to see to the application of them. The improvement purposes sanctioned by the settlement are, to a large extent, those which are sanctioned by the Settled Land Act, 1882; in some respects, I think, they go beyond them; but in the main they are those approved by the Act. The trustees have handed over the funds to the tenant for life, and he has applied them for improvements accordingly. Under the terms of the settlement he is under an obligation to replace the sums raised by paying to the trustees annual instalments of one twenty-fifth of each sum handed over to him. The question is whether Lord Vernon is under any obligation to continue to make any further payments of the instalments. It seems to me that he is. The funds, when raised, constituted capital moneys under the Act. It was competent for the tenant for life, if he was so minded, to apply to the trustees to have the funds dealt with under that Act, and applied for improvements accordingly. Section 26 of the Act contains careful provisions as to the mode in which capital moneys shall be applied for improvements. Speaking shortly, there must either be a scheme sanctioned by the trustees or the sanction of the court must be got. The Act, for some reason or other, has not been resorted to, but the money has been handed over to the tenant for life to be dealt with by him under the settlement. Why, then, is he to be relieved from the obligation imposed on him by the settlement, of recouping one twenty-fifth out of the fund handed over to him from year to year? It is said that that obligation is contrary to the policy of the Act, and is void under section 51. But does that obligation as to recouping in case the powers of the settlement are resorted to, tend in any way to prevent the tenant for life from exercising any of the powers under the Act? I cannot see that it does. The obligation only arises when the money is handed over to the tenant for life to be dealt with by him in accordance with the settlement; but it was open to him, and it is still open to him, to resort to the powers of the Act. Instead of asking the trustees to hand over the fund to be dealt with by him according to the powers of the settlement, he might have gone to them and asked them to deal with the moneys under the Act, and in that case he would have been under no obligation to recoup at all. If the provision in the settlement had been that he was bound to recoup the money if it had been applied by the trustees under the Act, that would have been void; but that is not the case here. So far from the provision in question tending to prevent the tenant for life from exercising the powers under the Act, it seems to me that it offers a strong inducement to him to resort to the powers in the Act rather than to those in the settlement. Unfortunately, through ignorance or for some other reason, he has resorted to the powers of the settlement instead of those under the Act, and all I can say is that, having done so, he is bound to go on making the payments out of the money handed over to him; but that is entirely without prejudice to any application he may make under section 15 of the Settled Land Act, 1890. That Act was passed in order to remove what was supposed to be the bad effect of certain decisions of this court when money had been applied for improvements authorized by the court, but without going through the forms required by the Act of 1882. Upon the present summons I can only say that at present there is an obligation upon Lord Vernon to contribute further payments to the sinking fund in question, according to the provisions of the settlement.

Solicitors for all parties, *Arnold & Henry White*.

Chan. Div.
Vaughan Williams, J. } May 19; June 21.

In re PORTSEA ISLAND BUILDING SOCIETY. (*a*.)

Company—Winding up—Registered building society—County court—Special case jurisdiction—Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *s.* 32, *sub-section* (4)—*Companies* (*Winding-up*) *Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 3, *sub-section* (3)—*County Court Rules, ord.* 41, *r.* 9.

In the winding up in the county court of a building society registered under the Building Societies Act, 1874, *a special case for the opinion of the High Court may be stated under section* 3, *sub-section* (3), *of the Companies* (*Winding-up*) *Act*, 1880.

The above-named society, which was a building society registered under the Building Societies Acts, was being wound up in the county court. The county court judge stated a special case, entitled in the Companies Acts, 1862 to 1890, the Building Societies Act, 1874, and the County Courts Act, 1888, for the determination of certain questions arising in the winding up. A preliminary objection was taken raising the question whether a judge of the county court could state a special case under section 3, sub-section (3), of the Companies (Winding-up) Act, 1890.

Finlay, Q.C., Bunting, and *Frank Evans*, for the committee of depositors, took the preliminary objec-objection that the county court had no jurisdiction to state a special case under the Companies (Winding-up) Act, 1890. The Companies (Winding-up) Act, 1890, has really nothing to do with the winding up of building societies registered under the Act of 1874. Under the 1874 statute the court for winding up purposes is the county court, and the Act of 1890 has been construed as not applying to the winding up of these societies. In 1892, however, the rule-making authority under the County Courts Act, 1888, made a rule (ord. 41, r. 9, also cited as rule 146) that the provisions of the Companies Acts, 1862 to 1890, and the rules made thereunder, so far as they related to winding up, should apply to the winding up of societies registered under the Building Societies Act, 1874, and that the winding up of any such societies should be conducted in all respects as if such societies were registered under any of the Companies Acts. That was probably meant to apply the procedure under the Acts to these liquidations. If it goes further it is *ultrà vires*, for the Act of 1888 only enables rules to be made for regulating procedure in the county court. But stating a special case is doing something more. The Legislature meant that building society liquidations are to be conducted in the county court; an appeal to a divisional court being given in a proper case. But if this rule applies the county court litigant may be dragged from his own district, not only to the High Court, but afterwards to the Appeal Court, and to the House of Lords.

Buckley, Q.C., and *Emmanuel*, for the liquidator, contended that there was jurisdiction to hear the special case.

Sir Henry James, Q.C., Bramwell Davis, and *G. G. Greenwood*, for other parties.

VAUGHAN WILLIAMS, J.—A preliminary objection was raised to my hearing and deciding this special case on the ground that the special case was stated pursuant to the provisions of section 3 of the Companies (Winding-up) Act, 1890. That section provides, by sub-section 3, that "if any question arises in any winding-up proceeding in a county court, or in the Stannaries Court, which all the parties to the proceedings, or which one of them and the judge of the court may desire to have determined in the first instance in the High Court, the judge shall state the facts in the form of a special case for the opinion of the High Court, and thereupon the special case and the proceedings, or such of them as may be required, shall be transmitted to the High Court for the purposes of the determination." It was contended that this section only applies to the winding up of companies in the county court, and that it has no application to the winding up of a society registered under the Building Societies Acts. It was urged that the Act of 1890 is not incorporated with the Building Societies Act, 1874 (37 & 38 Vict. c. 42), section 32 of which enacts, sub-section (4), that a society under the Act may terminate or be dissolved "by winding up either voluntarily under the supervision of the court or by the court," and that "general orders for regulating the proceedings of the court under this Act may be from time to time made by the authority for the time being empowered to make general orders for the court." And by section 4 of the same Act "the court means in England the county court of the district in which the chief office or place of meeting for the business of the society is situate.

Now, it was decided in *Andrew* v. *The Swansea Cambrian Benefit Society*, 29 W. R. 382, that the Companies Acts, 1862 and 1867, apply to liquidations under the Building Societies Act, 1874. It is said, and truly said, that this case does not decide that the Companies Act, 1890, applies to liquidations under the Building Societies Act, 1874, and that a decision that the Acts of 1862 and 1867, which were in force in 1874, are incorporated by implication in the subsequent Act of 1874 falls very short of a decision that the Act of 1874 by implication incorporates the Act of 1890, which was not in force when the Act of 1874 was passed.

This makes it necessary to examine the grounds of the decision in the above cited case—a case which, it may be observed, is confirmed by the decision in *In re Sunderland Building Society*, 37 W. R. 95, 21 Q. B. D. 349. Now Lindley, L.J. (then Lindley, J.), says in the former case that the true effect to his mind of the 32nd section of the Building Societies Act, 1874, is simply this—to substitute the county court for the Court of Chancery, and that it does in effect, although not expressly put, building societies, under the Companies Acts of 1862 and 1867 by virtue of the clauses in those Acts relating to industrial companies, although the Companies Acts, 1862 and 1867, are not expressly incorporated in the Building Societies Act. If this is the true ground of the decision it seems to me that the provisions in force at any particular time for the winding up of companies in the Chancery Division of the High Court, which now stands in the place of the Court of Chancery, will apply to a winding up in the county court of a building society, even though such provisions may be the result of enactments passed since 1874, for the only effect of the Act of 1874 is to substitute the county court as the tribunal for winding up instead of the High Court, and the duty of the county court will, at all times, be to apply to winding up in the county court the enactments which from time to time happen to be in force for the winding up of companies. If this view is right, it follows that the provisions of the Act of 1890 for stating a special case for the determination of questions arising in the winding up of a company in a county court will apply to the winding up of a

(*a*.) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

building society in the county court. It is to be observed that the particular section which the judges in *Andrew* v. *The Swansea Cambrian Benefit Society* held to apply to the winding up of a building society was section 43 of the Companies Act, 1867, which section enacts that a person dissatisfied may appeal.

There was another ground urged before me as showing that I had jurisdiction to determine this special case; it was said that jurisdiction was given to me by the County Court Rules, 1892, ord. 41, r. 9, which rule is as follows:—"The provisions of the Companies Acts, 1862 to 1890, and the rules made thereunder, so far as they relate to winding up, shall apply to the winding up of societies registered under the Building Societies Act, 1874"; "and the winding up of any such societies shall be conducted in all respects as if such societies were companies registered under any of the said Companies Acts." And it was said that the judgments in *Andrew* v. *The Swansea Cambrian Benefit Society* applying the Acts of 1862 and 1867 to the winding up of a building society in the county court, were partly based upon the rules of the county court adopting the orders and rules in Chancery under the Companies Acts, 1862 and 1867, which were utterly unworkable without the Acts themselves. I prefer myself to base my decision on the ground first stated, because I do not think that section 164 of 51 & 52 Vict. c. 43, which enables five county court judges, with the approval of the Lord Chancellor and the Rule Committee of the High Court, to frame rules and orders for regulating the practice in the county courts, gives power by these rules to apply to a winding up under the Building Societies Act provisions of Acts of Parliament which are not by the Act itself expressly or impliedly applied to a winding up under the Building Societies Act. Indeed, I doubt whether it would be competent under section 164 of 51 & 52 Vict. c. 43, to frame a rule in the very terms of sub-section (3) of section 3 of the Companies (Winding-up) Act, 1890; for it seems to me that such a rule would do something more than regulate the practice of the county court. The objection must therefore be overruled.

Solicitors, *Learoyd, Mellor, & James; Stanley Evans*, for *Scotney & Shenton*, Winchester; *A. W. Mills*, for *King & Lapthorn*, Landport.

Q. B. Div.
(Mathew and Wright, JJ.) May 30; June 2.

SMITH v. ROBINSON. (*a*.)

Landlord and tenant—Covenant to pay charges—Nuisance arising from condition of drains—"Charges charged on the lessor in respect of the premises"—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76).

In the lease of a house by the plaintiff to the defendant, the defendant covenanted to "pay, bear, and discharge all land tax, sewers rate, main drainage rate, and all other rates, taxes, assessments, charges, or impositions whatever, parliamentary, parochial, or otherwise, which now are, or at any time during the continuance of this demise may be, taxed, charged, assessed, or imposed upon the said demised premises or any part thereof, or on the said yearly rent hereby reserved, or any part thereof, or on the lessor, his executors, administrators, and assigns for or in respect of the said premises."

The plaintiff, having incurred expenses under the Public Health (London) Act, 1891, *in remedying a nuisance arising from an escape of sewer gas from the drains of the house into the basement, brought an action against the defendant to recover these expenses from him under the foregoing covenant.*

Held, that the action was maintainable.

Appeal by the defendant from a decision of his Honour Judge Bayley, sitting at the Westminster County Court, in favour of the plaintiff. By indenture of lease dated the 19th of March, 1891, the plaintiff, William Smith, demised unto the defendant, Alfred Robinson, a dwelling-house for the term of seventeen years, at the rent of £60.

The lease contained a covenant on the part of the defendant that he "shall and will during the continuance of this demise pay, bear, and discharge all land tax, sewers rate, main drainage rate, and all other rates, taxes, assessments, charges, or impositions whatsoever, parliamentary, parochial, or otherwise, which now are or at any time during the continuance of this demise may be taxed, charged, assessed, or imposed upon the said demised premises, or any part thereof, or on the said yearly rent hereby reserved, or any part thereof, or on the lessor, his executors, administrators, and assigns, for or in respect of the said premises."

Then followed a covenant to repair as follows:—"The lessee, his executors, administrators, and assigns, shall and will forthwith put the said premises into complete repair at his and their own expense, and to the satisfaction of the lessor, his executors and administrators, and from time to time, and at all times during the said term hereby granted, at his and their own proper costs and charges well and sufficiently repair, support, uphold, maintain, pave, cleanse, glaze, amend, and keep the said messuage or tenement and premises hereby demised, with all and singular the appurtenances and all the walls, pales, posts, rails, pavements, sinks, sewers, drains, gutters, vaults, houses of office, and watercourses thereto belonging or in anywise appertaining, in, by, and with all needful and necessary reparations, when, where, and as often as need or occasion shall require, damage by fire only excepted."

In consequence of an order having been made upon the landlord, he incurred expenses under the Public Health (London) Act, 1891, in remedying a nuisance arising from the condition of the drains of the house, which allowed sewage gas to escape into the basement, and he brought an action against the defendant to recover these expenses from him.

The county court judge held that these expenses were a charge upon the lessor in respect of the premises, and gave judgment for the plaintiff.

The defendant appealed.

Lynden Bell, for the appellant.—The lessee was no liable. The charge was not a charge on the lessor i respect of the premises. [He cited *Rawlins* v. *Brigg* 27 W. R. 138, 3 C. P. D. 368; *Budd* v. *Marshall*, 2 W. R. 148, 5 C. P. D. 481, *Lyon* v. *Greenhow*, Times L. R. 457.] *Hartley* v. *Hudson*, 4 C. P. D 367, 28 W. R. Dig. 119, is distinguishable, as it di not relate to a nuisance. I admit that, unless th present case can be distinguished from *Hartley* v *Hudson*, that case binds me. But here there was misfeasance on the part of the landlord in not keepin the drains in repair. It is a charge on the landlor but not "in respect of the premises."

Cluer, for the respondent.—This was a Parli mentary charge imposed upon the owner. [He cite *Crosse* v. *Raw*, 23 W. R. 6, L. R. 9 Ex. 209; *Budd* v *Marshall*]. No distinction has ever before been take upon the ground of nuisance. [WRIGHT, J.—Is the any case of repairing an old drain?] *Rawlins* v

(*a*.) Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

Briggs was a case of additional drainage. [He also cited *Allum* v. *Dickinson*, 30 W. R. 930, 9 Q. B. D. 632, and *Hartley* v. *Hudson*.] This is a charge imposed by Parliament on the landlord in respect of the premises.

Lynden Bell, in reply.—In *Crosse* v. *Raw* there was the word "outgoings."

Cur. adv. vult.

June 2.—WRIGHT, J., who delivered the judgment of the COURT, said: The plaintiff let the house to the defendant, and the lease contained the following covenants on the part of the defendant. [His lordship read the two covenants set out above.] The defendant did not repair, and a nuisance arose from the condition of the drains. The usual proceedings were taken, and the works prescribed were performed by the plaintiff. He now brings this action to recover the expenses from the defendant. The case seems covered by authority, unless it is distinguishable on the ground that this is not a new drain. We have come to the conclusion that the covenant does apply. The whole matter is statutory, and arises out of the exercise by the local authority of its power to control in the public interest the uses and conditions of house property. The "nuisance" itself may be merely the creation of the statute—*e.g.*, a nuisance only to the health of the occupier himself. The work to be done may be different from that which is necessary to abate a common law nuisance or to satisfy the repairing covenant. The expenses are recoverable by the local authority by statutory means. They are made a charge on the owner. The case is, therefore, within the words of the covenant, and, that being so, the cases as to new drains and paving expenses apply. Defendants have got off where there was no such word in the covenant as "charge," duty," or "outgoing," where there were no words extending to charges on the owner. But where the words are sufficient we must hold the governing intention to be that the landlord shall get his rent clear of all deductions.

Appeal dismissed.

Solicitors, *Thomas Dyson & Co.; Lovell, Son, & Pitman.*

Q. B. Div.
(Charles and Vaughan Williams, JJ.) May 16.

YOUNG (*Appellant*) v. FOSTEN (*Respondent*). (*a.*)

Public health—London—Repair of drain—Drain required so as to be a nuisance—Builder employed by owner to do repair—Liability of builder in first instance for the nuisance—Public Health (London) Act, 1891 (*54 & 55 Vict. c.* 76), *s.* 42.

A builder who is employed by the owner of a dwelling-house to repair a drain, and who repairs it so as to be a nuisance and injurious to health, is "the person who undertook or executed the repair" of the drain within the meaning of the 42nd section of the Public Health (London) Act, 1891, *and may be proceeded against under that section in the first instance, although the owner is not summoned.*

Case stated by the metropolitan police magistrate sitting at the South-Western Police Court.

The respondent had been summoned before the magistrate for that he did in the parish of Clapham, in the county of London, so repair a certain drain as to be a nuisance and injurious to health. The following facts were to be taken as admitted:—

The summons was taken out by the appellant on behalf of, and by the direction of, the board of works for the Wandsworth district, which board is the sanitary authority for the parish of Clapham.

In or about the month of October, 1892, the sanitary authority received information that, by by reason of a defect of a structural character, the drain to a certain dwelling-house was in such a state as to be a nuisance and injurious to health. Immediately after the receipt of this information the sanitary authority served upon the owner of the dwelling-house a notice requiring him to abate the nuisance within a specified time, and to execute and do such works as might be necessary for that purpose.

The owner, who neither resided nor carried on business in the house, immediately upon the receipt of the notice from the sanitary authority, gave instructions to the respondent, who is a builder, to do the necessary repairs to the drain, in order to abate the nuisance and carry out the requirements of the sanitary authority.

The respondent thereupon took up and relaid the drain, and shortly afterwards an inspector, acting for the sanitary authority, visited the house and tested the drain, when he found, as the fact was, that the joints of the pipes composing the drain were not properly cemented, and that the drain was leaky and in such a state as to be a nuisance and injurious to health. The inspector then called the attention of the respondent to the condition of the drain, but the respondent then declined to do anything further to the drain.

The sanitary authority then caused the summons to be taken out by the appellant on their behalf, under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 42, against the respondent.

On the hearing of this summons it was contended by the appellant that the respondent, the builder who actually did the repairs to the drain, was a person who undertook or executed the said repairs within the meaning of the section.

The magistrate, however, dismissed the summons without calling on the respondent to address him or offer any evidence, being of opinion that upon the true construction of the section, and as a matter of law, the owner of the dwelling-house was the person who, in the first instance, undertook the said repairs within the meaning of the section; and that the respondent was not liable to be summoned, except under the circumstances set out in the proviso under the said section.

The magistrate having stated the present case, the question now was whether the magistrate was right in so holding.

Section 42 of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), provides:—

"If a water-closet or drain is so constructed or repaired as to be a nuisance or injurious or dangerous to health, the person who undertook or executed such construction or repair shall, unless he shows that such construction or repair was not due to any wilful act, neglect, or default, be liable to a fine not exceeding twenty pounds:

"Provided that, where a person is charged with an offence under this section, he shall be entitled, upon information duly laid by him, to have any other person, being his agent, servant, or workman, whom he charges as the actual offender, brought before the court at the time appointed for hearing the charge, and if he proves to the satisfaction of the court that he had used due diligence to prevent the commission of the offence, and that the said other person com-

Reported by Sir SHERSTON BAKER, Barrister-at-Law.

mitted the offence without his knowledge, consent, or connivance, he shall be exempt from any fine, and the said other person may be summarily convicted of the offence."

Earle, for the appellant.—The magistrate fell into the error of supposing that the proviso created a new offence. It creates no new offence, the offence being created under the earlier part of the section, under which the actual offender is liable. Here the builder is liable in the first instance, as he is the person who undertook or executed the repair within the meaning of that section, and he is therefore the actual offender who has committed the offence under the first part of the section, and the proviso would only be a defence for him if he could show that some other person actually committed the offence.

The respondent appeared in person.

The COURT (CHARLES and VAUGHAN WILLIAMS, JJ.) held that the learned magistrate took an erroneous view of the section, as the respondent was the person who undertook the execution of the construction or the repairs of the drain within the meaning of the section, and that, therefore, he could be summoned and dealt with under the section in the first instance.

Appeal allowed; case remitted to the magistrate.

Solicitors for the appellant, *W. W. Young & Son.*

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams and Bruce, JJ.) — April 13, 14; May 6.

In re DAINTREY.
Ex parte HOLT. (*a.*)

Act of bankruptcy—Notice of suspension of payment—Letter marked "without prejudice"—Admissibility—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (h).

A bankruptcy petition presented against the debtor alleged as the act of bankruptcy that specified in section 4, *sub-section* 1 (h), *of the Bankruptcy Act,* 1883—*namely, that the debtor had given notice to the creditor that he had suspended, or was about to suspend, payment of his debts. The notice was given by a letter written by the debtor to the creditor, such letter being marked "Private and Confidential. Without prejudice"; and, on the hearing of the petition, the question was raised whether the letter could be looked at by the court for the purpose of determining whether an act of bankruptcy had been committed.*

Held, that the letter was admissible in evidence, and, the act of bankruptcy being thereby proved, a receiving order must be made against the debtor.

Appeal from an order of the registrar of the Brighton County Court dismissing a bankruptcy petition on the ground that no act of bankruptcy had been proved.

The debtor was a solicitor, and was indebted to the appellant in the sum of £949, moneys entrusted to him to invest. An action had been commenced by the appellant against the debtor, the writ being issued on the 15th of December, 1892, and judgment obtained on the 25th of January, 1893.

On the 24th of December, 1892, a letter in the form of a circular was sent by the debtor to the appellant, which stated that he was unable to pay his debts in full, and offering a composition. It was practically admitted that this letter amounted to a notice of suspension of payment under section 4, sub-section 1 (*h*), of the Bankruptcy Act, 1883, and a bankruptcy petition was subsequently presented by the appellant against the debtor founded on the letter as an act of bankruptcy.

The letter was, however, headed "Private and confidential—without prejudice," and the question was raised whether it could be looked at by the court for the purpose of determining whether an act of bankruptcy had been committed.

The county court registrar declined to admit the letter as evidence, and dismissed the petition.

The petitioning creditor now appealed.

Muir Mackenzie, for the petitioning creditor.—The registrar appears to have been influenced by some rather wide language in the case of *Walker* v. *Wilsher*, 37 W. R. 723, 23 Q. B. D. 335. But it would be really making nothing of the Act of Parliament if a debtor can give notice of suspension without prejudice. A person can no more commit an act of bankruptcy without prejudice than he can make a false representation in a prospectus without prejudice. This letter is plainly on the face of it one of a series to all the creditors.

He also referred to *Jones* v. *Foxall*, 15 Beav. 388.

Gore, for the debtor.—The letter contains an offer made without prejudice. It could not be used as evidence in an action between the parties, and the protection is not confined to an action only, but extends to other proceedings, such as bankruptcy.

He referred to *Ex parte Harris*, 23 W. R. 531; *Jones* v. *Foxall*; *In re River Steamer Co.*, 19 W. R. 1130, L. R. 6 Ch. App. 822; *Walker* v. *Wilsher*; *Paddock* v. *Forrester*, 3 Scott N. R., at p. 735; *Hoghton* v. *Hoghton*, 15 Beav. 278.

Cur. adv. vult.

May 6.—VAUGHAN WILLIAMS, J.—In this case the question raised is as to the admissibility of a document which is expressed to be written "without prejudice." The question arose in this way. A petition in bankruptcy was presented which alleged as an act of bankruptcy that the debtor had given notice to a creditor that he had suspended payment or was about to do so. It was proposed to prove this act of bankruptcy by the production of the document in question. It was objected that the document could not be put in evidence, being written "without prejudice." It was suggested in answer to this objection that the document in fact was a circular addressed by the debtor to his creditors, and that a document of such a character would be admissible in evidence, although headed "without prejudice." To this it was replied that there was no evidence dehors the document itself, that it was a document of such a character, or that it had been sent to any one beside the petitioner.

The petitioner by his counsel in reply to a question by the learned registrar before whom the petition was being heard, deliberately elected to rely only on the sending of the circular to the petitioner, and offered no evidence of the document having been sent to any other creditors. Under these circumstances it did not seem to us that we ought to allow further evidence to be put in on the appeal. We have, therefore, to decide the case on the materials before the learned registrar, who decided that the document was inadmissible, and dismissed the petition for want of proof of the act of bankruptcy alleged. In my opinion this decision was wrong. I think that the document was admissible in evidence. In the

(*a.*) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

first place, I think that the court was entitled to look at the document and its contents for the purpose of deciding the question of its admissibility.

It seems to me that the question of its admissibility depended upon a matter of fact, which matter of fact it was the function of the registrar in his character of judge, and not in his character as a juryman, to decide: *Cleave* v. *Jones*, 7 Ex. 421; *Froude* v. *Hobbs*, 1 F. & F. 612; and it seems to me that the judge for this purpose was entitled to look at the document, though not in evidence, just as he would have been entitled to have looked at the document if he had been trying a case before a jury, before allowing it to be put in evidence before the jury: *Boyle* v. *Wiseman*, 3 W. R. 577, 11 Ex. 360.

In my opinion the rule which excludes documents marked "without prejudice" has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation, and it seems to me that the judge must necessarily be entitled to look at the document in order to determine whether the conditions under which alone the rule applies, exist. The rule is a rule adopted to enable disputants without prejudice to engage in discussion for the purpose of arriving at terms of peace, and unless there is a dispute or negotiation and an offer the rule has no application. It seems to me that the judge must be entitled to look at the document to determine whether the document does contain an offer of terms.

Moreover, I think that the rule has no application to a document which in its nature may prejudice the person to whom it is addressed. It may be that the words "without prejudice" are intended to mean without prejudice to the writer if the offer is rejected, but, in my opinion, the writer is not entitled to make this reservation in respect of a document which, from its character, may prejudice the person to whom it is addressed if he should reject the offer, and for this reason also I think the judge is entitled to look at the document to determine its character.

The next question which arises is the question whether this document is of a character fulfilling the conditions to which the rule of exclusion applies. It seems to me that some of the conditions are complied with, but not all. There was a dispute, for there was an action pending between the parties. There was an offer, *i.e.*, the offer of a composition which was intended to apply amongst other things to the petitioner's claim in the action, but the document, the letter of the debtor to the petitioner, was, in my opinion, more than this. It was a clear act of bankruptcy, and it was notice to the petitioner of such act of bankruptcy, and it seems to me that a notice of an act of bankruptcy cannot be given "without prejudice," because the document in question was one which from its character might prejudicially affect the recipient, whether or not he accepted the terms offered thereby.

For the reasons I have already given I think that such a document does not fall within the rule which excludes offers for peace written without prejudice, and ought to have been admitted in evidence. If admitted, it conclusively proves the act of bankruptcy. It follows that the learned registrar ought to have made the receiving order on the petition, and we now make it and allow this appeal.

BRUCE, J., concurred.

Appeal allowed.

Solicitors for the appellant, *Senior, Attree, & Co.*, for *Bryden & Pitfield*, Petworth.

Solicitors for the debtor, *Daintreys.*

Prob. Div. & Adm. Div. } Jan. 25, 31.
Divorce. }

GREEN *v.* GREEN AND SEDGEWICK. (*a.*)

Divorce—English domicile—Foreign decree at suit of wife—Unjust allegation—Non-submission of husband to foreign jurisdiction—English suit—Philadelphian law.

A domiciled Englishman married in England a native of the United States of America. After a time the wife left the husband of her own accord without any cause, and, returning to America, refused to return to this country. She applied for and obtained from the court at Philadelphia, under a recent Act of that court, a decree dissolving the marriage, on the ground of her husband's cruelty. The husband was served with a citation to appear in the proceedings, but, acting on advice, he refused to submit to the jurisdiction of the court of Philadelphia, and did not appear. The wife subsequently went through a ceremony of marriage in Philadelphia with the co-respondent, and they cohabited together.

Held, that, though the marriage in America was legal there, the decree there dissolving the English marriage was not binding in this country, and could not affect the petitioner, who was a domiciled Englishman and had never been resident in Philadelphia or submitted himself to the jurisdiction of that court, and that the English marriage was still valid and binding; and this court accordingly pronounced a decree nisi *dissolving that marriage, on the ground of the adultery of the respondent and co-respondent.*

Hearing before the court itself of the husband's petition, praying for dissolution of the marriage by reason of the wife's adultery with the co-respondent. The evidence proved that Mr. James Green, a domiciled Englishman, carrying on business in London, met the respondent, then Mrs. Ida Woodruff, a widow, born in the United States of America, on a steamer, as he was returning from America, and on January 20, 1880, they were married at St. Mary Abbott's Church, Kensington, and cohabited together till April 23, 1890, when the respondent returned to America, as she alleged on account of the illness of her mother and her sister's marriage. She parted from the petitioner on friendly terms with an arrangement that she should return in June. Various excuses were given why she did not return, in spite of affectionate remonstrances from her husband, and ultimately he was asked to consent to divorce in the United States, but refused.

On July 7, 1891, the petitioner received a citation to appear in the Court of Common Pleas at Philadelphia to defend his wife's suit for "libel," brought for the purpose of obtaining a divorce on the ground of cruelty. Acting on the advice of his solicitors he did not appear, and in his absence, on July 2, 1892, the court of Philadelphia pronounced a decree dissolving the marriage on the ground of cruelty. It was proved that on June 9, 1891, the Pennsylvania Legislature passed an Act described as supplemented to the Act of 1855, and which extended the jurisdiction of the court to all cases of divorce from matrimonial bonds and from bed and board, when it should be shown in the petition to the court by any wife that she was formerly a citizen of the commonwealth, and that having intermarried with a citizen of any other State or foreign country, she had been compelled to abandon the habitation or domicile of her husband by reason of his adultery, barbarous treat-

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

ment, or desertion. The pleadings which were served on the petitioner contained allegations which, if true, complied with the terms of this Act.

On August 11, 1892, the respondent and co-respondent went through a ceremony of marriage at Philadelphia, and subsequently cohabited together as man and wife. The petitioner filed the present petition on August 19.

Jan. 25.—*Inderwick, Q.C.*, and *Pritchard*, appeared for the petitioner.

The respondent and co-respondent had not entered any appearance in the proceedings.

Cur. adv. vult.

Jan. 31.—BARNES, J., after going through the evidence, said:—The evidence in this case satisfies me that the charges made against the petitioner, in the American court were unfounded, and that the American decree was unjustly pronounced. The curious result is that the marriage of the respondent with the co-respondent, in America is legal, whilst the English marriage is still legally binding here. I have looked into the cases from the time of *Lolley's case*, Russ. & Ry. 237, down to *Tollemache* v. *Tollemache*, 1 Sw. & Tr. 557, 7 W. R. Div. Dig. 12, and *Harvey* v. *Farnie*, 31 W. R. 433, 8 App Cas. 43, and I find no case in which it has ever been decided that a man can be divorced from his wife by the laws of a country in which he has never been resident or domiciled. Here the domicile of the petitioner was and always has been English, and as a matter of law the respondent by her marriage acquired an English domicile. She left the petitioner of her own accord and without any cause whatever. The petitioner never submitted himself to the jurisdiction of the American court, and the decree was obtained there on grounds which would not have enabled the court to pronounce a decree here. There is no case precisely in point, but on the principle laid down in *Shaw* v. *Attorney-General*, 18 W. R. 1145, L. R. 2 P. & D. 156, it is clear that though the decree of divorce may be treated as valid in America, this court cannot recognize it as putting an end to a marriage binding in this country—the petitioner being domiciled in England. The respondent has therefore been guilty of adultery with the co-respondent, and I pronounce a decree *nisi* for the dissolution of the marriage.

Decree nisi.

Solicitors, *Pritchard & Sons.*

Prob. Div. & Adm. Div. } Jan. 28, 31.
Divorce. }

WHITWORTH *v.* WHITWORTH AND THOMASSON. (*a.*)

Divorce—Adultery of petitioner—Ignorance of law—Special circumstances—Discretionary bar—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 31.

On the hearing of a husband's petition for dissolution of the marriage on the ground of his wife's adultery, it was proved that the husband and wife signed a paper to the effect that they agreed to separate, and that each was at liberty to marry again. The husband, who was in humble rank, was advised by a friend who had done the same thing himself, and to whom the husband mentioned that he wanted a divorce, that this document would be legal and binding; and the court found on the evidence that the husband believed this. The husband lived for eighteen months as a single man, and then met a lady to whom he communicated the above facts, and she consented to and did go through a ceremony of marriage with him, and they lived together as man and wife for three years, when someone informed the husband that he was living in adultery, and, after consulting a solicitor, and on learning that the second marriage was not legal, he separated from the lady and took his own wife back; she did not remain long with him, and the charge against her was proved.

Held, that, as the petitioner acted in ignorance of the law, and in the bonâ fide *belief that the second marriage was legal, it was a proper case for the court to exercise its discretion under section* 31 *of the Matrimonial Causes Act*, 1857, *to excuse the adultery of the petitioner. The court accordingly pronounced a decree* nisi *for dissolution of the marriage.*

Hearing before the court itself of the husband's petition for dissolution of the marriage on the ground of his wife's adultery with the co-respondent, James Thomasson. The wife entered no appearance, the co-respondent appeared and pleaded that at the time when the adultery was committed he did not know the respondent was a married woman.

It appeared from the evidence of the petitioner and other witnesses that the parties were married on the 30th of April, 1872, at Spotwood, in the county of Lancaster, and cohabited together till 1882, with the exception of two short periods during which the respondent left the petitioner in consequence of his having indulged in drinking, and in 1882 she finally left him for the same cause and went to live with a man named Clegg, and with the exception of about three months in 1889 continued to live with him until his death, after which, in November 1891, she married the co-respondent. On his wife leaving him the petitioner consulted a friend who said it would be foolish to spend money on a divorce, as he and his wife could sign a paper giving each other leave to marry again, and that he and his wife had done so, and that his brother, who drew up the paper for him, would do so for the petitioner. In the result a paper was drawn up and signed, which, however, could not be produced, the substance of it was stated to be that the parties agreed to separate and each was free to marry again. The petitioner remained single for eighteen months, till he met a Miss Naylor, a Sunday-school teacher, to whom he explained all the circumstances and they were married in 1886, and lived together till 1889, when another Sunday-school teacher told him that the paper was invalid, and that he was living in adultery. He consulted a solicitor and at once separated from Miss Naylor, and communicated with his wife, who resumed cohabitation with him for a few months, but after that went back and lived with Clegg.

Priestley, for the petitioner, submitted that as the ceremony of marriage with Naylor was gone through in the *bonâ fide* belief that the petitioner was free to marry again, it was a proper case for the court to exercise the discretion given to it under section 31 of the Divorce Act, 1857, and grant the petitioner's prayer for divorce, notwithstanding his adultery.

In addition to the cases mentioned in the judgment he referred to *Collins* v. *Collins*, 33 W. R. 170, 9 P. D. 231; *Conradi* v. *Conradi*, 16 W. R. 1023, L. R. 1 P. & D. 514; *McCord* v. *McCord*, 23 W. R. 684, L. R. 3 P. & D. 237; *Ross* v. *Ross*, L. R. 1 P. & D. 734; *Stoker* v. *Stoker*, 37 W. R. 576, 14 P. D. 60.

Barnard, for the co-respondent.

Cur. adv. vult.

Jan. 31.—BARNES, J., after reviewing the evidence said: The principle on which the court acts in these cases has been distinctly laid down: there must be

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

some special circumstances attending the commission of such adultery, or special features placing it in some category capable of distinct statement and recognition to justify the court in exercising the discretion given to it under section 31 of the Divorce Act, 1857, in favour of the petitioner. There are three classes of cases, and they are set out in the judgment in *Morgan* v. *Morgan and Porter*, 17 W. R. 688, L. R. 1 P. & D. 644.

The first is ignorance of facts, such as in *Joseph* v. *Joseph and Wenzell*, 13 W. R. 872, where a man married again believing that his first wife was dead. There is also ignorance of law, as in *Noble* v. *Noble*, L. R. 1 P. & D. 691, 17 W. R. Div. Dig. 7, and *Moore* v. *Moore*, [1892] P. 382, where the petitioner married again before the decree *nisi* was made absolute under the impression that the first marriage had been finally dissolved.

It is argued that this case comes within that category, and that the petitioner entered into the second marriage in the *bonâ fide* belief that the first marriage had been dissolved. After hearing the evidence, I have come to the conclusion that the petitioner honestly believed that his first marriage had been legally dissolved. He was a man in a humble rank of life, he knew nothing about law—according to his own counsel, he was a stupid man, unable to understand his legal position, and was misled. In proof of that it was proved that he entered into the second marriage by banns. He explained the circumstances to his second wife, and as soon as he discovered, and that only in casual conversation, that the second marriage was illegal he separated from her and returned to his first wife, and if his wife had not left him again they would have been living together now. The conclusion to which I have come is that he acted *bonâ fide*, and that this case comes within the second category of cases—viz., that of persons who have acted in ignorance of the law. There will, therefore, be a decree *nisi*, but no costs against the co-respondent, as he has sworn that he believed the respondent to be a widow when he married her, and no evidence to the contrary was given.

Solicitors for the petitioner, *Torr, Janeway, Gribble, & Oddie.*

Solicitors for the co-respondent, *Douglas Norman & Co.*

Court of Appeal.

Original Motion.
(Lord Esher, M.R., and Bowen and Kay, L.JJ.) June 26.

BENTSEN v. TAYLOR, SONS, & CO. (*a.*)

Practice—Trial—New trial—Security for costs of motion—Foreigner resident abroad.

The plaintiff, a foreigner resident abroad and having no property within the jurisdiction, was ordered to give security for the costs of an action brought by him in the Queen's Bench Division. At the trial with a jury the verdict and judgment were entered for the defendants. The plaintiff moved for a new trial, and the defendants applied that the plaintiff should be ordered to give security for the costs of the motion for a new trial.

Held, that the proper practice was to make the application in the first instance at chambers, subject to an appeal direct to the Court of Appeal.

Application by the defendants that the plaintiff should be ordered to give security for the costs of a motion by him for a new trial of the action.

The plaintiff was a foreigner resident abroad, and having no property within the jurisdiction. Before the trial he had been ordered to give security for the costs of the action. The action was tried with a jury, and resulted in a verdict and judgment for the defendants. The question now arose whether the application ought not to have been made in chambers.

Carver, for the defendants.

Hodges, for the plaintiff.

Lord ESHER, M.R.—The question in this case is, what is the proper practice in this matter? This court, in taking motions for new trials, is now exercising the jurisdiction formerly exercised by the courts of common law at Westminster, or in later times by the Queen's Bench Division, There was jurisdiction in those courts to order a foreigner who invoked the assistance of the court, and who resided abroad and had no property here, to give security for the costs of the action. The practice was to exercise that jurisdiction at chambers. If, after giving security, the foreigner took a new step in the litigation not contemplated when the amount of the security was fixed, the practice was to apply at chambers to have the amount of the security increased. If again after the trial the foreigner applied for a new trial, I have little doubt that the judge at chambers would have said that that step was not in contemplation when the amount of the security was fixed, and would accordingly increase the amount. That seems to me to have been the former practice.

Now the motion for a new trial is made to this court. We exercise in that respect the jurisdiction formerly exercised by the old courts at Westminster and by the Queen's Bench Division, and we shall exercise it in as nearly the same way as possible. There must be an increase in the amount of the security in respect of this motion for a new trial, and we think that the proper practice is for the application for the increase of security to be made in chambers as it formerly was. From the decision in chambers an appeal will lie direct to this court, and not to the Queen's Bench Division, though I may add that any such appeal would be almost hopeless, except in an extreme case. Upon this occasion, however, we do not intend to send the matter back to chambers, but will exercise the jurisdiction here, and we fix the amount of security in respect of the motion for a new trial at £20. If a new trial should be granted this sum does not include the security for the costs of the new trial, and any application as to that, if necessary, must be made in the Queen's Bench Division in the same way as the original application for security for the costs of the action.

BOWEN and KAY, L.JJ., concurred.

Solicitors for the plaintiff, *Irvine, Hodges, & Co.*

Solicitors for the defendants, *Wynne, Holme, & Wynne*, for *Simpson, North, & Johnson*, Liverpool.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

From Q. B. Div. (Lord Esher, M.R., and Lopes and A. L. Smith, L.JJ.) April 17, 19.

KEARNEY v. WHITEHAVEN COLLIERY CO. (a.)

Master and servant—Wages—Coal Mines Regulation Act, 1887 (50 & 51 *Vict. c.* 58), *s.* 12—*Payment by weight—Deductions—Fines—Contract of employment—Agreement for allowance of fines—Validity of contract.*

According to the true construction of section 12 *of the Coal Mines Regulation Act,* 1887, *which provides for the payment of miners by weight, subject to the right of masters and men to agree upon certain deductions, the "deductions" therein mentioned are deductions from weight, not from wages. That from which the deduction is to be made is the whole amount of material which is sent up in tubs from the mine. That which is to be deducted is the foreign substance which is sent up in the tubs with the coal, or the slack or coal dust with which the tubs are improperly filled. Any other mode of making deductions is in contravention of the statute.*

The appellant entered into a contract of employment with the respondents, who were the owners of a colliery, by which he agreed not to leave his employment without giving fourteen days' notice, and further agreed that deductions might be made from his wages in respect of (inter alia) "*fines for dirt.*" *A system of fines and forfeitures was in force at the colliery in respect of dirt sent up with the coal, under which, if a collier sent up a tub containing more than* 35*lb. of dirt, he was to receive no payment in respect of such tub; if a tub contained between* 25*lb. and* 35*lb. of dirt, he was to receive half payment; and if a tub contained less than* 25*lb. of dirt, he was to receive full payment.*

The appellant having left his employment without giving notice, and having justified on the ground that the above system was unlawful, and therefore the contract of employment was illegal,

Held, that such fines and forfeitures were not deductions within the meaning of section 12 *of the Coal Mines Regulation Act,* 1887, *and that the system adopted was in contravention thereof; but that the contract of employment was not thereby rendered illegal, and the appellant was liable in damages to the respondents.*

Netherseal Colliery Co. *v.* Bourne, 14 *App. Cas.* 228, 37 *W. R. Dig.* 119, *considered.*

Appeal from the decision of a divisional court on a special case stated by justices of Cumberland.

At a petty sessions holden at Whitehaven on the 10th of March, 1892, a summons was heard which had been taken out by the Whitehaven Colliery Co. under the Employers and Workmen Act, 1875, against Patrick Kearney, claiming 7s. 6d. for damages for breach of a contract, such breach being his neglect to proceed to or perform his duties as a collier on Thursday and Friday, March 3 and 4. Summonses had also been taken out against 289 other colliers then employed in the same pit, but the case of Kearney alone was heard. It was proved that the appellant (Kearney) was in the employment of the respondents (the colliery company), and in consequence of the absence of the appellant and other miners the respondents incurred loss—namely, the wages paid to enginemen and others in receipt of a fixed rate of wages who were in attendance at the pit, but whose work was rendered unremunerative. A system of fines or forfeitures was in force at the pit in respect of dirt sent up with the coal. This had been revised on December 2, 1891, as follows:—There was to be no fine or forfeiture if, after the coal was riddled, the amount of dirt in the tub did not exceed 25lb.; if the amount was between 25lb. and 35lb., one-half of the tub was to be forfeited, and the collier was only to receive half-pay for that tub; if the dirt exceeded 35lb., the whole tub was to be forfeited. The tubs weighed about 15cwt. each.

The method of testing for dirt was as follows:—As the tubs came out of the pit, certain persons in the employment of the masters selected tubs at their discretion, about one or two in every forty, and passed them to specially-appointed persons called "testers" for the purpose of inspection. The testers riddled the coal and hand-picked the contents of the riddle, separating the dirt from the coal. The dirt was then weighed, and the weight reported to the weighman. The weighman, and the check-weighman who represented the colliers and was paid by them, then made up their sheets, showing all forfeitures, which were calculated on the scale set out above. No deduction was made in respect of tubs which were not tested, the colliers being paid in respect of the gross weight in those tubs, including coal and dirt. The magistrates found that the dirt was not coal, nor of the nature or substance of coal.

The form of contract signed by the appellant contained the following terms:—"I, the undersigned, in consideration of being employed at this colliery, do hereby agree to give to and to receive from the Whitehaven Colliery Co. fourteen days' notice to terminate such employment, and in the event of my leaving (either individually or collectively) without giving such notice to render myself liable to be proceeded against according to law. And I also agree to the company making the undermentioned deduction from my wages allowed by the Truck Acts, 1831 and 1887, namely (*inter alia*), fines for dirt."

It was submitted by the appellant that this system of fines was illegal, and that the appellant was justified in refusing to work. The magistrates held that the appellant was not justified in refusing to work. It was further submitted that the appellant, being paid by piecework, was not liable in damages if he neglected to continue his work, unless injury was thereby caused to property or machinery. The magistrates held the appellant to be liable in damages, and ordered him to pay 7s. 6d., that being a fair proportion, in their opinion, of the actual loss sustained by the respondents for wages paid by them in respect of the pit on the 3rd and 4th of March, and rendered unremunerative in consequence of the absence of the appellant and other men on those days.

Section 12 of the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), is as follows:—"Where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them, those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten, and the mineral gotten by them shall be truly weighed at a place as near to the pit mouth as is reasonably practicable. Provided that nothing in this section shall preclude the owner . . . from agreeing with the persons employed in the mine that deductions shall be made in respect of stones or substances other than the mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten, or in respect of any tubs, baskets, or hutches being improperly filled, . . . such deductions being determined in such special mode as may be agreed upon between the owner . . . and the persons employed."

The magistrates, at the request of Kearney, stated a special case, setting out the above facts and leaving

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

the following questions for the opinion of the court:—"(1) Were we right in holding that the appellant was not justified in leaving his work without notice? (2) In the event of the appellant not being justified in leaving his work without notice, were we right in holding that the appellant was liable in damages to the respondents?"

The Divisional Court (Grantham and Charles, JJ.) were of opinion that the appellant was not justified in leaving work without notice, and that he was liable in damages to the respondents, and they accordingly upheld the decision of the magistrates. The learned judges, however, differed in the reasons which they gave for their judgment. Grantham, J., thought that the system of fines adopted at the colliery was a special mode of determining how deductions should be made within the meaning of the Act, and was, therefore, perfectly legal. Charles, J., thought that such a system of deductions was in contravention of the statute, and therefore illegal, but he did not think that this illegality vitiated the whole contract of employment.

Kearney appealed to the Court of Appeal.

Willis, Q.C., and *Atherley-Jones*, for the appellant.—The system of forfeitures is a contravention of the Act of Parliament. The meaning of section 12 of the Coal Mines Regulation Act, 1887, is that in all cases to which the section applies, persons working in mines must be paid according to the weight of the mineral gotten by them. Payment by weight is the thing which the Legislature intended to insist upon. The proviso points out a way in which the weight on which payment is to be made, may be ascertained. The masters and men may arrange on a mode of making deductions in respect of stones and other foreign substances which may be brought up with the mineral. But the fundamental idea of the section is that payment is to be in accordance with weight, and that each man is to be paid in respect of all mineral gotten by him. "Deductions" means deductions from gross weight: *Netherseal Colliery Co.* v. *Bourne*, 14 App. Cas. 228, 37 W. R. Dig. 119. The system of forfeitures adopted in this case provides for deductions in wages, not deductions in weight, and violates the intention of the section altogether. Under it if a tub is found to contain 36lbs. of dirt, though the rest of its contents is all pure mineral, nothing is to be paid in respect of that tub. That is not payment by weight at all, it is not payment in respect of all the mineral which a man has gotten. It is not, of course, necessary to weigh and test every tub. It might be arranged that every tenth tub should be tested, and an average taken, and deductions made accordingly. That would be a special mode of making deductions within the meaning of the proviso. It would conform to the ruling idea of the enactment—viz., that payment should be by weight. But under this system, if there is a certain amount of dirt in a tub, the element of weight is disregarded altogether. The system of forfeitures being unlawful, the contract which stipulated that such forfeitures should be allowed is illegal. The stipulation for these forfeitures was part of the consideration for which the masters took the men into their employment. Part of the consideration being illegal, the contract is illegal altogether, and therefore the appellant is not bound by it.

Finlay, Q.C., and *Mattinson*, for the respondents.—There is nothing illegal in this system of fines and forfeitures. It is a special mode agreed upon by the owners and the men of determining how deductions shall be made under the proviso to section 12. The section, taken altogether, does not enact that each man must necessarily be paid in respect of every particle of coal he brings up. The first part says he shall be paid according to the actual weight gotten by him of the mineral contracted to be gotten. Then the proviso says that under certain circumstances deductions may be made. This must mean deductions from what he would have been paid under the first part if there had been no proviso. The cases in which deductions may be made are—first, where some foreign substance is sent up in the basket mixed with the coal; secondly, where a basket is improperly filled. The second case shows that this must be the true construction of the section. A basket "improperly filled" means a basket which is not properly full—*i.e.*, a basket partly filled. In such a case the proviso allows a deduction—*i.e.*, the man is to receive something less than full payment in respect of the coal which he sends up. Similarly a deduction allowed in the first case—viz., where some foreign substance or dirt is sent up with the coal—is a deduction from what would be full payment is respect of the coal actually sent up. The system here adopted is a convenient way of taking an average, and it is a mode agreed upon by the masters and men. The case of *Netherseal Colliery Co.* v. *Bourne* was on a different statute, and the judgments do not really draw a distinction between deductions from weight and deductions from payment. There the deduction was in fact a deduction from weight; and no other view arose. Therefore, the observations of the learned lords as to deductions in the section meaning deductions from weight were not necessary to the decision of the case, and do not govern this case. Even if this system of forfeitures is contrary to the statute, this does not vitiate the whole contract of employment. The agreement that these deductions shall be made is not a part of the consideration on either side.

Lord ESHER, M.R.—I am of opinion that the decision of the Divisional Court must be affirmed, but I think that the judgment of Charles, J., was right, and I do not agree with the judgment of Grantham, J. I think that this deduction was an illegal deduction, and therefore there was an illegality in part of the contract; but I think that that illegality was not an illegality in the consideration of the contract, and as regard the promises contained in the contract, though one was illegal, the rest can be separated, and are not vitiated thereby. Therefore the contract on the part of the workman not to leave work without giving fourteen days' notice was legal; and, as that has been broken, the masters can insist on recovering damages.

The question as to the legality of this deduction depends on the true construction of section 12 of the Coal Mines Regulation Act, 1887. I think that a construction has been placed on that section, or rather on the corresponding section in the earlier Act of 1872, by the House of Lords in *Netherseal Colliery Co.* v. *Bourne*. It has been suggested that some of the propositions there laid down by the learned lords were not necessary to the decision of that case. But I cannot agree that we in this court ought ever to say of a judgment of the House of Lords, which is founded on certain propositions as to a statute, that, though it is clear the House of Lords meant to put a particular interpretation on that statute, we shall disregard what they said because it was not necessary to the case. I take the judgment in that case to be founded on certain propositions enunciated by each of the learned lords. Lord Halsbury takes the section as a whole, and considers the first part and the proviso together, in order to see what construction ought to be put on the words "the weight of the mineral gotten" in the first part. The words themselves are capable of one or other of two constructions: if one

construction is put on them, the proviso has no effect; if the other construction is put on them, the clause and the proviso can be made to work harmoniously together. One meaning which the words may bear is, the weight of the actual mineral gotten—that is, pure coal. But, as Lord Halsbury recognizes, such weight has to be ascertained according to the practical usage of miners, and, if the actual and well-known method of mining is looked at, it may be that the words have another meaning—viz., the whole amount of stuff, partly pure mineral and partly stone and other materials, which the miner gets in the mine and sends to the surface.

According to this construction, the whole of that which is sent up is to be taken to be mineral, though strictly it is mineral and something else. If the first part of the section stood alone, there might be some question whether the words could be so dealt with. But the proviso, referring to the actual method in which mining work is conducted, shows that this is the construction which ought to be applied. The mineral gotten must mean the whole amount of stuff which the miner sends up. If the miner were entitled to be paid according to the weight of this whole amount, the owner would practically be paying wages for coal which had not been gotten. The Legislature, therefore, says that the owner may arrange a method to save himself from such a loss. It enacts that the section is not to preclude him from agreeing with the persons employed in the mine that deductions shall be made in respect of stones or substances other than mineral which are sent up in the baskets mixed with the mineral. He may deduct from the whole of what is in the basket that which is not mineral. But he may only do this in a certain way. The agreement must be made in accordance with the provisions of the statute, so that the workmen may see that the arrangement is carried out in a manner fair to themselves. The terms of the proviso to section 12 and the terms of section 13 show clearly that the meaning of the Legislature is that the things to be deducted are the extraneous substances, which come up with the coal and add to its weight; and the deduction is to be made from the whole amount of stuff, mineral and extraneous substances together, which is sent up from the mine. The deduction, therefore, is a deduction from weight, not from wages, though no doubt the deduction from weight will regulate the amount of wages. The same remarks will apply with regard to deductions in respect of tubs or baskets being improperly filled. I do not think a basket is improperly filled within the meaning of the section when it is partly filled. I think a deduction in respect of a basket being improperly filled means the deduction of anything which has got into a basket by improper filling—*e.g.*, slack or coal dust.

The consideration of this part of the section does not detract from the construction which I think we ought to put upon the Act, and which seems to me to follow from the propositions laid down by the learned lords in the case cited. Lord Halsbury says:—"In cases to which the statute applies the payment must be according to the weight gotten. From that weight gotten only certain things can be deducted, and the deductions can only be ascertained in a particular way." Lord Bramwell says:—"The effect of the enactment, then, is, that the men must be paid by weight, that that weight is to be the weight of all they send up, but that from it may be deducted the weight of certain matters, provided that weight is ascertained in a certain way." Lord Fitzgerald and Lord Herschell seem to me to assent to these propositions. And Lord Macnaghten says:—"If the agreement had stated in plain terms that a deduction was to be made from the wages of the miners in respect of slack—whatever form the deduction might have taken, whether the slack was to be absolutely rejected or paid for at a lower rate—no one, I think, could have doubted that that part of the agreement would have been in contravention of the Act of Parliament."

Having regard to these opinions, expressed by the House of Lords, how can we hold that the judgment of Grantham, J., in this case is right? It is clear that his judgment is wrong, and that of Charles, J., is right. The system of forfeitures adopted at this colliery must be held to be unlawful, and the contract into which the appellant entered with regard to the forfeitures was illegal, because it was in contravention of the terms of the Act of Parliament.

But does this render the whole contract illegal? Does it render illegal that part of the contract in which the appellant promised that he would not leave work without giving fourteen days' notice? It is clearly law that, if the consideration for a contract or a part of the consideration is illegal, every promise contained in the contract founded on that consideration becomes illegal. But if there is nothing illegal in the consideration, then, inasmuch as there may be several promises founded on that consideration, if any one of them is illegal, it cannot be insisted on; but the other promises, if legal, are not affected thereby, but remain good and can be enforced.

It was suggested that in this case the stipulation as to forfeitures was part of the consideration. But I cannot agree with that. This contract is a contract of employment. The workman would express it thus: In consideration of my entering into your employment you make me several promises. The master, on the other side, would express it thus: In consideration of my taking you into my employment, you make me several promises. All the promises on both sides are in respect of those considerations. And those considerations being perfectly legal, there is nothing to make the contract as a whole illegal. One of the promises made by the workman is illegal, and it cannot be supported. But the other promises on the part of the workman are not vitiated, and they can be relied on by the masters. I therefore agree with Charles, J. The stipulation as to fines for dirt was illegal, but the consideration for the contract of employment was legal, and the promise not to leave work without notice was binding. I think the magistrates were right, and the appeal must be dismissed.

LOPES and A. L. SMITH, L.JJ., concurred.

Appeal dismissed.

Solicitor for the appellant, *T. Milburn*, Workington.

Solicitors for the respondents, *Harrison & Powell*, for *Brown & Auld*, Whitehaven.

High Court of Justice.

Chan. Div. } North, J. } Nov. 22.

DUKE OF NORTHUMBERLAND v. PERCY. (a.)

Rent-charge—Option to redeem by transfer of specified sum of £3 per Cent. Consols—National Debt (Conversion) Act, 1888 (51 & 52 *Vict. c.* 2), *s.* 21, *sub-section* 1; *s.* 25, *sub-section* 2—*Deed executed before passing of Act—Right to redeem by New* 2¾ *per Cent. Annuities (Goschens).*

The plaintiffs, by two deeds executed before the passing of the National Debt (Conversion) Act, 1888, *created on their estates a perpetual rent-charge of* £10,000 *in favour of the defendant, with a right on their part to redeem the said rent-charge, or certain portions thereof, by a transfer of specified sums of* £3 *per Cent. Annuities.*

Held, that, under section 25, *sub-section* 2, *of the National Debt (Conversion) Act, the plaintiffs could redeem by a transfer of a similar amount of the New* 2¾ *per Cent. Stock (Goschens).*

Motion for judgment.

By an indenture made the 22nd of July, 1871, certain hereditaments were granted by the plaintiffs, the Duke of Northumberland and Earl Percy, to trustees to the intent (in certain events) that they should for ever thenceforth receive the perpetual rent-charge of £10,000 out of the said hereditaments with the usual powers of distress and entry for the better securing of the payment of the same; and subject thereto to the use of other trustees for the term of 500 years, commencing from the death of the plaintiff duke, upon trusts for the better securing payment of the rent-charge. And it was declared that the trustees of the rent-charge, in certain events, should pay the same unto the defendant Lord A. Percy and his assigns for his life; and, in certain other events, should pay the said rent-charge, or so much thereof as should not have been appointed by the said Lord A. Percy in virtue of the exercise of his power of jointuring or charging portions thereinafter given to him, to the first and every other son of the defendant Lord A. Percy in tail male. And by the said indenture certain powers of jointurture and providing portions for younger children out of the said rent-charge were conferred on the defendant Lord A. Percy. And it was thereby agreed and declared that if the plaintiffs or the survivor of them, or any Duke of Northumberland for the time being, should at any time or times at their or his expense transfer or cause to be transferred into the names of the trustees or trustee for the time being of the said yearly rent-charge of £10,000 any sum or sums of £3 per Cent. Annuities not being less in any one transfer than £3,333 6s. 8d., and should declare that such transfer was made in or towards satisfaction of the aforesaid yearly rent-charge of £10,000, then and from thenceforth such yearly rent-charge should be reduced and abate to the extent of £100 a year for each sum of £3,333 6s. 8d., and all sums so transferred should be held upon trust to convert the same into money and invest such money on the purchase of hereditaments in fee simple to be settled to uses corresponding as nearly as might be with the trusts declared of the said rent-charge; and until such conversion, investment, and settlement, the dividends of the said sum of £3 per Cent. Annuities should be paid to the person or persons entitled to the rents and profits of the said hereditaments, if purchased and settled as aforesaid. And it was declared that the plaintiffs should have the power during their joint lives to revoke or vary those presents or any portion of them, or to declare any new uses or trusts of the same.

The defendant Lord A. Percy attained the age of twenty-one years on the 2nd of October, 1872, and in 1880 a marriage was agreed upon between him and Lady Victoria F. C. Edgcumbe.

By an indenture dated the 30th of July, 1880, indorsed on the said indenture of the 22nd of July, 1871, the plaintiffs, the duke and Earl Percy, made a new and irrevocable appointment of another rent-charge of £10,000 in lieu and substitution of the first-mentioned rent-charge of £10,000, but similarly charged and secured. And it was declared that the trustees of the new rent-charge were to hold it upon the trusts expressed in the deed of 1871 concerning the old rent-charge of £10,000, and exactly as if the trusts contained in the deed of 1871 with reference to the old rent-charge of £10,000, and the powers of substituting Bank Annuities therefor, were again repeated with reference to the new rent-charge of £10,000, except as to the power of revocation.

Lord A. Percy, on the occasion of his marriage, exercised his powers of jointuring and charging portions on the said rent-charge. There were at the time of the action two children of this marriage living, who were both infants.

The National Debt Conversion Act was passed on the 27th of March, 1888.

The plaintiffs claimed to be entitled to redeem the rent-charge by transferring into the name of the surviving trustee thereof, a sum of £333,333 6s. 8d. New Consolidated 2¾ per Cent. Annuities. The trustee of the rent-charge refused to receive any sum of such New Consols, and the defendant, Lord A. Percy, on behalf of himself and his family, denied the right of the plaintiffs to so redeem the rent-charge. The plaintiffs then commenced these proceedings, and the question came before the court on motion for judgment.

Cozens-Hardy, Q.C., and *Onslow*, for the plaintiffs.—By virtue of the National Debt (Conversion) Act, 1888, we are entitled to satisfy the claim by transferring to the defendants 2¾ per Cent. Stock, known as Goschens. Section 21 authorizes such a transfer in case of a contract to transfer, and in this case there is a covenant. If we are wrong on this point at least section 25, sub-section 2, applies. In any case, we can redeem by a transfer of the specified amount of Local Loans Three per Cent. Stock under 50 & 51 Vict. c. 16, s. 8.

Yate Lee (Sir H. Davey, Q.C., with him), for the defendants.—The Act must be strictly construed. Mr. Hardy has made a mistake in considering that section 21, sub-section 1, applies to this case. It has no reference to an option to redeem; it only relates to an agreement to transfer stock. As for section 25, sub-section 2, the reference to any stock must mean a reference to any particular or specific amount of stock, not to stock generally. Sub-section 2 has reference to a specific bequest only. If this view is wrong sections 19 and 21 are useless.

They were not further heard, and *Cozens-Hardy, Q.C.*, and *Onslow* were not again called on.

NORTH, J.—The first point in this case depends on the construction of the National Debt (Conversion) Act, 1888. I am not satisfied that section 21 would not apply to the present case. That section refers to an agreement to transfer any amount of Three per Cent. Stock, and I am not satisfied that there is any

(a.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

distinction between the phrase "an agreement to transfer" and an "agreement as to the transfer of any amount of stock." I do not, however, express any concluded opinion, for the 25th section seems to me to apply exactly. [His lordship read sub-section 2.]

Now, in this instrument, executed before the passing of this Act, or rather in these instruments, the deeds of 1871 and 1880, which operate together, there are references to stock liable to be converted —references to the Three per Cent. Annuities and Bank Annuities; and they are stocks liable to be converted or exchanged in pursuance of this Act. Then the section goes on to say "may if the stock is so converted or exchanged"—and that is what has taken place—be construed as a reference to the new stock; and the new stock means the stock created by this Act instead of the Bank Annuities or the Three per Cent. Annuities. Now, these words seem to apply precisely. The stocks are stocks liable to be converted under the Act of 1888, and such conversion has taken place. Then the reference to Three per Cent. Annuities or the Bank Annuities must be taken to refer to the new stock created under the Act of 1888.

Then it is argued that reference to a "stock liable to be converted or exchanged" means a reference to a particular sum of stock. That would be putting a new meaning on the Act, and adding to it something which if inserted would not be intelligible.

Then it is said that there is something in the second part of this sub-section which throws light upon the first part, because there are words which relate to what is to take place in case of "a specific bequest of such stock," and there is no provision for the case of a general bequest of such stock. The reference to a specific bequest seems to me to be put in expressly for this purpose. It might be said, if there were a specific bequest of a kind of stock which has ceased to exist, the bequest is gone. You cannot put in a certain amount of new stock in place of a gift of old stock when the old stock is gone altogether. That seems to me, if it were necessary to find an explanation, a sufficient explanation for the addition of these subsequent words, which do not affect the earlier words. It is said that if the words at the opening part of the sub-section are to have the general meaning suggested, the latter words would be unnecessary, and that there are some other sections in the Act which would also be unnecessary. I do not see why I should cut down the plain meaning of the opening words for that reason. It is difficult to construe Acts of Parliament drawn on the present system; but if every clause in addition to its natural meaning is to have an artificial meaning given to it, so that it shall not cover anything provided in any other section of the Act, there will be a fresh terror put upon those who have to construe Acts of Parliament.

Under the circumstances, I think the earlier words of sub-section 2 clearly do apply to this case, and that the new stock, popularly known as Goschens, is a fit subject for investment and transfer in place of the Bank Annuities or Three per Cent. Annuities referred to in these deeds respectively.

Solicitors, *Bell, Stewards, & May.*

Chan. Div. } Romer, J. } Dec. 6, 7, 8.

CROSSLEY v. MAGNIAC. (a.)

Power of attorney—Stock—Stockbroker—Payment on account by London stockbroker to country stockbroker—London stockbroker's liability to country customer—Foreign principal.

The plaintiff, who lived abroad, being the owner of a sum of New Consols, gave to the defendants, a firm of stockbrokers in London, a power of attorney appointing one of the defendants his attorney to sell the Consols. The power of attorney was sent originally to the plaintiff's brother in England, and by him to C., a country stockbroker. C. sent it to the defendants, who were his London agents. The defendants sold the stock and credited C. with it in his account with them, and the sum went in reduction of sums due to them by him, or sums paid to C. by them. C. subsequently became bankrupt, and the plaintiff sued the defendants for the proceeds of the sale of the Consols, less commission.

Held, that the defendants were liable to refund the moneys to the plaintiff, as the crediting it in their account with their country client, C., was not a payment to the plaintiff; and that, though the power of attorney to sell came to them through C., the defendants were not entitled to treat the plaintiff as a foreign principal, and so to act as if C. only were their principal.

Trial of action.

This was an action brought by Horatio Nelson Crossley, a resident in Canada, to recover from the defendants, C. H. Magniac, Gilbey, and Sumner, a sum of £967 10s. and interest, the price of a sum of Consols (less £2 10s. commission) sold by them under the following circumstances.

The plaintiff had a brother, J. W. Crossley, who resided in Halifax, England, and who had a general power of attorney for the plaintiff. Acting on instructions from the plaintiff, J. W. Crossley instructed one Caw, a local stock and share dealer in Halifax, to take steps to sell £1,000 New Consols belonging to the plaintiff. The general power of attorney not being such as the Bank of England would act on, Caw on the 13th of June, 1890, wrote to the defendants as follows:—"Please apply for power of attorney for sale of £1,000 Goschens, standing in name of Horatio Nelson Crossley, of Brian Royd, Greetland, near Halifax, gentleman. . . . Mr. Crossley's present address is Sandy Bay Farm, Lake Rosseau, Muskoka, in the State of Ontario, in the Dominion of Canada." Gilbey & Sumner (the defendant's firm) eventually obtained two forms of powers of attorney from the Bank of England for one of the defendants to act as the plaintiff's attorney for the sale of £2,000 stock, one of the powers relating to £1,000, the subject of this action, the other to another sum not the subject of this action. The powers of attorney were sent to Caw, by him handed to J. W. Crossley, and then transmitted to the plaintiff, who executed and returned them to J. W. Crossley.

By the power of attorney relating to the £1,000 Consols, the plaintiff appointed "Southard Gilbey . . . my attorney in my name and on my behalf to sell and transfer all or any part of the sum of one thousand pounds £2 15s. per Cent. Consolidated Stock standing in my name in the books of the Governor and Company of the Bank of England, and to receive the consideration money and give receipts for the same."

J. W. Crossley retained the power of attorney relating to the £1,000, the subject-matter of the action, but sent the other one to Caw, who forwarded it to Gilbey & Sumner, and they sold the stock and remitted the proceeds to Caw, who paid them to J. W. Crossley.

In January, 1891, J. W. Crossley, at Caw's suggestion, sent the remaining power of attorney to him, and he forwarded it to the defendants with instructions to sell the stock, which they did, crediting Caw

(a.) Reported by J. W. GREIG, Esq., Barrister-at-Law.

in their books with the proceeds. They had previously been pressing Caw to reduce the balance due from him to them on their account with him. Caw was adjudicated bankrupt in July, 1891, his account with the defendants having been drawn upon by him until no balance stood to his credit, though the proceeds of the Consols had been credited to him. J. W. Crossley had, previously to the date of the bankruptcy, made inquiries of Caw as to whether the stock had been sold, and had been told by him that it had not.

The further details of the case appear in the judgment.

Neville, Q.C., and *T. Bateman Napier*, for the plaintiff.—The defendants had notice of who was the true owner of the stock, and ought to have paid the purchase-money to the plaintiff or to his agent Caw, if he had authority to receive it, and ought not merely to have credited Caw with it in their account with him; and are now liable to make it good.

Haldane, Q.C., and *Kirby*, for the defendants.—The defendants were acting as Caw's agents, and in no other capacity. The power of attorney from the plaintiff was a mere document of title. There was no privity between the plaintiff and the defendants, and the case of *New Zealand and Australian Land Co.* v. *Watson*, 29 W. R. 694, 7 Q. B. D. 374, shows that payment to Caw, the principal, was a discharge to them. Even if the plaintiff was their principal, he was a foreign one, and could be disregarded and Caw treated as principal: *Elinger Actien-Gesellschaft* v. *Claye*, L. R. 8 Q. B. 313, 21 W. R. Dig. 207; *Montgomerie* v. *United Kingdom Mutual Steamship Association*, 39 W. R. 351, [1891] 1 Q. B. 370.

ROMER, J.—The plaintiff, being the owner of a sum of New Consols standing in his name, gives a power of attorney to a member of the defendants' firm, authorizing him to sell and transfer the stock for the plaintiff and on the plaintiff's behalf. By virtue of this power the stock is sold by the defendants and transferred to the purchaser, and the purchase-money is received by them. The defendants are paid for their services as brokers out of the plaintiff's money, the proceeds of the sale. What was thereupon the duty of the defendants with regard to such proceeds? It was to pay the amount, less their commission, to the plaintiff or to some person authorized by him to receive it. And if the defendants paid to any such person, and if with that person they had other private dealings, they were bound, as between themselves and the plaintiff, to pay that authorized person in cash, and not in account between them. Of course payment by cheque, duly cashed, is payment in cash for this purpose.

Now, what difference did it make that in the case before me the defendants, being instructed to act for the plaintiff, obtained the power of attorney from him through the intermediary of a country broker? I think it makes no difference, seeing the defendants clearly knew that the stock was the plaintiff's, and sold it for him, and under his power of attorney, in the way I have mentioned. The defendants cannot, in my opinion, ignore the power of attorney, and the wording of it, in the way in which, through their counsel, they now seek to do. Nor, in my opinion, did the fact that the plaintiff was abroad entitle the defendants to regard the country broker as their principal in the matter, and to ignore the plaintiff. There was clearly privity between the plaintiff and the defendants in the matter of this sale. The authorities cited by the defendants' counsel with reference to a foreign principal have no bearing, in my opinion, on the present case.

What have the defendants done with the proceeds of the sale? Admittedly they have not paid them to the plaintiff. Have they paid them in cash to a person authorized to receive the proceeds for the plaintiff? I assume, in favour of the defendants, that the country broker was authorized, on behalf of the plaintiff, to receive the proceeds of the sale. But the defendants did not pay the proceeds to the country broker for the plaintiff. What they did was this. They chose to treat the purchase-money of the stock as the country broker's own, and to ignore the plaintiff in the matter. It was said that this was justified by some custom or usage. The evidence does not establish to my satisfaction any such custom or usage. Moreover, I do not think any such custom or usage would be held valid by this court which purported to justify an agent, having his principal's money in his hand, to ignore that principal, and apply the moneys in payment of money due to him from a third person. The defendants, in my judgment, were not justified in ignoring the plaintiff in the matter, or in treating the proceeds of sale as the country broker's own money. What the defendants did with the proceeds was this. They carried them to the credit of the country broker in the account between themselves and that country broker. This wiped off a debt of £596 16s. 4d. due from the country broker to them, leaving a balance in favour of the country broker of £372 11s. 2d. They did not even pay this £372 11s. 2d. to the country broker for the plaintiff, still less did they pay it to the country broker for his principal, the plaintiff, in cash. They carried that balance of £372 11s. 2d. to the credit of the country broker in the further accounts between the broker and themselves. A further balance is later on struck as between the country broker and the defendants in the account between them, and the balance of £372 11s. 2d. is increased to a balance in favour of the country broker of £403 15s. 3d. This £403 15s. 3d. the defendant did not pay to the country broker for the plaintiff, but they let the country broker draw on them a bill for it, as being a balance due to the country broker from them on his private account between them. The whole of that bill they paid at maturity to a third person—not the plaintiff. This cannot, in my opinion, be treated by the court as a discharge to the defendants as between themselves and the plaintiff.

The same observations apply with regard to a sum of £125 which appears to have been paid to the county broker by the defendants on the 31st of January, 1891. The country broker appears to have drawn a bill on the defendants for £125 as in the account between the two of them. The bill was accepted by the defendants and paid by them in account as between themselves and the country broker. It was not a payment by the defendants to the country broker in respect of this particular purchase-money belonging to the plaintiff. Still less, in my judgment, was it a payment in cash so as to enable the defendants to say that they had discharged their duty to the plaintiff by paying part of the proceeds of the stock in cash to an agent authorized to receive it by him.

The case of *Bridges* v. *Garrett*, 18 W. R. 815, L. R. 5 C. P. 451, to which I was referred by the defendants' counsel, is clearly distinguishable. There the payment was made to a person clearly entitled to receive in respect of the moneys which the person to whom it was paid was entitled to receive on account of his principal and in respect of the amount which he was so entitled to receive. The only question which arose there was because the payment included other moneys and was made by a crossed cheque, but it was held that that did not prevent it from being a payment in cash duly

authorized merely because it included other moneys, or because it was paid by a crossed cheque. The cheque was duly cashed and the cash was received. That case is clearly no authority in favour of the defendants in the case before me.

The case before Day, J., to which I was referred (and which does not appear to have been reported) clearly turned on the special findings of fact by the learned judge in that case, and I need not further refer to it. It is not an authority in the present case in favour of the defendants.

It follows that in my judgment the plaintiff has succeeded and there must be an order for payment by the defendants to the plaintiff of £967 10s. of the amount of the proceeds of sale less commission with interest at 4 per cent. to the day of payment from the 28th of January, 1891.

Solicitors, *Rowcliffes, Rawle, & Co.*, for *Wavell, Son, & Marshall*, Halifax; *Slaughter & May*.

Privy Council.

March 4.

BRYANT, POWIS, & BRYANT (LIMITED) *v.* LA BANQUE DU PEUPLE.

BRYANT, POWIS, & BRYANT (LIMITED) *v.* BANK OF QUEBEC. (*a.*)

(*On appeal from the Court of Queen's Bench for Lower Canada, Province of Quebec.*)

Power of attorney—Construction of—Agent's authority—Bill of exchange.

Where an agent is authorized by power of attorney to enter into contracts for (1) *the purchase or sale of goods,* (2) *the chartering of vessels, and* (3) *the employment of agents and servants; and, as incidental thereto or consequential thereon, to do certain specified acts and other acts of the same kind as those specified, such an authority does not confer upon the agent powers at large, but only the necessary powers, in addition to those named, which are requisite to carry into effect the declared purposes of the power of attorney.*

An agent, borrowing money on behalf of his principal under such an attorney, would exceed his powers.

But should the agent do any act which is in itself warranted by the terms of the power used, then such act is binding on the principal as to all persons dealing in good faith with the agent, and they are not bound to inquire into the facts aliunde.

An agent indorsing bills of exchange "per pro," and getting them discounted by a bank in the ordinary course of business, is within the powers conferred on him, when the power of attorney given him specifically mentions the drawing and indorsing of bills on behalf of the principal; and this is so as to bonâ fide *holders for value, though the agent abuse his authority.*

The first appeal was from a decree of the Court of Queen's Bench for Lower Canada, Province of Quebec. The facts are set out in their lordships' judgment, the question being whether the company was to be charged with moneys obtained by one Davies for his own purposes, but borrowed by him in the name of the company, and professedly on their behalf; and this depended on the construction and effect of the power of attorney given to Davies by the company; this power of attorney will be found fully set out in the judgment of the Privy Council.

Hall, Q.C. (of the Canadian bar), and *Hollams*, for the appellant.—Davies had exceeded his authority. He was not agent for negotiating bills &c., in this manner. He was acting for his own private advantage and outside his agency. [*Castle* v. *Baby*, 5 Low. Can. Rep. 411; *Churchill* v. *MacKay*, 20 Can. Sup. Ct. Rep. 472, 476; and *Joumenjoy Coondoo* v. *Watson*, 9 App. Cas. 561, 32 W. R. Dig. 149, were referred to.] The English and French law are alike, or almost so—as to the legal effect of a power. [Lord MACNAGHTEN referred to section 25 of the English Bills of Exchange Act, 1882.]

Fullerton, Q.C., and *Chase Casgrain* (Attorney-General for Quebec), for the respondent bank.—The general words ought to be read apart from the rest of the document, and should not be limited. Davies was simply putting himself in funds, such being necessary for the purposes of the company: *Bank of Bengal* v. *M'Leod*, 7 Moo. P. C. 35, 38. [Lord MACNAGHTEN referred to *Attwood* v. *Munnings*, 7 B. & C. 278, that powers of attorney should be construed strictly.]

Joumenjoy Coondoo v. *Watson*; *Montaignac* v. *Shitta*, 15 App. Cas. 357, 39 W. R. Dig. 178; *Withington* v. *Herring*, 5 Bing. 442; and *Cropper* v. *Smith*, 1 Pat. Cas. Rep. 89, were cited or referred to.

The second appeal was from a decree of the same court. Two bills of exchange indorsed in the name of the appellants by Davies "per pro C. G. Davies" had been discounted by the respondent bank in the ordinary course of business, and the company had been held liable to the bank thereon, and now appealed against this decision.

Hall, Q.C. (of the Canadian bar), and *T. W. Hollams*, for the appellants.

Stuart, Q.C. (of the Quebec bar), and *Vesey Fitzgerald*, for the respondent bank.

The judgment of their lordships (Lords HOBHOUSE, MACNAGHTEN, HANNEN, SHAND, and Sir RICHARD COUCH) was delivered by

Lord MACNAGHTEN.—The appellant in these appeals is a company incorporated with limited liability under the statute of the United Kingdom known as the Companies Act, 1862. It was formed in 1885 for the purpose of taking over the business of the firm of Messrs. Bryant, Powis, & Bryant, of London, Quebec, and Montreal, lumber merchants.

On the 1st of January, 1888, the company discontinued the business of buying and shipping timber, which up to that time it had carried on in Quebec in succession to the firm of Bryant, Powis, & Bryant, and thenceforth the company restricted its business in Quebec to making advances on the security of lumber and timber, principally if not solely in connection with the operations of a firm of lumber merchants trading as "Smith, Wade, & Co."

On the formation of the company one Charles Griffiths Davies, of Quebec, who had been agent and attorney for the firm of Bryant, Powis, & Bryant, was appointed the agent and attorney of the company in Canada. The appointment was contained in a power of attorney, bearing date the 25th of November, 1885. Davies remained in the regular employment of the company at a fixed salary up to the 1st of January, 1888. He then went into business on his own account, and carried on business as broker and general

(*a.*) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

commission and shipping agent, under the style of "C. G. Davies & Co." But he still acted for the company when occasion required, receiving a commission for his services. His power of attorney was not revoked or withdrawn, and the company continued to hold him out as their agent.

In February, 1890, Davies left Quebec under the pressure of pecuniary difficulties. It was then discovered that he had taken advantage of his position as agent and attorney for the company to procure money on the credit of the company for his own private purposes. The company in consequence found itself exposed to heavy and unexpected demands, and there was a good deal of litigation, in the course of which various points were raised, depending on the special circumstances of the particular case. That litigation has given rise to these two appeals, which their lordships will now proceed to consider separately.

BRYANT, POWIS, & BRYANT (LIMITED) v. LA BANQUE DU PEUPLE.

In the appeal of *Bryant, Powis, & Bryant (Limited)* v. *La Banque du Peuple* the question is whether the company is to be charged with moneys obtained by Davies for his own purposes, but borrowed by him in the name of the company and professedly on their behalf.

The facts are not in dispute. On the 1st of October, 1889, Davies went to the respondent bank, who had been at one time, but who were not then, the bankers of the company, and asked the manager, M. Dumoulin, for a loan of 25,000 dols. on account of the company, saying that it was required for the purpose of a remittance to be made by him on that day to the head office in London. The manager consented to make the advance on what is termed a "short loan." Davies drew a cheque on the bank in the name of the company, "per pro C. G. Davies," for 25,000 dols. The cheque was paid as an overdraft, and as collateral security for its repayment Davies deposited with the bank three promissory notes, amounting together to 40,000 dols., drawn by Smith, Wade, & Co. in favour of Bryant, Powis, & Bryant (Limited), and indorsed in their name, "per pro C. G. Davies."

On the 5th of the same month Davies went to the bank again, and told the manager that he found that the sum of 25,000 dols. more was required, and thereupon he obtained a further loan to that amount. The transaction was carried out in precisely the same manner as the former loan, and by way of collateral security Davies indorsed and deposited three further promissory notes of Smith, Wade, & Co., amounting together to 35,000 dols.

Before the 4th of December, 1889, Davies paid the bank out of his own moneys 10,000 dols., in reduction of the loan. On that day the six promissory notes, which then had become due, but had not been presented for payment, were returned to Davies, who gave in exchange two other promissory notes for 25,000 dols. each, dated the 28th of September, 1889, and made by Smith, Wade, & Co. to the order of the company, and indorsed in the name of the company "per pro C. G. Davies."

For these notes Davies took the following receipt:—

"Quebec,
"4th December, 1889.

"Received of Messrs. Bryant, Powis, & Bryant (Limited), through their agent here the following bills payable as collateral security for the payment of loan of (37,000 dols.) thirty-seven thousand dollars with interest at 7 per cent., viz.:—

	dols.
"S. W. & Co. p. note due 31st March .	25,000
"S. W. & Co. p. note due 31st March .	25,000
	"50,000

"p. AUGUSTE LABARDIE,
"pro Manager Banque du Peuple,
"Quebec."

Before the two notes became due the company forbade Smith, Wade, & Co. to pay the bank, and they also gave notice to the bank disclaiming liability, and calling upon the bank to hand over the notes to them.

When the notes fell due the bank brought this action upon them against Smith, Wade, & Co. and the company. Smith, Wade, & Co. submitted themselves to the judgment of the court. The company disputed their liability on various grounds, and they also filed an incidental demand, claiming the promissory notes in question as their property.

The case came on to be heard before Andrews, J. The learned judge, in an able and elaborate judgment, decided in favour of the company, on the ground that the bank had notice that Davies was acting under a limited authority, and that the power of attorney of the 25th of November, 1885, from which alone Davies derived his authority, did not authorize him to borrow money in the name of the company. The other grounds upon which the company resisted the claim of the bank were rejected by the learned judge. As the argument before their lordships was substantially confined to the question of authority, it is not necessary to allude to them, beyond saying that in the course of the discussion the learned counsel for the appellant very properly disclaimed in express and unqualified terms any imputation of want of good faith on the part of the bank or on the part of M. Dumoulin.

On appeal, the Court of Queen's Bench for Lower Canada, by a majority of three to two, reversed the decision of Andrews, J., and condemned the company to pay to the bank the sum of 37,000dols, with interest from the 31st of March, 1890, and costs of suit.

The learned judges who formed the minority in the Court of Appeal adopted and relied upon the judgment of Andrews, J. The views of the majority are expressed in the formal judgment pronounced by Cross, J. That judgment proceeds upon the ground that "the specific powers" granted to Davies by the power of attorney "did not necessarily imply the negation of the powers of general agency granted to and exercised by the said Charles G. Davies under the said power of attorney," and that the words used in the concluding part of the power of attorney, which are quoted in the judgment, and which will be considered presently, "refer not specially to said special powers but to the business generally of the respondents" (*i.e.*, Bryant, Powis, & Bryant, Limited), "and by their terms give the said Charles G. Davies a discretion to do, execute, and perform any matter or thing which in the opinion of the said Charles G. Davies ought to have been done or performed in or about business of the respondents, therefore outside and beyond what had been otherwise provided for by the said power of attorney," and consequently that Davies had power to bind the company "and did so bind them by his indorsation in their name of said promissory notes and drawing the money advanced thereon."

On the appeal before this board the learned counsel for the appellant did not seriously dispute the proposition that the words "per pro," in the acceptance or indorsement of a bill of exchange or promissory note amount to an express statement that the party so accepting or indorsing the bill or note has only a

special and limited authority, and, therefore, that a person who takes a bill or note so accepted or indorsed is bound at his peril to inquire into the extent of the agent's authority: *Stagg* v. *Elliot*, 10 W. R. 647, 12 C. B. N. S. 373-381 per Byles, J. Nor was it disputed that powers of attorney are to be construed strictly—that is to say, that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication. It was pointed out, indeed, that the decisions on which the learned counsel for the appellant mainly relied in support of these propositions were decisions of English judges; but it was not shown that there is any difference in this respect between the law of Canada and the law of England. The provisions of the Civil Code of Lower Canada, and the Canadian authorities which were cited to their lordships, appear to be in harmony with English law and English authorities.

In the result the argument was reduced to a consideration of the true construction and effect of the power of attorney of the 25th of November, 1885. It will therefore be necessary to state its provisions somewhat in detail.

That instrument begins by reciting the formation of the company, "to undertake and carry on as successors to Messrs. W. Bryant, F. C. Bryant, and H. W. Powis, who were the founders of the company, the trade and business of wood and timber importers, brokers, merchants, and dealers then carried on by them in partnership together at London, Quebec, Montreal, and elsewhere under the name or style of Bryant, Powis, & Bryant, and for other purposes more particularly mentioned in the memorandum of association of the company." It then recites the provisions of the articles of association authorizing the appointment of an attorney, and proceeds as follows: "And whereas the directors deem it desirable in the interest of the company to appoint an agent and attorney to represent the company in Canada aforesaid, now know ye that the company doth hereby appoint Charles Griffiths Davies, of Desprairie-street, in the city of Quebec, Canada, aforesaid, to be the true and lawful attorney of the company, for and in the name and on behalf of the company to enter into any contract or engagement for the purchase or sale of goods and merchandise of whatever nature or kind, and for the charter and recharter of any ships or vessels, and for the engagement of all such agents, clerks, and servants as may be necessary for carrying on and conducting the business of the said company, and to draw and sign cheques on the bankers for the time being of the said company, and to draw, accept, and indorse bills of exchange, promissory notes, bills of lading, delivery orders, dock warrants, coupons, bought and sold notes, contract notes, charter-parties, accounts, current accounts, sales, and other documents which shall, in the opinion of the said attorney, require the signature or indorsement of the company, and also" to sue for and recover debts, to demand and obtain delivery of goods belonging to the company; and generally to act for the company in and about the recovery of debts and the delivery of goods in all respects as fully and effectually as the company could itself do; to give receipts, to bring and defend and compromise actions; "also to enter into, make, sign, seal, execute, deliver, acknowledge, and perform any contract, agreement, deed, writing, or thing that may in the opinion of the said agent or attorney be necessary or proper to be entered into, made, signed, sealed, executed, delivered, acknowledged or performed for effectuating the purposes aforesaid, or any of them, and for all or any of the purposes aforesaid to use the name of the company"—then follow the words quoted in the judgment of the Court of Appeal—"and to do, execute, and perform any other act, matter, or thing whatsoever which ought to be done, executed, or performed, or which in the opinion of the said agent or attorney ought to have been done, executed, or performed in or about the business affairs of the company."

To put it shortly, the power of attorney authorized Davies to enter into contracts or engagements for three specified purposes: (1) the purchase or sale of goods; (2) the chartering of vessels; and (3) the employment of agents and servants; and, as incidental thereto, or consequential thereon, to do certain specified acts and other acts of the same kind as those specified. If the instrument be read fairly, it does not, in their lordships' opinion, authorize the attorney to borrow money on behalf of the company, or to bind the company by a contract of loan. It appears to their lordships that the words quoted in the judgment of the Court of Appeal are to be read in connection with the introductory words of the sentence to which they belong, "for all or any of the purposes aforesaid." So read, the words in question do not confer upon the agent powers at large, but only such powers as may be necessary, in addition to those previously specified, to carry into effect the declared purposes of the power of attorney.

Their lordships will therefore humbly advise her Majesty that the appeal ought to be allowed, and the judgment of Andrews, J., restored. The respondents will pay the costs of the appeal to the Court of Appeal and the costs of this appeal.

BRYANT, POWIS, & BRYANT (LIMITED) v. THE QUEBEC BANK.

The question raised in the appeal of *Bryant, Powis, & Bryant* (*Limited*) v. *The Quebec Bank* may be disposed of very shortly.

The appeal is from a decision of the Court of Queen's Bench for Lower Canada affirming the decision of Andrews, J., who held the company liable to the respondent bank in respect of two bills of exchange indorsed in the name of the company, "per pro C. G. Davies," and discounted by the bank in the ordinary course of business.

In the discussion at the bar it was conceded by the learned counsel for the appellant that the bank were *bonâ fide* holders for value; and the argument, as in the previous case, was substantially confined to the question of Davies' authority.

The authority of Davies as the agent and attorney of the company was derived from the power of attorney of the 25th of November, 1885, which has been fully stated already. That instrument in terms authorizes the attorney to indorse bills of exchange. Their lordships agree with Andrews, J., that the fact that Davies abused his authority and betrayed his trust cannot affect *bonâ fide* holders for value of negotiable instruments indorsed by him apparently in accordance with his authority.

The law appears to their lordships to be very well stated in the Court of Appeal of the State of New York, in *President* v. *Cornen*, 37 N. Y. R. 10 [illegible] 322, cited by Andrews, J., in his judgment in another case brought by the Quebec Bank against the company. The passage referred to is as follows:—

"Whenever the very act of the agent is authorized by the terms of the power, that is, whenever by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent, as to all persons dealing in good faith with the agent; and

persons are not bound to inquire into facts *aliunde*. The apparent authority is the real authority."

Their lordships will therefore humbly advise her Majesty that the appeal ought to be dismissed with costs.

Solicitors for Bryant, Powis, & Bryant (Limited), *Wilson, Bristow, & Carpmael.*

Solicitors for La Banque du Peuple, *Bompas, Bischoff, & Co.*

Solicitors for the Quebec Bank, *Ashurst, Morris, & Co.*

Feb. 24.

COMMERCIAL BANK OF AUSTRALIA (LIMITED) *v.* OFFICIAL ASSIGNEE OF JOHN WILSON & CO. (*a.*)

(*On appeal from the Supreme Court of New South Wales.*)

Principal and surety—Agreement with some co-sureties—Payment—Bankruptcy—Proof for full amount due—Banker—Appropriation of sum deposited.

Several persons, including W., had become guarantors to the appellant bank for the discharge of £6,250. Some of the guarantors, not including W., subsequently entered into an arrangement by agreement with the bank, that their liability, as between them and the bank, should be limited, so that, in lieu of their personal liability to pay the entire sum guaranteed in case of default of the principal debtor, there should be substituted a deposit of £3,000 in the bank to a suspense account. The bank had the power of appropriating the £3,000 towards the payment of the principal debt, but had not done so. W. became bankrupt.

Held, that the agreement did not amount to payment, and that, apart from bankruptcy, the carrying out of such an arrangement in no way affected the liability of W.; and, further, that the bankruptcy of W. could make no difference as to the amount of W.'s liability; so that the bank were entitled to prove in W.'s bankruptcy for the full sum of £6,250, without making the deduction of the £3,000.

This was an appeal from a judgment of the Supreme Court of New South Wales (In Bankruptcy). The facts are set out in their lordships' judgment.

Cozens-Hardy, Q.C., and *Vaughan Hawkins*, for the appellants.

Byrne, Q.C., and *C. H. Sargant*, for the respondent.

The judgments of their lordships (Lord HERSCHELL, L.C., Lords WATSON, HOBHOUSE, MACNAGHTEN, and MORRIS, Sir RICHARD COUCH, and the Hon. GEORGE DENMAN) was delivered by

Lord HERSCHELL, L.C.—The sole question for determination in this case is whether the appellants, the Commercial Bank of Australia, are entitled to prove against the estate of the bankrupt John Wilson for the sum of £6,250 or £3,250.

The question turns upon the construction of an agreement entered into in the year 1890 between the appellants and three persons, O'Connor, Hart, and Freehill, who with others, including Wilson, had become guarantors to the bank for the discharge of a liability incurred or to be incurred by Her Majesty's Theatre and Grand Opera House Co. of Sydney (Limited). The parties to the guarantees were not in all cases the same, but nothing turns on that. After reciting the several guarantees that had been entered into, the agreement further recites that Hart and Freehill had offered and proposed to pay to the said bank the sum of £2,000 in discharge of their respective individual liabilities under the said joint and several guarantees, and that O'Connor had offered and proposed to pay £500, and to give the bank his promissory notes for a further sum of £500 in discharge of his individual liability under the joint and several guarantees. The agreement further recites that the bank had "declined to receive the said moneys in reduction of the said account"—that is, the account due by the principal debtor, Her Majesty's Theatre and Grand Opera House Co. (Limited)—"but have agreed with the said Francis Bede Freehill, James N. Hart, and Daniel O'Connor that they will not look to them for more than £1,000 each, on condition that the same sums or their equivalent shall be deposited to a separate account with the said bank, to be appropriated by the said bank in satisfaction, in part or in whole, of the said debt of Her Majesty's Theatre and Opera House Co. (Limited) when and so soon as the said bank may deem prudent, the receipt of such sums to be entirely without prejudice to the bank's right to sue or look to the other guarantors for the full amount of the said guarantees, it being understood that such moneys shall be and remain as a security to the bank for the due payment of the said respective sums of £1,000 each, credited to a special suspense account with the said bank accordingly." Then the agreement witnesses "that in pursuance of the said agreement, and in consideration of the sum of £2,000, paid by the said James N. Hart and Francis Bede Freehill, and £500, together with the said promissory notes, paid by the said Daniel O'Connor, at or before the execution hereof to the credit of a suspense account with the said bank (receipt whereof is hereby acknowledged), the said bank doth hereby release and discharge the said Daniel O'Connor, James N. Hart, and Francis Bede Freehill, their heirs, executors, and administrators, respectively, of, from, and against all debts, claims, and demands whatever of the said bank against them, the said Daniel O'Connor, James N. Hart, and Francis Bede Freehill, under and by virtue of their said joint and several guarantees and all actions, suits, or causes of action in respect thereof. Provided nevertheless, and these presents are executed upon this express condition, that nothing herein contained shall release, or be construed or operated to release, the said Daniel O'Connor in the event of either or any of the said promissory notes being dishonoured, or to release or in any manner to prejudice or affect any claim or demand which the said bank has or ever had upon or against the said John Shepherd, John Wilson, or James Allison" (who were the co-guarantors), "or either of them, or their, or either of their, respective estates and effects."

There can be no doubt that the object of the bank in not receiving this sum in discharge of the account due by the principal debtor was to preserve their right, if it could lawfully be done, to prove against the estate of any of the co-sureties who might become bankrupt. The contention on behalf of the respondent in support of the judgment below, which was dissented from by the Chief Justice, has been, first, that the effect of the agreement, to which their lordships have directed attention, was to operate as payment of the principal debt *pro tanto*, and that therefore, £3,000 of the debt having been in fact discharged, there could be no proof except for the balance; and, secondly, that even if it was not to be regarded as payment, supposing the question had arisen between Wilson and the bank, yet Wilson being bankrupt, and his estate in process of distribu-

(*a.*) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

tion amongst his creditors, an arrangement of this description could not prevail to affect the right of the assignee in bankruptcy, and consequently that in the bankruptcy the bank could prove for no more than the balance.

The agreement, it is said, amounted to a payment. The question is, whether it amounted to payment of a part of the principal debt; because unless it did, the principal debt still remains, and not having been in any part discharged, the bank are entitled to prove for it against the estate of the surety. Their lordships have pointed out that it certainly was the intention of the parties to this agreement that the principal debt should not be discharged. It is said that this has nevertheless been done in spite of the intention of the parties. Their lordships are unable to agree that that is so. The arrangement which the agreement embodies appears to their lordships to amount to this—that the liability of the guarantors who were dealt with by that agreement should, in lieu of their personal liability to pay the entire sum guaranteed in case of default of the principal debtor, be as between them and the bank limited in this way, that there should be substituted for it the deposit in the bank of a sum of money less than the whole amount, but which should afford a complete security to the bank *quoad* the amount to which it extended. Accordingly, the sum of £3,000—taking the promissory notes, they having been paid, as equivalent to cash—was deposited in the bank to a suspense account. The bank no doubt had power, when it thought it prudent to do so, to appropriate that sum to the payment of the principal debt *pro tanto*, and as soon as they made such appropriation it would undoubtedly operate as payment. They never have made such appropriation. The question is whether prior to appropriation it operated as payment of the debt. Their lordships are unable to see why it should do so. The money was put to a special account called a suspense account, presumably in the names of these guarantors who had paid it in. At all events it was ear-marked as a special account. Down to the time of appropriation by the bank of this amount, their lordships are unable to see anything which could discharge the principal debtor. If that debtor had come and tendered the entire amount due, the bank would have been neither justified, as it appears to their lordships in saying, nor bound to say that, £3,000 of the amount having been already paid, all that they were in a position to receive was the residue. Upon the whole of the terms of the agreement there appears to be nothing more than a substitution of a certain sum of money deposited in the bank as security, in lieu of the personal liability of guarantors which down to that time had rested upon these persons who were parties to the agreement with the bank.

Apart, therefore, from any question arising out of the bankruptcy, their lordships cannot think that the carrying out of such an arrangement as this in any way affected the liability of Wilson, the co-surety, for the total amount of the debt due to the bank.

But then it is said that, Wilson having become bankrupt, and the question being one affecting his creditors, this agreement must be regarded in their favour as a payment, and that otherwise it would be an evasion of the bankruptcy law. Their lordships are unable to concur in this view. Supposing that no such agreement as this had been entered into, the creditors of Wilson would have been in no better position than if this agreement is held to have the effect contended for by the appellants. How, then, can a transaction, which does not prejudice the position of the creditors, but which leaves their position exactly what it would have been if there had been no such agreement, be said to be an evasion of the bankruptcy law? Their lordships find it difficult to understand the proposition when so stated; and in their opinion, upon the true view of the agreement and its consequences, that is really what the contention on the part of the respondent amounts to. The truth is, that the fallacy which lurks in the argument of the respondent is this, that it is suggested that the comparison is to be between the position of the creditors of Wilson if no such agreement had been entered into, and the position of the creditors of Wilson if they can claim the benefit of this sum as a payment. No doubt, if they can so claim the benefit of it as a payment, their position would be better than it would have been if there had been no agreement; but in their lordships' opinion, for the purpose of seeing whether the agreement on its true construction (and their lordships have already pointed out what is their view is the true construction) is, or would effect, an evasion of the bankruptcy law, the comparison must and can only be made between the position of the creditors without any agreement, and the position of the creditors supposing the agreement to have been entered into and to be construed as their lordships have held it must be construed.

For these reasons their lordships find themselves unable to concur in the judgments arrived at by the courts below, and they will humbly advise her Majesty that the appeal should be allowed, that the judgments below should be reversed, and that it be declared that the appellants are entitled to prove under the bankruptcy for the amount of the full sum of £6,250, without making deduction of the sum of £3,000. The respondent must pay the costs in the courts below and of this appeal.

Solicitors for the appellants, *Want & Co.*

Solicitors for the respondents, *G. P. Slade.*

Court of Appeal.

From Chan. Div. (Lindley, Bowen, and A. L. Smith, L.JJ.) — Nov. 18, 19; Dec. 13.

MAXIM-NORDENFELT GUNS AND AMMUNITION CO. v. NORDENFELT. (a.)

Covenant—Restraint of trade—Severability—Validity—Sale of business—Business in the nature of a trade secret—Restraint co-extensive with area of business—No limit of space.

In 1888 *the defendant covenanted with the plaintiff company, which carried on* (inter alia) *the business formerly carried on by the defendant and sold by him to a company with which the plaintiff company was afterwards amalgamated—of the manufacture of quick-firing and other guns and ammunition, that he "should not during the term of twenty-five years from the date of the incorporation of the company, if the company should so long continue to carry on business, engage, except on behalf of the company, either directly or indirectly, in the trade or business of a manufacturer of guns, gun mountings or carriages, gunpowder explosives or ammunition, or in any business competing or liable to compete in any way with that for the time being carried on by the company.*

In pursuance of a further agreement the defendant acted as one of the plaintiff company's two managing directors. The defendant in 1890 *having, owing to ill*

(a.) Reported by ARTHUR LAWRENCE, Esq., Barrister-at-Law.

pates, resigned his office in the plaintiff company, and having entered into arrangements with a foreign company for carrying on business in competition with the businesses of the plaintiff company, the plaintiff company commenced an action asking that the defendant might be restrained by injunction from so acting in breach of the covenant.

Held, that the covenant was severable, and was valid and must be enforced so far as it related to the business of the manufacture of guns, gun mountings or carriages, gunpowder explosives or ammunition; for that, so restricted, it was not, although unlimited in space, contrary to public policy or wider than was reasonably necessary for the protection of the interests of the covenantee.

Semble, *that the covenant would be too wide, and therefore invalid, in its application to any business which the company might carry on during twenty-five years.*

Decision of Romer, J., *reversed.*

The law as to "general restraints" and "partial restraints" reviewed.

Per Bowen, L.J.—*The rule as to general restraint of trade ought not to apply where a trader or manufacturer finds it necessary, for the advantageous transfer of the goodwill of a business in which he is interested and for the adequate protection of those who buy it, to covenant that he will retire altogether from the trade which is being disposed of, provided always that the covenant is one the tendency of which is not injurious to the public.*

Appeal from a decision of Romer, J.

The question was whether a covenant entered into by the defendant with the plaintiff company, by which he agreed not to carry on certain businesses for twenty-five years, was valid or not.

The defendant prior to the year 1886 carried on business in London, Stockholm, and elsewhere as a manufacturer (being also patentee) of quick-firing guns and ammunition, and in 1886 sold those businesses to the Nordenfelt Co. for £287,500. The Nordenfelt Co. was afterwards amalgamated with the Maxim Gun Co., and the plaintiff company was the result of that amalgamation, being formed and registered in July, 1888. The defendant became the holder of a large number of shares in the plaintiff company, and was one of its first directors, and one of its first two managing directors. The defendant carried on various other businesses besides those which he had sold to the Nordenfelt Co., and in September, 1888, was forty-six years of age or thereabouts.

On the 12th of September, 1888, a deed was executed by the plaintiff company and by the defendant, pursuant to arrangements entered into before the formation of the plaintiff company, and by that deed it was covenanted between the parties as follows:—

"(2) The said Thorsten Nordenfelt (the defendant) shall not during the term of twenty-five years from the date of the incorporation of the company, if the company shall so long continue to carry on business, engage, except on behalf of the company, either directly or indirectly, in the trade or business of a manufacturer of guns, gun mountings or carriages, gunpowder explosives or ammunition, or in any business competing or liable to compete in any way with that for the time being carried on by the company; provided that such restriction shall not apply to explosives other than gunpowder, or to subaqueous or submarine boats or torpedoes, or castings or forgings of steel or iron, or alloys of iron, or of copper; provided also that the said Thorsten Nordenfelt shall not be released from this restriction by the company ceasing to carry on business merely for the purpose of reconstitution or with a view to the transfer of the business thereof to another company, so long as such other company taking a transfer thereof shall continue to carry on the same. (6) The said Thorsten Nordenfelt also covenants and agrees with the company that so long as the company, or any successor to or assignee of the business of the company, shall continue to carry on the business of the company, the company, or such successor or assignee, shall be entitled to the full and exclusive benefit of all new inventions or improvements now made or discovered, or that may hereafter be made or discovered by him in connection with guns, gun mountings or carriages, gunpowder explosives or ammunition, and with that object he will with all convenient speed communicate to the company particulars of any such new invention or improvement made or discovered by him, and will give to the company full information and details thereof, with all models, plans, drawings, and designs as to the exact mode of working and using the same, and from time to time at the expense in all things of the company will execute and do all such documents and things as may be requisite for the purpose of enabling the company to obtain in its name or in the name of any nominee any British, Colonial, or foreign patent for such inventions and improvements, and will from time to time and at all times give all such advice, explanations and instructions to the company and its *employés* as may be necessary to enable them effectually to exercise and work such inventions and improvements."

The defendant, pursuant to other parts of the agreement, acted as managing director of the plaintiff company till January, 1890, when, owing to disputes, he resigned, and since his resignation he had made arrangements with a foreign company known as the Société Cockerill, Belgian gun and ammunition manufacturers, for carrying on business with reference to quickfiring guns, &c.

The plaintiff company brought this action for the purpose, *inter alia*, (1) of restraining the defendant during twenty-five years from July, 1888, if the plaintiff company or its successors should so long continue to carry on business, from engaging, except on behalf of the plaintiff company or its successors, either directly or indirectly, in the trade or business of the manufacture of guns, gun mountings or carriages, gunpowder, &c. (except as mentioned in the agreement), or in any business competing or liable to compete in any way with that carried on by the plaintiff company or its successors; and (2) of obtaining an order directing the defendant to transfer to the plaintiff company certain patents alleged to have been taken out by him since January, 1890, for inventions in guns, ammunition, &c.

Romer, J., held that the provisions of clause 6 of the deed as to the patents must be enforced, but refused to grant the plaintiff company any relief in respect of the covenant (contained in clause 2) in restraint of trade, holding that it was void upon the ground that it was too wide and within the mischief which renders all covenants against trade generally invalid.

From that decision, so far as it held the covenant in clause 2 invalid, the plaintiff company appealed.

Sir Horace Davey, Q.C., and *W. F. Hamilton*, for the appellants.—The covenant is valid. It is not too extensive or in excess of what is reasonably required for the protection of the covenantees. It is severable: *Mallan* v. *May*, 11 M. & W. 653; *Price* v. *Green*, 16 M. & W. 346; *Baines* v. *Geary*, 35 Ch. D. 154, 35 W. R. Dig. 64. The burden of proof is on the covenantor to show that public policy would be sacrificed if he were held bound to his covenant. Where, as

the covenant as part of it, encourage rather than restrict trade in this country. In the next place, the business to which the covenant relates is very peculiar, owing to the small number and character of possible customers. Then, again, the assignment of the patents and their connection with the covenant prevent the covenant, for some years at all events, from having any tendency to produce a monopoly not already produced by the patents, and also prevent the covenant from imposing any undue restriction on the liberty of the defendant to carry on the businesses to which the covenant, as restricted, relates, and I can see no reason for holding that the possible duration of the covenant beyond the expiration of the patent invalidates the covenant. Further, our predecessors, from whom we inherit this branch of the law, would never have thought it contrary to public policy to prevent a man from assisting foreigners to compete with an English trader who had bought his business; and I am not aware that it has ever been judicially held to be contrary to public policy to give effect to a covenant entered into for such a purpose. Lastly, the covenantor is at liberty to carry on the specified businesses on behalf of the company, and is also at liberty to carry on for his own benefit the other businesses reserved to himself, and to which he prefers to devote his attention. Apart from public policy, the covenant in question is reasonable as restricted. So restricted, it is not wider than is reasonably necessary for the protection of the interests of the covenantees.

On these grounds I am of opinion that the appeal ought to be allowed. The order appealed from ought to be varied by declaring that the covenant in question is valid so far as it relates to the trade or business of a manufacturer of guns, gun mountings or carriages, and gunpowder explosives or ammunition. An injunction restricted to those businesses ought to issue, and an inquiry ought to be directed to assess the damages sustained by the plaintiff company by reason of the breach by the defendant of his covenant as restricted, and the defendant ought to pay the costs of the appeal and also the costs of the action, except those expressly reserved by the order of Romer, J.

BOWEN, L.J., read the following judgment:—There was an early period in English history when the courts set their face apparently against all restrictions upon trade alike, whether limited or unlimited. This period has long since passed away, but it has been, in my opinion, the doctrine of the courts of common law ever since the reign of Queen Elizabeth that contracts in general restraint of trade are void as being contrary to public policy. Contracts in general restraint of trade may be defined as those by which a person restrains himself from all exercise of his trade in any part of England. A mere limit in time has never been held to convert a covenant in general restraint of trade into a covenant of particular or partial restraint of trade. It is necessary to insist on this distinction, which is embedded in the reports and text-writers of the last three centuries, since it is through not preserving the exact meaning of the term "in general restraint of trade" that some confusion has apparently at times arisen. The common law is as precise as it can be on the point. Contracts unlimited in area, although they may be limited in time, are, as a rule, held bad on the ground of public policy. The broad principle is be found as far back as the year 1614 in *Rogers* v. *Parry*, 11 Jac. 1, 2 Bulstrode, p. 136; and in *Broad* v. *Jolyffe* (1620), Cro. Jac. 596. It is reaffirmed explicitly by Parker, C.J., in the leading case of *Mitchel* v. *Reynolds* (1711), where "general restraint of trade" is explained and defined. The doctrine is assumed to be unquestioned in *Chesman* v. *Nainby* (1726), 2 Ld. Raymond, 1456, 1 Bro. Parl. C. 234; and in *Clerke* v. *Comer* (1734), Cas. temp. Hardwicke, 53. "Any deed," says Best, C.J., in *Homer* v. *Ashford* (1825), 3 Bing. 322, "by which a person binds himself not to employ his talents, his industry, or his capital in any useful undertaking in the kingdom would be void." A note to *Hunlocke* v. *Blacklowe*, 2 Wm. Saunders, 6th ed., 156, sufficiently states the reason why a covenant does not cease to be in general restraint of trade merely because the time is limited. "The principle," says the learned editor, "on which restraints of trade partial in point of space have been supported has not been applied to restraints general in point of space, but limited in point of time; for that which the law does not allow is not to be tolerated because it is to last for a short time only." A similar explanation is given by Parke, B., in *Ward* v. *Byrne* (1839), 5 M. & W. 562, where a covenant indefinite as to the area of restraint of trade, but limited to nine months after the end of the covenantor's employment, was held void in law. "When a general restriction limited only as to time is imposed, the public are altogether losers for that time of the services of the individual, and do not derive any benefit whatever in return." "Looking at the authorities cited it does not appear," says Parke, B., "that there is one clear authority in favour of a total restriction upon trade limited only as to time." An ambiguous expression as to limits in respect of time in the gunmaker's case (*Gunmakers' Co.* v. *Fell*, Willes Rep. 384) is explained by Parke, B., and is due probably to an oversight. The judgment of Rolfe, B., is on the same lines as that of Parke, B. Partial restrictions "have always left things in this state, that when allowed a portion of the public is not injured at all; that portion of the public to which the restriction does not extend remains exactly as before. But here"—viz., in a case of general restraint for a time certain—"the whole of the public is restrained during the period in question." *Ward* v. *Byrne* was followed, in 1840, by *Hinde* v. *Gray*, 1 Scott N. R. 123. Tindal, C.J., repeats the proposition in *Proctor* v. *Sargent* (1840), 2 Man. & Gran. 20. "Where we once hold a restriction to be unreasonable in point of space the shortness of the time for which it is imposed will not make it good." The truth is that the classification which seems to distinguish restraints which are limited in point of space from restraints which are limited in respect of time is a cross division. The antithesis between time and space looks so plausible that some text-books and more than one judge in the last few years have lapsed into the mistake of supposing that it corresponds in any way to the line of cleavage upon which general restraints and partial restraints are divided. "In respect of space," says Lord Campbell, in *Tallis* v. *Tallis* (1853), "there must be some limit." Since the reign of Queen Elizabeth the common law authorities are really all one way. Scores of cases have proceeded on this basis, and those who dispute the rule can only do so, as it seems to me, by disregarding the judgments and opinions of an uncounted number of unanimous common law judges.

Distinguished from these general restraints which the English law discountenances are partial or limited restraints, or, as they are sometimes termed, particular restraints, which upon certain conditions the English law permits and enforces. An agreement in "particular" or "partial" restraint of trade may be defined as one in which the area of restriction is not absolute but in which the covenantor retains for himself the right still to carry on his trade either in some place, for the benefit of some persons or in some limited or prescribed manner. Particular restraints, accordi

tion, and whether it be of the party's own trade or not; that to obtain the sole exercise of any known trade throughout England is a complete monopoly and against the policy of the law; that no man can contract not to use his trade at all; and in other parts of that judgment these topics are further enlarged upon. A sharp line is drawn between general restraints not to carry on a particular trade anywhere in England and partial restraints, which are not so extensive. The former are condemned because they cannot be of any use to the covenantee and must be to the detriment of the English public. The latter are allowed, provided they are founded on a sufficient or good and adequate consideration and are not unduly oppressive—*i.e.*, not more extensive than is reasonably necessary for the protection of the covenantee. Such I take to be the law as laid down in *Mitchel* v. *Reynolds*, in which an attempt was made to show how two conflicting principles might be harmonized.

It is curious to observe how the law upon this subject has gradually been relaxed to suit developments of trade, and has been made conformable to modern ideas and views of public policy and of reasonableness. In the times of Henry V. and of Elizabeth covenants, even in partial restrain of trade, were held contrary to public policy, although they have long since ceased to be so regarded—see *In re Dyer's case*, 2 Hen. V., Pasch. fo. 5, pl. 26, and *In re Blacksmith's case*, 29 Eliz., the substance of which will be found in Pollock on Contracts, 5th ed., p. 341. When *Mitchel* v. *Reynolds* was decided, and for many years afterwards, it was considered that the consideration for covenants in partial restraint of trade must be adequate. This, however, was held in *Hitchcock* v. *Coker*, 6 Ad. & E. 438, not to be necessary, and the old view on this point has never since been entertained. Again, it used to be considered that in actions on covenants in partial restraint of trade there was a presumption rather against than in favour of the validity of the covenant, but in *Hitchcock* v. *Coker*, and again in *Tallis* v. *Tallis*, 1 W. R. 114, 1 E. & B. 391, this view was held to be erroneous, and covenants in partial restraint of trade were upheld which were not shown to be unreasonable on the ground that they extended further than was required for the protection of the covenantee. As regards space, the old doctrine certainly was that a covenant not to carry on a particular business anywhere in England was invalid. But this was because in former times it was thought impossible that so wide a covenant could be necessary for the reasonable protection of the covenantee, and it was thought that so wide a covenant must necessarily be injurious to the public interest.

A little consideratiou, however, will show that in modern times and as business is now carried on neither of these reasons is universally true, and the rule which condemns all covenants not to carry on a particular trade anywhere in England must have some exception or qualification or be quite unfitted for modern use. Suppose, for instance, that an English patentee sells his patent, and covenants that during its subsistence he will not carry on any business in England which involves any infringement of the patent, and that if he does he will pay the purchaser certain sums by way of liquidated damages. No one, I apprehend, could possibly hold the covenant to be invalid simply because it extended to the whole of England. To adhere in all cases to the old rule that a covenant in restraint of trade must be void if it extends to the whole of England will frequently be found to sacrifice the principle which underlies the rule to the rule itself, and, whenever this is the case, to adhere to the rule is as contrary to sound legal principles as it is contrary to good sense. Accordingly, whilst the principle on which the old division of restraints into general and partial depended ought not to be lost sight of, and has been constantly enforced in many modern instances, there are, on the other hand, several cases in which covenants in restraint of trade have been held valid, although the restraint extended over the whole of England. When, however, these cases are examined they will be found to conform with the principle which underlies the reasoning of the judgment in *Mitchel* v. *Reynolds*, for in those cases the restraint was not greater than the protection of the covenantee required, and the covenant, taken in connection with the business to which it referred, could not be said to be injurious to the public interests. The cases to which I more particularly refer are *Wallis* v. *Day*; *Jones* v. *Lees*; *Leather Cloth Co.* v. *Lorsont*, 18 W. R. 572, L. R. 9 Eq. 345; *Rousillon* v. *Rousillon*; *Badische Anilin Soda Fabrik* v. *Schott*.

Whittaker v. *Howe*, in which Lord Langdale enforced a covenant by a solicitor not to practise anywhere in the United Kingdom, went, I think, too far, because there was nothing to take the case out of the general rule which invalidates so wide a covenant. The covenant imposed a greater restraint than the protection of the covenantee required, and was therefore, in my view, contrary to public policy. Wickens, V.C., declined to follow that case in *Allsopp* v. *Wheatcroft*, but he thought the want of limit as to space necessarily fatal, and Cotton, L.J., I think, took the same view in *Davies* v. *Davies*. But this, again, is not, in my judgment, in all cases without exception. In *Rousillon* v. *Rousillon* Fry, L.J., in one of those admirable judgments for which he was so justly celebrated, came to the conclusion that the only test by which to determine the validity or invalidity of a covenant in restraint of trade given for valuable consideration was its reasonableness for the protection of the trade or business of the covenantee. This accords with the view of James, L.J., in *Leather Cloth Co.* v. *Lorsont*, and is, in my opinion, the doctrine to which the modern authorities have been gradually approximating. But I cannot regard it as finally settled, nor, indeed, as quite correct. The doctrine ignores the law which forbids monopolies and prevents a person from unrestrictedly binding himself not to earn his living in the best way he can. Our predecessors expressed their views on this subject by drawing a distinction between partial and general restraint of trade, and this distinction cannot be ignored. But what is more important than nomenclature or classification is the principle which underlies both.

I have endeavoured to arrive at and to express the principle on which this branch of the law is founded, and, applying it to the present case, I have come to the conclusion that the defendant's covenant is not wholly void, but that it is valid and ought to be enforced to the extent to which the plaintiff company seeks to enforce it. My reasons are as follows:—(1) The covenant is severable, and if, as I think is the case, the covenant is too wide in its application to any business which the company may carry on during twenty-five years, still the covenant may be and is valid as regards the gun and ammunition business: see *Mallan* v. *May*, *Price* v. *Green*, and *Baines* v. *Geary*. (2) The covenant thus restricted, although unlimited as to space, and in that sense and to that extent general, is nevertheless not contrary to public policy, and, therefore, not contrary to the rule which forbids general as distinguished from partial restraints. In the first place, the covenant is part of a transaction for securing to an English company the inventions and business of a foreigner. The transaction, and

trade, and which is, therefore, partial. The only real question that remained, on such a view of that particular bargain, was whether it was a reasonable one, as to which point the remark that the privilege was commensurate with the restraint appears conclusive. The case is similar to those in which rules regulating trade have been distinguished from rules made in restraint of it—*Freemantle* v. *Silk Throwsters' Co.* (1668), 1 Lev. 229; *Wannel* v. *Chamberlain of London* (1725), 1 Str. 675; *Bosworth* v. *Hearne* (1737), Andrews, 91; *Harrison* v. *Godman* (1756), 1 Burr. 12; *R.* v. *Harrison* (1762), 3 Burr. 1322, 1328. The inquiry as to the reasonableness of the restraint in any particular instance is, however, one that appertains only to the case of partial restraints. It is no objection necessarily to such partial restraints that they are sometimes to continue during the life of the covenantor, who may possibly survive the covenantee, for such an arrangement enables the goodwill of the business to become the object of purchase and sale: *Atkyns* v. *Kinnier*, 4 Ex. 776, 782; *Pemberton* v. *Vaughan*, 10 Q. B. 87, 89.

Such is a *résumé* of the history of the common law doctrine as to restraint of trade. The first cloud upon the clear sky of the common law narrative comes in the equity decision of Lord Langdale in *Whittaker* v. *Howe* (1841), a decision all the more inexplicable since it was given within three or four years of *Hitchcock* v. *Coker*, *Wallis* v. *Day*, *Leighton* v. *Wales*, *Archer* v. *Marsh*, *Ward* v. *Byrne*, *Hinde* v. *Gray*, and *Proctor* v. *Sargent*, from a careful study of which cases alone the broad doctrine of the law as I have above described it may be gathered with perfect ease. The case of *Whittaker* v. *Howe* was one in which a solicitor, for valuable consideration, agreed not to practise as a solicitor in any part of Great Britain for twenty years. Everything appears clear in the case except the judgment of the court. The covenant was not a covenant in partial but in general restraint of trade; and, the restraint of trade being a general one, the court had nothing to do with the reasonableness of the transaction. Lord Langdale nevertheless begins by stating that the question was whether the restraint intended to be imposed on the defendant was reasonable; and he cites as a guide for himself the words of Tindal, C.J., in *Horner* v. *Graves*, 7 Bing. 743. Yet *Horner* v. *Graves* is an instance of partial, and not general, restraint of trade, and Tindal, C.J., in giving judgment explicitly so states. Lord Langdale next refers in support of his conclusion to *Davis* v. *Mason*, which, again, is a case not of unlimited but of limited restraint. Lord Langdale thus appears to miss the whole point of the common law classification, and treats the matter before him under the wrong category. It is to be observed, however, that *Whittaker* v. *Howe* was merely a decision upon an application for an interlocutory injunction, and that Lord Langdale himself appears to have reserved the right to reconsider the matter at the hearing. "In the progress of the cause," he says, "it may become necessary to consider further the points which have been raised, but at present I am of opinion that the right claimed by the defendant to act in violation of the contract for which he has received the consideration is at least so far doubtful that he ought not to be permitted to take the law into his own hands." As Patteson, J., points out in *Nichols* v. *Stretton*, 10 Q. B., at p. 353, the decision in *Whitaker* v. *Howe* cannot be reconciled with *Ward* v. *Byrne*, or, indeed, with the whole stream of common law authority. In 1869 the case of the *Leather Cloth Co.* v. *Lorsont* occurred before James, V.C. To the soundness of the actual decision in that case of the illustrious equity lawyer who tried it I have no objection to urge; but his language seems calculated in several passages to confuse and not to throw light upon our conceptions of the established common law doctrine. The Vice-Chancellor's expressions are at times coloured by the same kind of misapprehension of the common law as that which pervades the judgment of Lord Langdale in *Whittaker* v. *Howe*. The defendant in the *Leather Cloth Co.'s case* had sold to the plaintiff company certain letters patent for the manufacture of American leather cloth, together with all the processes of manufacture. He covenanted in return not to carry on in any part of Europe the manufacture which was the subject of the patent, and not to communicate to any person or persons the means or processes of such manufacture so as in any way to interfere with the exclusive enjoyment by the plaintiff company of the benefits agreed to be purchased. This was nothing but the sale of a secret process with a corresponding covenant not to use it or divulge it; and the sale, moreover, of a process which could not be used without being divulged. Sales of secret processes are not within the principle or the mischief of restraints of trade at all. By the very transaction in such cases the public gains on the one side what is lost on the other; and unless such a bargain was treated as outside the doctrine of general restraints of trade, there could be no sale at all of secret processes of manufacture. In order to justify such an obvious exception it was not necessary to deny the existence of the common law rule against general restraints of trade. Yet the Vice-Chancellor observes that a man may enter into any stipulation, however restrictive, provided that the restriction, in the judgment of the court, is not unreasonable, having regard to the subject-matter of the contract. In so saying he apparently ignores the distinction that had been drawn for more than 250 years between general and partial restraints of trade. The test he suggests as the true one in all cases entirely leaves out of sight the interests of the public, on the consideration of which interests the rule against general restraint of trade is built. In *Allsopp* v. *Wheatcroft* (1872) Wickens, V.C., restated and reaffirmed the common law doctrine as to general restraints of trade, and explained the decision in the *Leather Cloth Co.* v. *Lorsont* as an exception due to the character of the subject-matter. Some years later, in *Rousillon* v. *Rousillon*, Fry, L.J. (then Fry, J.), in one of the many striking and brilliant judgments for which the profession will long admire him, proclaimed his disbelief in the existence of the rule of the common law, and laid down the proposition that there is no absolute doctrine that a covenant in restraint of trade is void merely because it is unlimited in regard to space. The question in each case, he held, was whether the restraint extended further than was necessary for the reasonable protection of the covenantee, and that if it did not do so the performance of the covenant would be enforced even though the restriction was unlimited as to space. This broad negation of the rule appears to me to destroy the distinction (illustrated at length in *Mitchel* v. *Reynolds*) which always has subsisted between general and partial restraints of trade. In destroying it Fry, L.J., appears to me to overlook the principle which underlies the entire doctrine of the unlawfulness of general restraints of trade, that the interests of the contracting parties are not necessarily the same as the interests of the commonwealth. Rules which rest upon the foundation of public policy, not being rules which belong to the fixed or customary law, are capable on proper occasion of expansion or modification. Circumstances may change and make a commercial practice expedient which formerly was mischievous to commerce

But it is one thing to say that an occasion has arisen, upon which, to adhere to the letter of the rule, would be to neglect its spirit, and another to deny that the rule still exists. The *dicta* which Fry, L.J., cites from *Hitchcock* v. *Coker*, from *Tallis* v. *Tallis*, and from *Mallan* v. *May* are all *dicta* in cases of partial restraint, where the reasonableness of the particular contract necessarily came under consideration. The necessary protection of the individual may in such cases be the proper measure of the reasonableness of the bargain. When Fry, L.J., passes (28 W. R. 626, 14 Ch. D. 366) to examine the question of the existence of the common law rule, he assumes, as it appears to me, without sufficient justification, that complete protection of the individual is the only reason which ought to lie at the root of the doctrine. But the reasonableness of the legal principle which forbids general restraint altogether is not the same thing as the reasonableness (as between the parties) of the bargain in any particular case. With regard to the argument that the rule, if it existed, would be an artificial one and would therefore admit of no exceptions, the judgments of the judges and of the House of Lords in the case of *Egerton* v. *Earl Brownlow*, 4 H. L. Cas. 1, illustrate, I submit, the distinction between a fixed rule of customary law and a rule based on reason and policy. The latter may admit of exceptions, although the former may not. Nor does the Lord Justice, to my mind, sufficiently allow for the weight of a multitude of decided cases when he states that "there are undoubtedly cases in which it has been said that the restraint must not be universal," and illustrates this by reference to *Ward* v. *Byrne*, *Hinde* v. *Gray*, and *Allsopp* v. *Wheatcroft*. The entire history of the subject of restraint of trade proceeds surely on the basis of the existence of the rule in question. With *Whittaker* v. *Howe* I have already dealt. *Jones* v. *Lees* was, as I have pointed out, a case of partial restraint in respect of the mode of manufacture. "I consider," says Fry, L.J., in conclusion, "that the cases in which an unlimited prohibition has been spoken of as void relate only to circumstances in which such a prohibition has been unreasonable." Is it not a truer view that the courts have never even entered on the consideration of the circumstances of any particular case where the prohibition has been unlimited as to area? In *Davies* v. *Davies* opposite opinions on the subject of the common law rule were expressed both by Cotton, L.J., and by Fry, L.J., but the matter did not call for decision.

The result seems to me to be as follows:—General restraints, or, in other words, restraints wholly unlimited in area, are not permitted by the law. Partial restrains, or, in other words, restraints which involve only a limit of places at which, of persons with whom, or of modes in which the business is to be carried on, are valid when made for a good consideration, and where they do not extend further than is necessary for the reasonable protection of the covenantee. A limit in time does not by itself convert a general restraint into a partial one. "That which the law does not allow is not to be tolerated because it is to last for a short time only." In considering, however, the reasonableness of a partial restraint, the time for which it is to be imposed may be a material element to consider. Such, I think, is a *résumé* of the common law doctrine up to this day.

I proceed now to consider, upon this view of the law, the appeal before us. In my opinion the different parts of the covenant are really capable of being separated from each other. The present breach relates to one portion only, and the covenant, even if it were invalid as to the rest, might, I think, nevertheless, be binding as to part. The real question in respect of which the action is brought was, as we were informed, a threat by Mr. Nordenfelt to engage abroad in the sale or manufacture of guns and ammunition. The case thus raised is a new and unprecedented one. Mr. Nordenfelt's old business did not, broadly speaking, consist in the supply of commodities to any English city or district, nor of any article intended for English consumption or use at all. He may have at times, for anything we know, supplied the English Government with some materials for war, but his trade consisted in manufacturing and selling guns and ammunition for the use and benefit of the foreign world, or of the middleman and agents who negotiate orders for foreign exportation. The area over which he might distribute his guns or ammunition was a foreign one, unlimited in geographical space, no doubt, but it must be remembered that the Governments or bodies who require to use guns and materials of war are capable of approximate enumeration. A covenant in restraint of trade made by such a person as the defendant with a company he really assists in creating to take over his trade differs widely from the covenants made in the days of Queen Elizabeth by the traders and merchants of the then English towns and country places. When we turn from the homely usages out of which the doctrine of *Mitchel* v. *Reynolds* sprang to the central trade of the few great undertakings which supply war material to the Executives of the world, we appear to pass into a different atmosphere from that of *Mitchel* v. *Reynolds*. To apply to such transactions as the present the rule that was invented centuries ago in order to discourage the oppression of English traders and to prevent monopolies in this country seems to be the bringing into play of an old-fashioned instrument. In regard, indeed, of all industry a great change has taken place in England. Railways and steamships, postal communication, telegraphs, and advertisements have centralized business and altered the entire aspect of local restraints on trade. The ancient rules, however, still exist; it is desirable that they should be understood to remain in force, but great care is evidently necessary not to force them upon transactions which, if the meaning of the rule is to be observed, ought really to be exceptions. "The determination of what is contrary to the so-called policy of the law"—say the Privy Council in *Evanturel* v. *Evanturel*, 23 W. R. 32, at p. 36, L. R. 6 P. C. 1, at p. 29—"necessarily varies from time to time. Many transactions are upheld now by our own courts which a former generation would have avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion." This passage from the judgment of the Privy Council appears to foreshadow exactly the problem we have in the present appeal to solve. Is this case one which falls within the rule against general restraint of trade, or ought it to be an exception? Exceptions to rules which are not "artificial" but based on reason and public policy ought themselves to be instances in which to apply the letter of the rule would be to violate its true meaning, and in which the very reason on which the rule is based mililates in favour of the exception. One instance of an exception to the rule which discourages general restraints of trade is admitted to exist in respect of the assignment of trade secrets, and it may here be useful again to allude to the ground upon which such dispositions of property are excluded from the operation of the ordinary doctrine. In the case of the assignment of a trade secret there arises a conflict between two ideas, both of which are developments in opposite

directions of the larger principle that English industry and trade ought to be left free. The first of the two seemingly antagonistic corollaries to which this larger principle leads is the maxim that no one should be allowed to contract himself out of his liberty to trade. The second, which appears to conflict with the first, is that every man should be at liberty to sell the goodwill of his trade on any terms that are neither oppressive to himself nor injurious to the State. These two antinomies are well contrasted by James, V.C., in the *Leather Cloth Co.'s case.* The history, indeed, of the entire doctrine as to restraint in trade is itself nothing but a narrative of the continual efforts of the English law, amidst all the changing conditions of English industry and commerce, to adjust and harmonize these two opposite points of view. It has been in the process of such gradual adjustment that the more indulgent law as to partial restraint of trade has been evolved. The laxer rule as to partial restraint is thus itself an exception, the definition of which again expanded from time to time as society required it. The law as to trade secrets, like the law of partial restraint, is an exception too. Before the manufacturer or trader sells his trade secret he is the sole possessor of it. If he is to sell it to advantage, he must of necessity be able to undertake not to retain the right to use it or to communicate it to others. A covenant that he will not destroy the value of that which he himself is handing over causes in such a case no diminution in the supply of commodities to the world, but tends, in nine cases out of ten, to stimulate it. There is no tendency in such a transaction to create a monopoly, for the monopoly existed *ex hypothesi* already. Trade cannot suffer by the substitution of one possessor of a secret for another. The analogy between the sale of a trade secret and the sale or transfer of a goodwill of such a business as Mr. Nordenfelt's is not, of course, exact, but there is a strong similarity between the two cases. Mr. Nordenfelt has assisted in creating the plaintiff company to take over what really had been his own business. It never could have been called into existence as a substantial undertaking if he had not been willing to retire in the company's favour from the whole field of competition. He obtained ample consideration for what he gave.

But he also retained (as ought not to be forgotten) the right still to continue trading in a substantial portion of his old manufacture — torpedoes, submarine boats, explosives other than gunpowder, and other matters. So much as to the reasonableness of the agreement itself. But it still remains to be considered whether such an agreement can be calculated to injure the public. It seems to me that it would almost amount to legal pedantry if courts of law were to discover in Mr. Nordenfelt's covenant the elements of danger to the commonwealth. He agreed to disappear from the number of those who make guns and ammunition for other countries. How can the British public possibly be inconvenienced by this? He ceases, it may be said, to employ English labour so far as his manufacture of guns and ammunition is concerned. But he only does so in order to enable a thriving company to take his place, at the disposal of which he was to place for a time his services; and the restriction on himself to which he has consented will only last while his place in the trade is actively filled by the company or the successors to whom in turn it may resell the goodwill. So far as he might have had occasion to supply the English Government with guns or ammunition this company can act in his stead; although out of his liberty to do so if he desires it, he cannot in law contract himself, nor is his agreement to be read as imposing any such invalid or possibly illegal stipulation. Can it, then, be said that a contract by which he consents to the transfer of the business of making guns and ammunition for foreign lands to an English company with whom he undertakes not to compete so long as the old trade is flourishing in their hands, is against the policy of English law? So to hold would surely be to reduce to an absurdity the law of restraint of trade. I answer the question in the words of Lord Nottingham in the *Duke of Norfolk's case*:—"Pray let us so resolve cases here that they may stand with the reason of mankind when they are debated abroad."

For the purpose of clearness I will, in conclusion, attempt to summarize the exact ground on which I consider this case should be decided. The rule as to general restraint of trade ought not, in my judgment, to apply where a trader or manufacturer finds it necessary, for the advantageous transfer of the goodwill of a business in which he is so interested, and for the adequate protection of those who buy it, to covenant that he will retire altogether from the trade which is being disposed of, provided always that the covenant is one the tendency of which is not injurious to the public. This last element in the definition ought not, I think, to be overlooked, for I can conceive cases in which the absolute restraint might as between the parties be reasonable, but yet might tend directly to injure the public, and a rule founded on public policy does not admit of any exception that would really produce public mischief; such might be possibly the case if it was calculated to create a pernicious monopoly in articles for English use, a point I desire to leave open, and one which, having regard to the growth of syndicates and trusts, may some day or other become extremely important. As good faith demands that Mr. Nordenfelt should be bound by his solemn agreement and as the public can in no way be injured by his being held to it, I think the injunction as defined by my brother Lindley should be granted, and the order made in the form he has suggested.

A. L. SMITH, L.J., in delivering a written judgment said:—The question for determination is whether, where it is sought to enforce a covenant in restraint of trade made upon good consideration, which is unlimited as regards space, but is limited in some other way, such as to the persons with whom the covenantor is to trade, or as to the business which he is prohibited from carrying on, the court is to declare the covenant *ipso facto* void, or is to ascertain whether in the circumstances of the case the restraint is reasonable or not. [His lordship, having referred to the facts of the case and to the covenant in clause (2) set out above, proceeded:—] I am of opinion that that portion of the covenant which restrained the defendant from carrying on any business whatever, competing or liable to compete in any way with that for the time being carried on by the company, is severable from the rest as was held in *Mallan* v. *May* and *Price* v. *Green* and many other cases since. This is not, therefore, a covenant as Romer, J., apparently at one time thought void by reason of its preventing the defendant from carrying on all the businesses mentioned in the articles of association of the plaintiff company. The covenant, as it will be seen, is expressly limited to one only of the classes of business in which the defendant was skilled. It left open to him to trade when and where he pleased in all the numerous nitro-glycerine powders and explosives, including dynamite, also in torpedoes, castings or forgings of steel or iron or alloys of iron or copper; obviously a very large area in which to carry on business.

It is unnecessary to determine the point which gave

rise to the difference of opinion between Cotton, L.J., and Fry, L.J., in *Davies* v. *Davies*, whether, in the case of a covenant in general restraint of trade which is absolute and unlimited, the court is or is not to ascertain if the covenant is reasonable under the circumstances, as thought Fry, L.J., or if it is *ipso facto* void, as being against public policy, as was the opinion of Cotton, L.J., for this point does not arise; but I must say that I incline to the opinion that a covenant by a man never again to trade anywhere in anything is *ipso facto* void, as being against public policy, and that it is too late now to question the law as to this, even if it were desired to do so. In this case the covenant, though unlimited as to space, is limited as to the subject-matter of the restraint.

It was argued by the Solicitor-General, for the defendant, that, if in fact the covenant be unlimited as regards space, it mattered not how much or how little of the covenantor's trading was restrained, and he asserted that the covenant was *ipso facto* void; and he cited cases, and especially the case of *Ward* v. *Byrne*, where the restraint was absolute for nine months, and being unlimited as to space was held bad; and *Allsopp* v. *Wheatcroft*, where Wickens, V.C., thought that there was a recognized rule as to the necessity of a limitation of space to render a covenant valid, dissenting from the opinion of James, V.C., in *Leather Cloth Co.* v. *Lorsont*. The whole of the cases have been dealt with either in the masterly judgment of Fry, J., in *Rousillon* v. *Rousillon* (1880), or by Bowen, L.J., in his judgment just delivered. Over fifty years ago Lord Langdale held in *Whittaker* v. *Howe* that a covenant restraining a solicitor from practising in any part of Great Britain for a period of twenty years should be enforced. I do not stop to inquire whether the case was rightly decided, but I cite it as I believe it is one of the first, if not the first, cases in which a covenant was held to be good, with no limit as to space. In the case of *Leather Cloth Co.* v. *Lorsont* (1869) James, V.C., held that a covenant restraining trading throughout the United Kingdom was not, upon the face of it, necessarily bad, and he stated that he did not read the cases as having laid down any such irrebuttable presumption. Fry, L.J. (then Fry, J.), in *Rousillon* v. *Rousillon* held the same, though he went further, and Chitty, J., in *Badische Anilin und Soda Fabrik* v. *Schott* also held that a covenant unlimited as to space was in that case valid. It is true that Cotton, L.J., in one part of his judgment in *Davies* v. *Davies* approved of the decision in *Allsopp* v. *Wheatcroft*, but (36 W. R., at p. 88, 36 Ch. D., at p. 383) he says: "The case of *Hitchcock* v. *Coker* (1837) I think introduced what I may here mention, that undoubtedly now if a covenant is in any way limited, either sufficiently as regards space or sufficiently as regards time, then it will not be considered as an absolute restraint of trade, but only a limited restraint, and then the question as to whether the limit is reasonable will come into consideration." Cotton, L.J., did not deal with a covenant partial in itself as regards the subject-matter of the restraint, but the learned Lord Justice appears to me to have thought that a covenant which was only in partial restraint of trade was not void merely because it was unlimited as to space. Bowen, L.J., has fully discussed the question whether a limit as to time ever converts a covenant which is in general restraint of trade into a covenant in partial restraint of trade, and I agree, not only with his remarks, but in the conclusion he has arrived at thereon. The judges who took part in the above-mentioned cases appear to have thought that a non-limit as to space was not in all cases of itself fatal to a covenant in restraint of trade. I may point out that one of the grounds given by Lord Macclesfield in his well-known judgment in *Mitchel* v. *Reynolds* why covenants in general restraint of trade were void, and which especially applies to a covenant unlimited in point of space, has in my opinion no application at the present day. He says where restraint is general throughout the kingdom this must be void, being no benefit to either party, and only oppressive, "for what does it signify to a tradesman in London what another does at Newcastle?" That may have been a good reason in 1711, but it certainly is not so at the present day.

I now come to some of the cases in which, the subject-matter of the covenant being only a partial restraint of trade, such covenants have been held to be good, though unlimited in any other way. In *Gale and Others* v. *Reed*, 8 East, p. 79 (1806), the plaintiffs sued the defendant for breach of a covenant for not during his lifetime employing exclusively the plaintiffs to make all the cordage ordered of the defendant by his friends and connections whom the plaintiffs could trust. It was held that inasmuch as the defendant had only covenanted to employ the plaintiffs to make cordage for those of the defendant's friends whom the plaintiffs could trust, this was only a partial restraint of trade, for the defendant could supply those whom the plaintiffs did not think fit to trust, and that, consequently, this covenant was valid. The case of *Young* v. *Timmins* (1831) is an exemplification of a covenant being held good where the covenantor covenants to work exclusively for one master to the exclusion of all others. So in *Wallis* v. *Day* (1837) a man for good consideration covenanted that he would not, during his life, exercise his trade of a carrier except as the assistant-carrier of A. B. The court held the covenant good, upon the ground that it was not an absolute, but a partial restraint, for the man was not restrained during his life-time from serving A. B., he was only restrained from serving anyone else. In *Jones* v. *Lees* the plaintiff, a patentee of improvements in spinning machines, bound the defendant to use his patent during the term of the patent, and the defendant covenanted with the plaintiff not to make or sell any machines without the plaintiff's invention being used therein. The court held that inasmuch as the restraint was partial as to the mode of exercising the trade, although total as to space the covenant was valid. In the case of *Mills* v. *Dunham* this court held that a covenant not to transact business after leaving an employer similar to the business transacted by the employer was valid, it being only a partial restraint, and this although there was no other limit in the case. These cases show that a covenant in partial restraint of trade, whether as to the person with whom the covenantor is to trade, or as to the business which he is prohibited from carrying on, may be good although unlimited as to space. In my judgment there is no such hard and fast rule as is contended for—viz., that *every* covenant in restraint of trade is *ipso facto* void if it is unlimited as to space; but, on the contrary, in my judgment a covenant which is but a partial restraint of trade will be good, though unlimited as to space, if, in the circumstances of the particular case to which it is applied, the covenant is reasonable.

The court has therefore to determine whether the covenant in question, under the circumstances existing in this case, is an unreasonable restraint of trade, applying the well-recognized rule as to reasonableness; for, if the covenant be reasonable, it ought to be enforced. The question of reasonableness—though an inference to be drawn from existing facts—has ever been held to be a matter of law. The rule to be applied has long since been settled by the cases of

Horner v. *Graves* and *Hitchcock* v. *Coker*, and acted upon. It is this: "Where the restraint is such as only to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public, then the covenant is not unreasonable."

Now arise the questions, Are the limits of time and space in the covenant sued on reasonable for the protection of the covenantee? and, Is the covenant so large as to interfere with the interests of the public? It is argued that the defendant was forty-six years of age when he entered into the covenant, a twenty-five years' restriction would probably continue during his lifetime, and it was suggested that it was no limit at all, but was merely delusive. I do not agree with these suggestions. It will be remembered that if the plaintiffs and their successors cease to trade, the restraint comes to an end. The £287,500 which the plaintiffs paid to the defendant for the business must obviously take many years before it can be recouped by trading; and why am I to hold that twenty-five years is more than a fair protection to the plaintiffs? No facts have been given in evidence from which I can draw such an inference. Indeed, what facts have been proved tend in an opposite direction. In considering this, it does not seem to me that the age of the covenantor is the matter to be considered, but what is the fair protection of the covenantee; and I may say that my own opinion is that if the limit had been the covenantor's life in the special circumstances of the case it would not have been unreasonable.

Now, as to the limit of space.

The plaintiffs' business is world-wide; there is hardly a place of note in any quarter of the globe into which they do not carry on business, and, consequently, from which competition may not arise. How can it be truly said that a restraint which is but co-extensive with the area traded over by the plaintiffs is unreasonable, and affords more than a fair protection to their interests? In my judgment the limit of space in all these cases must necessarily vary with the ever-changing circumstances attending the development of trade and the varying circumstances of the particular trader; and, bearing in mind what the plaintiffs' trade is, the limit, though co-extensive with the world, is not, in my opinion, unreasonable. In my opinion the limits of time and space in this particular case are no more than to afford a fair protection to the plaintiffs.

Now, as to public policy.

Of the many reasons given by Lord Macclesfield in *Mitchel* v. *Reynolds* as to why a covenant in restraint of trade was void as being against public policy, at the present time by far the most cogent, if not the only ones, still extant are—(1) that a man may not be prevented from working at his trade and thus become destitute; and (2) that the State has an interest in the producing power of its members. Where a man is left not only with such an area wherein to trade and to continue to earn his living, but is also placed in possession of between £200,000 and £300,000, as the defendant in this case is, and the public are not deprived of the trade theretofore carried on by the covenantor, I cannot myself see how, as a matter of fact, either of the above-mentioned public policies are trenched upon, and I think they are not. I entirely agree with what was said by Sir George Jessel in *The Printing and Numerical Registering Co.* v. *Sampson*, 23 W. R. 463, L. R. 19 Eq. 465, that there is, at any rate, another public policy which he called "paramount"—viz., that "men of full age and competent understanding should have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, should be held sacred and should be enforced by courts of justice." How are the interests of the public interfered with? They have a company producing in England what the defendant otherwise might have produced, and probably as efficiently as the defendant would have done, and they have also a man (the defendant) equipped with a very large sum of money wherewith to carry on the numerous trades which are left in his uncontrolled possession. In my judgment the interests of the public are certainly not interfered with, at least to their detriment, and the point of public policy does not avail the defendant. For these reasons I am of opinion that the covenant should be enforced, that the appeal must be allowed, and the relief as framed by Lindley, L.J., granted.

Appeal allowed.

Solicitors for the appellants, *Wilson, Bristows, & Carpmael.*

Solicitors for the respondent, *Munns & Longden.*

NOTE.—It being stated that the defendant desired to appeal to the House of Lords, the court said that the operation of the injunction would be suspended for two months, the defendant giving an undertaking to be answerable in damages to the plaintiffs. There would be liberty to apply to the court.

From Q. B. Div. (Lord Esher, M.R., and Bowen and Kay, L.JJ.) June 26.

In re STUART.
Ex parte CATHCART. (*a.*)

Solicitor—Costs—Agreement—"Fair and reasonable"—Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), *ss.* 4, 8, 9.

An agreement as to the remuneration of a solicitor, to be "fair and reasonable" within the meaning of the Attorneys and Solicitors Act, 1870, *must be "fair" in the sense of having been fairly obtained, and "reasonable" in the sense of being reasonable in its terms.*

A solicitor, who was retained by a client to attend on her behalf upon the taxation of a bill of costs, made an agreement in writing with his client under which the client was to pay him five per cent. on all costs taxed off the bill. The bill of costs when delivered amounted to about £5,000, and about £2,000 was taxed off, the greater part of this latter sum consisting of refresher fees paid to counsel which were largely in excess of the fees allowed by the rules. The client having applied, under sections 8 *and* 9 *of the Attorneys and Solicitors Act*, 1870, *to have the agreement set aside as not being "fair and reasonable,"*

Held, that, as the agreement was fully explained to the client, and its effect was understood by her before she entered into it, it could not be said to be unfair; but that, as the remuneration which the solicitor would receive under the agreement was largely in excess of that which he would receive for the work done apart from the agreement, the terms thereof were not reasonable, and the agreement must be set aside.

Appeal from an order of the Queen's Bench Division affirming an order of the judge at chambers setting aside an agreement between a solicitor and his client, Mrs. Cathcart, respecting the amount of payment for his services.

Certain costs having been incurred in proceedings

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

in lunacy instituted by Mr. Cathcart against his wife, by which he sought to have her declared of unsound mind, and in which he failed, an order was made that two-thirds of the husband's taxed costs should be paid out of certain Consols belonging to Mrs. Cathcart. Before the bill of costs was delivered Mrs. Cathcart required her solicitor, R. A. Stuart, to make the following written agreement:—"*Cathcart* v. *Cathcart*.—Dear Sir,—I agree to pay you 5 per cent. on all costs taxed off Messrs. Crawley & Arnold's bill in the above action.—MARY CATHCART. I agree to the above.—R. A. STUART." The bill of costs when delivered amounted to about £5,000, and upon taxation £1,980 was taxed off. Of this sum £1,323 was taxed off in respect of refresher fees paid to counsel as being in excess of the maximum refresher fees allowed by the rules. The taxing master, upon the application of the solicitor under section 4 of the Attorneys and Solicitors Act, 1870, examined and allowed the agreement. Mrs. Cathcart then took out a summons at chambers to have the agreement set aside under sections 8 and 9 of the Act as not being fair and reasonable. The taxing master informed the learned judge that twenty guineas would be the ordinary remuneration for the work done apart from any agreement. The judge set aside the agreement, and the Divisional Court affirmed the order.

The solicitor appealed.

Winch, Q.C., and *Stephen Lynch*, for the solicitor.

Bigham, Q.C., and *Cluer*, *contrà*.

Lord ESHER, M.R.—This is an application by Mrs. Cathcart, a client of Mr. Stuart, to have an agreement as to the solicitor's remuneration set aside, with the result that the solicitor's costs would be left to be taxed in the ordinary way. The application was by summons at chambers. Whether it ought to have been made by motion in the Divisional Court is now immaterial, because the case has been before the Divisional Court, and may be treated as if it had been made by motion in court. The client is a lady, and the agreement was that the solicitor should act for her upon the taxation of her husband's bill of costs, and should be paid 5 per cent. upon so much of the bill of costs as was struck off upon taxation. It has been suggested that the agreement is void as against public policy, upon the ground that it amounted to champerty. It may be so; I am not prepared to say that it is not. It may also be void upon the ground that the solicitor, in dealing with a female client, did not explain to her its full effect. If the agreement is void on either of these grounds it is void at common law, apart altogether from the statute.

It is then said that, if the agreement is not void upon either of those grounds, the court will set it aside under sections 8 and 9 of the Attorneys and Solicitors Act, 1870, as not being fair and reasonable. Assuming that this agreement is not void on either of those two grounds, can we set it aside under sections 8 and 9? Can we say that the agreement is not "fair?" We must take it that the client had it fully explained to her and fully understood its effect and deliberately entered into it with her eyes open. Under those circumstances no one can say that it is unfair in the sense of having been unfairly obtained. The agreement must also be "reasonable." We cannot introduce the element of fairness with the meaning of reasonableness. Who is to judge of its reasonableness? The Act makes more stringent the power of the courts over solicitors, and the meaning of the section seems to me to be that, when the agreement is challenged, the court must be satisfied, not merely that the agreement is fair in the sense I have pointed out, but also that it is reasonable in its terms. If the terms are such that the agreement is unreasonable in respect of the amount of remuneration for the work done, though the solicitor has fully explained it to the client, and the client has voluntarily agreed to it, the court, knowing the class of work better than the client, will say that it is not reasonable in its terms.

In the present case the master has stated that twenty guineas would be the ordinary remuneration for the work done, and it is therefore impossible to say that the agreement under which the solicitor will receive a sum amounting to nearly £100, though the agreement may have been almost forced upon the solicitor, is reasonable.

Upon these grounds I think that this appeal must be dismissed.

BOWEN and KAY, L.JJ., concurred.

Appeal dismissed.

Solicitors, *R. A. Stuart; A. E. Fenton.*

From Q. B. Div. (Lord Esher, M.R., and Bowen and Kay, L.JJ.) — June 19.

REG. v. JUSTICES OF OXFORDSHIRE. (*a*.)

Justices—Appeal to quarter sessions—Notice of appeal—Service upon solicitor who had appeared for respondent at petty sessions—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *s.* 31.

The appellant, against whom a bastardy order had been made at petty sessions, served notice of appeal to quarter sessions upon the solicitor who had been retained to appear for the respondent at petty sessions, and the solicitor accepted service on her behalf. The quarter sessions declined to hear the appeal, upon the ground that the service of the notice of appeal was bad.

Held, affirming the decision of the Queen's Bench Division, *that the solicitor upon whom the notice of appeal was served had ceased to be the respondent's solicitor when the proceedings at petty sessions had determined, and that the service was bad.*

Appeal from an order of the Queen's Bench Division (Mathew and Wright, JJ.) discharging a rule *nisi* for a *mandamus* to the Oxfordshire Quarter Sessions to hear and determine an appeal against a bastardy order.

On March 9 an order was made at petty sessions adjudging that the appellant was the putative father of a bastard child of the respondent, and directing him to pay to the respondent 3s. a week for the maintenance of the child. The respondent had retained a solicitor to appear for her at the hearing for the purpose of obtaining the order.

On March 16, being the last day for appealing, the solicitor for the appellant called upon the solicitor who had appeared for the respondent at petty sessions, and served him with notice of appeal against the order, and the solicitor accepted service on behalf of the respondent; and upon the same day the latter wrote to the respondent a letter which she received next morning, stating that he had accepted service of the notice of appeal, and asking whether he should instruct counsel to appear for her at quarter sessions. After some correspondence the respondent wrote to the effect that she did not intend to retain him upon the appeal, and she employed another solicitor. When the appeal came on at quarter sessions, objec-

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

tion was taken on behalf of the respondent that the notice of appeal had not been properly served, as the person upon whom it was served was not her solicitor at the time.

The quarter sessions held that the service was bad, and that the respondent had not ratified the act of the solicitor in accepting service on her behalf, and accordingly refused to hear the appeal upon the merits. The Queen's Bench Division having discharged a rule *nisi* for a *mandamus*, the appellant appealed to the Court of Appeal.

Mackarness, for the appellant.—It is submitted that personal service is not necessary: *Ex parte Portingell*, 40 W. R. 102, [1892] 1 Q. B. 15; and therefore service upon the respondent's solicitor would be good service. The solicitor who appears for the party at petty sessions remains that party's solicitor for the purpose of being served with notice of appeal until the time for appealing has expired, unless the solicitor's authority has been previously determined, and the determination made known to the opposite party. [He referred to *Syred* v. *Carruthers*, 6 W. R. 595; *Pennell* v. *Churchwardens of Uxbridge*, 10 W. R. 319; *De la Pole* v. *Dick*, 33 W. R. 585, 29 Ch. D. 351; *Anderson* v. *Watson*, 3 C. & P. 214.] He also contended that the act of the solicitor in accepting service of the notice of appeal on her behalf had under the circumstances been ratified by her.

F. Fitzgerald, for the respondent, was not called upon.

Lord ESHER, M.R.—The question in this case is whether the notice of appeal was given to the respondent. It is the case of a girl who had obtained an order at petty sessions that the appellant should pay for a fixed time a certain sum per week for the maintenance of her child. A solicitor was instructed by her to get the order, and he appeared for her at the hearing. He obtained the order, and there was an end of the matter. The appellant, however, desired to appeal to quarter sessions, and he was bound to serve notice of appeal. The argument is that personal service is not necessary, that service on the respondent's solicitor is good service, and that the solicitor upon whom this notice of appeal was served was at the time her solicitor. It is sufficient in this case to consider only the last step in the above argument, namely, whether the solicitor upon whom this notice was served was at the time the respondent's solicitor. We may, for the purposes of this case only, assume the other steps in the argument. The appellant gave the notice of appeal to the gentleman who had acted as the respondent's solicitor at the petty sessions, and it was argued that he was her solicitor still. What made him her solicitor still? No statute says that he is to remain her solicitor. Does the common law say so? With regard to actions which proceed to judgment and execution, and, as *De la Pole* v. *Dick* shows, in chancery actions where the decree has to be worked out in chambers, the common law, that is, the unwritten law applicable both to common law courts and to chancery courts, said that so long as anything remained to be done in the litigation to obtain the fruits of the judgment the solicitor for the party remained his solicitor so far as regards the opposite party unless his authority was determined, and such determination made known to the opposite side. Therefore, between judgment and execution which would give the fruits of the judgment, the solicitor for the defendant would remain his solicitor so far as regards the opposite party. But the moment, by execution, the fruits of the judgment were obtained, he would cease to be the solicitor. *De la Pole* v. *Dick* did not intend to lay down any new law, but the court stated the rule, after examining the authorities, in clearer terms than it had been stated before. But the court expressly declined to say whether the solicitor of a party continued to represent him as long as the right of appeal existed. It was, however, suggested by the judges that it would be very inconvenient if the authority did not continue as long as there is a right of appeal, and consequently rule 3 of order 7 was made to carry out the suggestion of the judges. That rule, however, only applies to proceedings in the High Court, and does not apply to this case.

In the present case the solicitor was employed to get an order at petty sessions, and when he had got that order nothing more remained to be done in that litigation. It cannot be said that the doctrine of the continuance of the solicitor's authority until the fruits of the litigation are obtained applies, because then the solicitor might continue to represent her during the whole time that the weekly sums are payable. Therefore, the solicitor here was not the respondent's solicitor at the time the notice of appeal was served upon him, and therefore the service was bad. Nor under the circumstances did she ratify the act of the solicitor in accepting service on her behalf. Therefore, no notice of appeal was given to the respondent at all, and the quarter sessions were right in refusing to hear the appeal.

BOWEN and KAY, L.JJ., concurred.

Appeal dismissed.

Solicitor for the appellant, *T. A. Jones*, for *Stockton & Son*, Banbury.

Solicitors for the respondent, *Cunliffes & Davenport*, for *Davenport Rose*, Oxford.

From Chan. Div. (Lindley, Bowen, and Kay, L.JJ.) [and Chan. Div.] — April 14, 20; May 16.

JONES v. CONWAY AND COLWYN BAY JOINT WATER SUPPLY BOARD. (a.)

Local government—Water supply—Entry on land without district—Notice required—Consent of adjoining authority—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 16, 32, 54, 285.

A joint board duly constituted as a local authority within the Public Health Act for the purpose of supplying their united district with water gave notice under the Public Health Act, s. 16, *to a landowner whose lands lay without their district of their intention to enter his lands to lay water mains; but they did not comply with the requirements of section* 32 *as to giving notice of the intended work by advertisement, and serving a copy of such notice on the owners and occupiers of the land on which the work was to be made. The defendant board had, however, obtained leave under section* 285 *from the adjoining local authority, in whose district the said lands were situate, to lay the mains. The board had not yet actually supplied any water. On motion to restrain the board from entering the said lands,*

Held, by North, J., *that the board were "a local authority supplying water within their district" within the meaning of the Public Health Act, s.* 54; *and that, therefore, by virtue of sections* 54 *and* 16 *read together, the board had the same rights and duties with respect to*

(a.) Reported by M. J. BLAKE and C. F. DUNCAN, Esqs., Barristers-at-Law.

the laying of water mains without their district as they had with respect to sewage.

Held, by the Court of Appeal (*affirming* North, J.), *that, as the board had not given the notices required by section* 32, *they must be restrained from entering on the plaintiff's lands, and that the fact of the leave of the adjoining local authority having been obtained under section* 285 *did not dispense with the necessity of giving the notices required by section* 32.

Motion.

This was an action by the tenant for life of certain lands situate at Gwyn yr Ardda, in the county of Carnarvon, for an injunction restraining the Conway and Colwyn Bay Joint Water Supply Board from entering upon and carrying water mains through the said lands.

The defendant board were constituted by a provisional order made by the Board of Trade, duly confirmed by an Act of Parliament which received the royal assent on the 5th of August, 1891. Their joint district comprised, but was not co-extensive with, the urban sanitary districts of Conway, Colwyn Bay and Colwyn, and the rural sanitary district of the Conway Union. Article 13 of their provisional order set out that the purposes for which the joint district was formed were (*a*) for procuring a common supply of water for the constituent districts; (*b*) for the acquisition of such landss, waterworks, easements, &c., and the execution of such works, &c., as might be necessary for collecting and conveying water for distribution by the constituent authorities. Article 14 provided that all the powers, duties, and liabilities of the constituent authorities in connection with procuring a common supply of water should be transferred to the joint board. Article 15 provided that the joint board should have, exercise, perform, and be subject to all the powers, rights, duties, capacities, liabilities, and obligations of a local or urban sanitary authority in relation to water supply under the Public Health Act, 1875, or any Act amending that Act, so far as the same were applicable for the purposes of the order, and that the provisions of the Public Health Act, 1875, and of any Act amending that Act, in relation to water or works belonging to a local or urban sanitary authority should, so far as the same were applicable, extend and apply to any water or works belonging to the joint board. The private Act of 1891 expressly incorporated section 285 of the Public Health Act, 1875, relating to the execution of works in adjoining districts. The defendant board had not yet delivered any water. The works of the defendant board were not completed, and the constituent authorities were still supplying water separately.

The plaintiff was the owner of land situate in that part of the rural sanitary district of the Conway Union which was outside the defendant board's joint district. In pursuance of the scheme for the supply of water the board had given notice to the plaintiff, acting on their surveyor's report, of their intention to carry water mains through his lands under section 16 of the Public Health Act, 1875, which provides that any local authority may, after giving reasonable notice in writing to the owner or occupier, carry any sewer through any lands within their district if on the report of the surveyor it appears necessary, and may also (subject to the provisions of the Act relating to sewage works without such district) exercise any of the powers given by this section, without their district for the purpose of outfall or distribution of sewage. The defendant board had also obtained the consent of the Conway Board of Guardians, the local sanitary authority of the district in which the plaintiff's land was situate, to execute the work under section 285 of the same Act, which provides that any local authority may, with the consent of the local authority of any adjoining district, execute in such adjoining district any such works as they may execute within their own district. But the defendant board had not given the notices required by section 32, which provides that a local authority shall three months at least before commencing the construction or extension of any sewer without their district, give notice of the intended work by advertisement in a local newspaper, and serve such notice on the owners and occupiers of the lands on which the work is to be made.

The plaintiff now moved for an injunction.

Farwell, Q.C., and *Pattullo*, for the plaintiff.—The defendant board's first step should have been under section 51, which provides that a local authority may construct or hire waterworks, &c.; they have not yet supplied any water; they are, therefore, not "a local authority supplying water" within section 54, which provides that "where a local authority supply water within their district they shall have the same powers, and be subject to the same restrictions, for carrying water mains within or without their district as they have and are subject to for carrying sewers within or without their district." They do not, therefore, possess the powers, &c., given by the Act to local authorities in respect to sewers extended by section 54 to water mains. In the alternative, if they are within section 54 then they have not complied with section 32. [They cited *Hill* v. *Wallasey Local Board*, [1892] 3 Ch. 117.] They also argued that the defendants must take the land under section 176, which incorporates the Lands Clauses Consolidation Acts with the Public Health Act.

Byrne, Q.C., and *Ashton Cross*, for the defendant board.—We are a local authority within section 54. We are entitled to execute the work, having obtained the consent of the adjoining authority under section 285.

They cited *Roderick* v. *Aston Local Board*, 25 W. R. 403, 5 Ch. D. 328; *Lewis* v. *Weston-super-Mare Local Board*, 37 W. R. 121, 40 Ch. D. 55.

Farwell, Q.C., replied.

April 20.—NORTH, J.—The question that arises in this case is as to the powers of the defendant board under the powers conferred on them by the Public Health Act, which comes within their sphere by virtue of their provisional order duly confirmed by Act of Parliament. [His lordship then said that, while the earlier provisions of the Public Health Act to the end of Part VII. dealt with local authorities acting for and within their own districts and having for certain limited purposes only powers outside, Part VIII. applied the provisions of the Act to cases not confined to their particular district. His lordship then reviewed sections 279 to 286, dealing with the union of districts, and said that the joint board had, by virtue of article 15 of their provisional order, been created a local authority within the definition of a local authority in the Public Health Act, and that therefore the 285th section applied to the joint board, not because they were a joint board, but because they were, though a joint board, made a local authority. His lordship then stated the facts above set out, read sections 51 to 54, and also section 16, and continued:—] To apply section 54 to section 16 it runs this way: "Where a local authority supply water within their district they shall have the same powers, &c., for carrying water mains within their district as they have, &c., for carrying sewers, &c." —I am separating the sections into two—"and they shall have the same powers, &c., for carrying water mains without their district as they have for carrying sewers without their district." So whatever

powers they have as to sewers within their district the local authority supplying water may have as to water mains within their district, and whatever powers they have as to sewers without their district the local authority supplying water may have as to water mains without their district.

It was suggested there was a difficulty about applying the latter portion of section 16, relating to sewers, to section 54, relating to water mains; but I do not see any difficulty about it. Under section 16 a local authority making sewers may enter any lands, on notice, within their district, and may also go without their district, but the sewers without their district are to be only for the purposes of outfall or distribution of sewage. Section 54 says that whatever powers they have of carrying sewers without their district, the same powers are given to carry water mains without their district. It is quite true the authority could not carry sewers without their district except with reference to outfall, &c., but that has nothing to do with section 54. Section 16 limits the powers of carrying sewers outside a district, but it does not limit section 54, which says that whatever powers there are in proper cases for carrying sewers without a district under section 16, the same powers there are of carrying water mains without a district. Therefore, under section 54, there is power given to carry water mains without a district in exactly the same way as, to a limited extent, or for a limited purpose I should say, powers are given to carry sewers without a district under section 16.

Then, before I pass from section 54, I should make this comment upon an argument founded upon it. It was said that it is confined to a case where a local authority supplies water within their district. It is said that in the present case there is no local authority supplying water within the united district with which we have to deal. It is said therefore by the plaintiff that section 54 does not apply, inasmuch as the joint board is not a local authority supplying water within their district —the only supply in what may be called the joint district being the separate supplies of the separate constituent bodies in their separate districts. I do not agree with that argument. I think that section 54 does apply here. I think the phrase "where a local authority supply water within their district," &c., is intended only to be confined to places where there is a local authority which has taken upon itself the burden of carrying out the sections of the Act relating to water supply, which are not compulsory in one sense at all, but optional, though it would be the duty of a local authority to undertake the supply of water if the circumstances of the case required it. I read the words "where a local authority supply water," &c., as meaning where a local authority is not merely an authority which is already a water-supplying body, but where it is a local authority supplying water within the district—that is, exercising the powers of water supply within the district. To put a different construction upon it would seem to me to lead to an absurdity. Mr. Farwell's argument was that whenever a local authority proceeded to supply water their first step, at any rate, must be taken under section 51, and that they must adopt one of the proceedings of either constructing works of their own or hiring waterworks or contracting with some person or corporation for a supply of water, and that it is only after they have come into existence for that purpose, and are, therefore, acting under that provision, that they can then invoke the provisions of section 54; that they are entitled in the first instance to proceed under section 51, and it is only when they are established that they can get the assistance of section 54. That, in my opinion, is not the meaning of it. It seems to me that it would be very absurd to say that they must in the first place, to some possibly very limited extent indeed, supply water, and as soon as they have taken some one step to supply water to a single house within their district, they then come within section 54. Take the case of sewers, suppose a body is sewering a district, I see nothing in section 16 to say that they may not enter upon lands within their district before they have drained a single house, while they are making their sewers which, when completed, will have the effect of draining the district. So here it seems to me absurd to require them first to do something, however small, to supply water before they can obtain the assistance of section 54. In my opinion, therefore, a local authority supplying water within their district means a local authority taking the steps contemplated by this Act for supplying water within their district, or, to use the words of the Act, exercising the powers given them by the Act in relation to a supply of water. In my opinion the defendants are within section 54.

Then they gave notice under section 16, and if the defendants' work had been entirely within their district they had then done everything necessary to entitle them to take the steps they have taken; that is, there has been a proper report and reasonable notice given. Then the question is as to whether they can go without their district, and that depends on the latter part of section 16, by which they may, subject to the provisions of the Act relating to sewer work without their district, exercise any of the powers given by the section without their district. Now, the provisions of the Act relating to sewage works without a district are found in sections 32 to 34, and they provide: [His lordship then read sections 32 and 33 and continued.] Therefore, if a sewer is to be made without a district it is to be made subject to the provisions of these sections. If a water main is to be made without a district under section 54, then it must be made subject to the provisions of the Act relating to sewage works without the district—that is to say, the same proceedings must be taken under sections 32 to 34 as would have been taken if it were a sewer instead of a water-main. Now, it is conceded that no steps of that sort have been taken. No notice has been given under section 32, and nobody has had an opportunity of making any objections. That seems to me a very formidable difficulty in the way of the defendants. The only question is whether they have got out of it by reference to section 285, which provides: [His lordship then read section 285 and continued:—] The argument now is, that as they have got the leave of the authority of the adjoining district, in which the plaintiff's land is situate, they may execute and do in that district everything that they might do within their own district, and that by virtue of section 285, the adjoining district is for this purpose made part of their own district, and therefore they may make a water main through it as a sewer might have been made through it under the first part of section 16, without the second part of section 16 having any application. In my opinion that is not the meaning of section 285. I think that section 285 is to enable the local authority acting under it to do certain things as within their powers which but for that section would have been outside their powers. They can do certain things in an adjoining district without the imputation of acting *ultrà vires* if they have got the consent of its local board. But in my opinion that has not the effect of making the adjoining district or that portion of it their own district for all the purposes of section 16. Or in other words it does not dispense with the necessity of, as between themselves and the owners of the

land or other persons, observing the requirements which have to be observed with respect to sewers which are made outside the district of the board making them. To read section 285 as I am asked to do would amount to this, that I should have to read the earlier portions of the Act as though they said that a local authority may enter any land within their district to construct a sewer, and may also go outside their own district for the same purpose, either subject to the provisions of the Act relating to sewage works without a district or, if they can obtain the leave of the adjoining local authority, without being subject to such provisions. Now these sections 32 to 34 are a special set of sections, and are grouped under the heading, "As to sewage works without the district," and in my opinion they are referred to in the latter part of section 16.

In my opinion, therefore, the defendant board cannot, as regards an outsider, such as a landowner, enter upon lands outside their district without complying with the provisions of sections 32 to 34. I was not referred to, nor have I been able to find, any authority throwing any light whatever upon the construction of section 285; but the view I take with respect to it is that, whatever its effect may be as regards the powers of the board as to what is within or what is without their powers, it does not enable them to deal with outsiders—persons who are owners of land without their district—unless they comply with the provisions of sections 32 to 34.

Another point was raised on behalf of the plaintiff which it is not necessary to consider, but I have formed my opinion upon it. I think the law is clear, and I do not hesitate to express it. Assuming that in other respects the defendants had been right, it would have been quite sufficient for them to do what they have done, without proceeding to take the land under section 176. They would have a right to enter upon the land and do their works, though of course they would have to make compensation to the persons whose lands were entered upon for any injury done to them. But there is nothing in the Act that such compensation shall precede the entry upon the land. The cases of *North London Railway Co.* v. *Metropolitan Board of Works*, 7 W. R. 640, and *Lewis* v. *Weston-super-Mare Local Board*, as well as that case of *Roderick* v. *Aston Local Board*, all seem to be authorities to that effect.

The result is, I come to the conclusion that the plaintiff is right in complaining that the defendants have entered upon his land without having taken the steps necessary under sections 32 to 34.

The defendant board appealed from the order of North, J., in so far as it granted an injunction against them.

Byrne, Q.C., and *Ashton Cross*, for the appellants, referred to the Public Health Act, 1875, ss. 16, 32, 54, 285.

Farwell, Q.C., and *Fattullo*, for the respondent, were not called on.

LINDLEY, L.J.—The more the sections which have been referred to are examined the more plain the case becomes; and I propose to say little beyond expressing my concurrence in the judgment of North, J., who has exhaustively considered the various provisions of the Act. Section 54, which relates to a local authority supplying water, deals with the matter by reference to section 16, which relates to the making of sewers. That section consists of two parts, one of which relates to what may be done by a local authority within their own district; and the other part refers to the provisions of the same Act relating to sewage works outside their district; and those provisions are, as has been admitted by Mr. Cross, and indeed could not be denied, sections 32, 33, and 34 of the Act. The present case is one where there is a united board; and we find that the united district which has been formed does not include the whole of separate districts mentioned in the provisional order, but leaves some parts outside; so that the jurisdiction of the joint board is not coterminous with the districts of the several boards which are united. The plaintiff's land is outside the joint district. But section 285 gives power to any local authority, with the consent of the local authority of an adjoining district, to execute works in such district. Substituting "joint board" for "local authority" in that section, it provides that any joint board may, "with the consent of the local authority of an adjoining district, execute and do in such adjoining district such works or things as they may execute and do in their own district, and on such terms as to payment or otherwise as may be agreed on between them and the authority of such adjoining district." Those words make it clear that the section is dealing with what may be done as between the two boards, and has nothing to do with the rights of individuals. Therefore sections 32, 33, and 34 apply to this case, and in my opinion the learned judge was right and the appeal must be dismissed.

BOWEN and KAY, L.JJ., concurred.

Appeal dismissed.

Solicitors, *Bell, Brodrick, & Gray*, for *Glynne, Jones, & Jones*, Bangor; *Cunliffes & Davenport*, for *Jones & Porter*, Conway.

High Court of Justice.

Chan. Div. North, J. — April 25.

AUSTIN v. BEDDOE. (*a*.)

Will—Bequest of residue—Lease—Assent by executors—Assent by executors as to part of residue.

Testator bequeathed the residue of his estate, including the lease of a colliery, to trustees, who were also executors of his will, on trust for his son on his attaining twenty-one years of age. On the son's attaining that age, the trustees let him into possession, but made no formal assignment of the lease, and there were still debts due from the testator's estate.

Held, that the assent of the executors was sufficient to pass the property in the colliery, and that it was competent for them to assent to the bequest of part of the residue of the estate without assenting to the rest.

This was an action on the part of the lessors to recover possession of a certain colliery, known as Penygroes, in Glamorganshire.

A lease of this colliery had been granted in 1872 for a term of sixty years, and had been assigned to William Beddoe, father of the defendant.

By his will (which so far as it affects the present case is fully set out in the judgment), dated the 25th of April, 1884, William Beddoe appointed R. O. Jones and Gwylym Cristor James executors and trustees thereof, and directed them to stand possessed of the residue of his estate, including the Penygroes Colliery, on trust for his son Edward on his attaining twenty-one years.

(*a*.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

The testator died on the 15th of February, 1887, and his will was proved on the 4th of April, 1887. After the testator's death the executors continued to carry on the Penygroes Colliery until 1888 at considerable loss, when the defendant came of age. The executors, after some negotiations which will be found summarized in the judgment, then allowed him to enter into possession, and he proceeded to work the colliery and pay the expenses.

In answer to an inquiry on the part of the plaintiffs' solicitor as to whether he was right in communicating with them on the subject of the colliery, the defendant being now of age, Mr. G. C. James replied on the 27th of September, 1888, that Mr. Beddoe was now of age and would be paying all accounts in respect of the Penygroes Colliery. No formal assignment of the lease was, however, made to him by the executors.

In the January of 1892 the plaintiffs commenced an action against the defendant, having previously, under section 14 of the Conveyancing Act of 1881, served on him a notice requiring him to remedy certain breaches of covenant and to pay compensation. The defendant had failed to comply with the notice.

In his statement of defence, delivered on the 26th of October, 1892, the defendant denied that the premises comprised in the lease ever became vested in himself. The said lease and premises therein comprised were, the defendant stated, vested in William Beddoe, and upon his death they were and are vested in R. O. Jones and G. C. James as his legal personal representatives.

On the matter coming before the court Mr. G. C. James, the above-named executor and trustee, proved in his evidence that there were debts still due from the testator's estate in connection with which legal proceedings were pending.

Cozens-Hardy, Q.C., MacSwinney, and *P. W. Evans*, for the plaintiffs.—The evidence proves that the executors have made over the property to the defendant, and thus assented to the bequest. He is therefore the proper defendant in the action.

Upjohn, for the defendant.—The evidence does not show assent; and even if it did, assent does not pass property in case of a residuary gift. The doctrine of assent applies only in the case of a specific or general legacy. In such a case the title of the legatee is complete at once, and it is only necessary for the executors to satisfy themselves that the property not so bequeathed is sufficient to meet the liabilities of the estate before they assent. The residue, however, is the primary fund for the payment of debts and legacies, and the executors cannot divest themselves of it without a formal assignment. For this reason the executor is joined with the residuary legatee in assignments of leaseholds. Again, there cannot be an assent as to part of the residue only, as is stated to have been made in this case. It must be an assent to the whole. If the executors assented to the whole, it follows that they have made themselves personally responsible for the testator's debts, which is absurd.

Cozens-Hardy, Q.C., in reply.

Williams on Executors, pp. 1383-4, and *Elliott* v. *Elliott*, 9 M. & W. 23, were referred to in the argument.

NORTH, J.—The first point that I have to decide is a very simple one. The testator, who died in February, 1887, made a will, by which, after various dispositions, he gives certain properties specifically mentioned, and as to the residue of "my other hereditaments, messuages, and premises, not including certain partnership property, and all the rest and residue of my real and personal estate (except as aforesaid), I direct my trustees to stand possessed thereof in trust for my said son Edward, his heirs, executors, and administrators," and so on. There is a clear, absolute disposition of the residue in favour of the son Edward. Then follow the words: "As to such parts thereof as are of freehold and copyhold tenure for my said son Edward and his heirs, but in case of his death without issue then I devise the same to Catherine and Elizabeth in equal shares, subject as to the same limitations over as between them, in case either of them should die without issue." That applies clearly, in my opinion, to freeholds and copyholds only, and does not touch leaseholds.

The testator died in February, 1887; the executors remained in possession for a certain time of the property with which we are now dealing; but in June, 1888, the property producing nothing and there being rent payable in respect of it, and nothing out of which the rent could be paid, the residuary legatee had some conversation with the executors or one of them, and said he wanted to work the property, and for the purpose of developing it to sink a shaft—in other words, to incur a considerable expenditure, which the executors did not see their way to do. They had no money to do it with, and they were not going to spend any part of the testator's estate in sinking a shaft for that purpose. What they do is this. By arrangement with the son they let him into possession. [His lordship then proceded to comment on the evidence in detail, and afterwards continued:—] That is the evidence of the defendant and Mr. James, and what is the meaning of it? I have not the least doubt what the meaning of it is—namely, that as the defendant was residuary legatee, the executor said, "We cannot spend any more money out of the testator's estate, but you may take possession." I should add that at the same time the executor writes to the lessor giving the address of the residuary legatee, and saying that in future he will discharge the rent. From that time the defendant does pay what is to be paid, and the executors do not. Of the intention of this arrangement I have no doubt whatever. It never was intended for a moment to cheat the residuary legatee into finding money of his own to spend on the estate for the benefit of the testator's estate. I think it would have been a very gross wrong if the executors had let him into possession on the terms they did, without assenting. In fact their conduct in the matter seems to me the strongest possible evidence of assent. When I say that they would be cheating him, I do not believe that for a moment they meant to do so. I believe they were acting straightforwardly and rightly, but the meaning of their acts was that he was the person to take the burden on himself and incur the outlay that would have to be made, and the effect of saying that that was done, without assenting, would be that they would have a right to take his improvements, a contention which I cannot accede to for a moment.

Then it is said that as a matter of law they could not assent. In my opinion they could. In the first place, it is said this was a bequest of residue, and not a specific or pecuniary bequest. It was a bequest of certain estates with respect to which the executor has certain duties. He is to pay the debts and liabilities out of it. He may have to pay legacies out it before the property can get to the residuary legatee, but the property does not vest in the legatee without his assent. With his assent it does. It was said there is a distinction between a residuary bequest and any other bequest. I find no trace of it, and no authority has been cited to me in which there is the slightest trace of any distinction between the two. In my opinion the necessity for assent to a bequest of

residue is the same as the necessity for assent to a bequest of a specific chattel or chattels in order that it may vest in the legatee, but when it does vest in him, no doubt he then has the legal estate and can dispose of it. It is said that the practice is not for executors to assent to a particular bequest of residue, but to assign it to the residuary legatee who is the subject of the residuary bequest. That is entirely new to me. If there is anything in it, it means that the residuary legatee cannot have furniture handed to him without some assignment, which is absurd. I take it that, if pressed, Mr. Upjohn would have confined the application to such things as leaseholds, but I know no proposition or authority for treating leaseholds different from anything else. No doubt the residuary legatee in selling leaseholds which he takes as such, gets the executor to join. It is essential that the assent should be given in some way, and if the executor joins in the assignment and testifies his assent, there is a perpetuation of testimony which may be very useful to a purchaser. But to say that a residuary legatee whose legacy has been clearly assented to in writing by the executors cannot make a title is quite new to me.

Then it is said that there cannot be an assent to part of a legacy, and, therefore, if there is any assent here it must have been an assent to the entire residuary bequest; and it is not reasonable to suppose that the executors did assent to the entire residuary bequest, inasmuch as there are some liabilities of the testator's estate still outstanding. In the first place, as a matter of law, it is not correct to say that an executor cannot assent to one out of two, or to one or more out of a larger number, of bequests to the same person or different persons. He may do so of course. If live stock is given to A. and furniture to B., the executor might very well assent to the bequest of the live stock to A. without assenting to the bequest of the furniture to B., and for a very good reason—namely, that he wished to have the responsibility of the live stock being kept, put upon the person to whom it is given. I put it as if there were two different persons, but it does not matter in the least. If there are two things given to the same person the executor may assent to one and decline the other, and *Elliott* v. *Elliott* is a very clear authority, if authority were wanted, to fortify the opinion of all of us extending over a series of years.

Then, further, it is suggested that it is not reasonable to suppose the executors would have assented here, when there are outstanding liabilities. I do not see anything unreasonable in that. No doubt, if there were shown to be very large outstanding liabilities, and the question was whether assent had been given with respect to the only remaining available asset, there would be something in it. But there is nothing in it. There is no improbability in the inferring an assent because there are outstanding liabilities, unless you see the executor would be prejudiced by giving his assent, and it is impossible to say that, unless the other assets with respect to which he has not assented are clearly insufficient to meet the liabilities. In fact, the reason why he may assent to one and not the other, is because he sees he may part with part of the property to one legatee, but as to the rest cannot do so at present.

In my opinion, there is the clearest possible evidence of assent, and I have no doubt assent to this legacy was intended. At any rate, whether intended or not, the facts proved amount to evidence of assent. Assent is a matter really of fact and not of law. There is no doubt that an executor may assent. The question here is whether, as a matter of fact, the circumstances are such that one is justified in coming to the conclusion he did assent, and I have no doubt they are. That being so, if he did assent, the legal objections to his power of assenting fail. Therefore, upon this question, I am of opinion that when the defendant attained twenty-one, and when he was let into possession, there is evidence the executors did assent to the bequest to him so far as related to this property.

Solicitors, *Ridsdale & Son*, for *R. Y. Evans*, Cardiff; *Schultz & Son*, for *James*, Merthyr Tydfil.

Chan. Div.
Kekewich, J. } April 21, 28.

FLETCHER v. BETHOM. (*a*.)

Practice—Pleading—Frivolous action—Motion to dismiss—Rules of the Supreme Court, 1883, *ord.* 25, *r.* 4.

The plaintiff claimed as heir-at-law of a testator who died in 1774, *and alleged that the defendants were in possession as trustees of the testator's will. Some of the defendants traversed this allegation by their defence, whilst the remainder, without delivering a defence, put in evidence, in denial. On a motion by all the defendants to dismiss the action,*

Held, that, as the evidence in support was not distinct and conclusive, and that as some of the defendants had put in a defence, the motion failed.

The plaintiff claimed as heir-at-law of a testator who died in the year 1774, and by the 7th paragraph of his statement of claim he alleged that the defendants were or claimed to be the present trustees of the testator's will, and as such had received the rents and profits of the testator's real estate.

Four of the defendants put in a defence traversing this paragraph of the statement of claim, and pleading the Statute of Limitations. The remaining two put in no defence, but filed evidence by which each of them denied that he was a trustee of the will, and stated that the legal estate had been duly conveyed to the beneficial owners in 1824.

This was a motion by all the defendants asking for the dismissal of the action on the grounds that (*a*) the statement of claim showed no reasonable cause of action, and (*b*) the action was vexatious and an abuse of the process of the court.

Hadley, for the defendants who had put in no defence.—I apply under ord. 25, r. 4: *Lawrence* v. *Lord Norreys*, 38 W. R. 753, 15 App. Cas. 210; *Haggard* v. *Pelicier Frères*, [1892] 2 A. C. 61, 40 W. R. Dig. 137.

Gatey, for the other defendants.—*Attorney-General of Duchy of Lancaster* v. *London and North-Western Railway Co.*, [1892] 3 Ch. 274.

Warmington, Q.C., and *Whinney*, for the plaintiff.—There is a *primâ facie* case. The defendants should have applied for particulars.

KEKEWICH, J.—For some of the purposes of this case it is necessary to bear in mind the terms of ord. 25, r. 4, and the decisions thereon. But the notices of motion, appeal also to the inherent jurisdiction of the court, which has been often recognized, and my judgment must deal as much with that as the jurisdiction given by the order. It was admitted on behalf of the plaintiff that but for the allegation in paragraph 7 the statement of claim would be demurrable. Though not directly admitted it is reasonably obvious that it was inserted for the express purpose of preventing this result. It is scarcely consistent with

(*a*.) Reported by FRANCIS T. DUKA, Esq., Barrister-at-Law.

paragraph 6, for it is not credible that three different farms are vested in different persons, and yet that they all hold the entirety as trustees of one and the same will. It would, however, be straining the jurisdiction of the court to defeat the plaintiff at this stage on the ground of such inconsistency, and the 7th paragraph must be treated as good by way of allegation. The practical question is whether it can be expunged by evidence, that is, whether the court is at liberty on such motions as these to admit evidence to contradict that paragraph, and then, the contradiction being complete, to treat the statement of claim as if the allegations were not there. It is settled that for the purposes of at any rate the first branch of the rule, evidence is not admissible: see *Republic of Peru* v. *Peruvian Guano Co.*, 36 W. R. 217, 36 Ch. D. 489, and *Attorney-General of Duchy of Lancaster* v. *London and North-Western Railway Co.* On the other hand, in order to show that any particular action is an abuse of the powers of the court, evidence seems on principle to be admissible, and has frequently been admitted. The language of A. L. Smith, L.J., in the last case I have referred to may be cited as adverse to this; but it would not be fair to construe it as going beyond the case in hand, which was not concerned with inherent jurisdiction. The distinction between the two classes of cases as regards the admissibility of evidence is stated by Chitty, J., in *Republic of Peru* v. *Peruvian Guano Co.*, and by Lord Blackburn in *Metropolitan Bank* v. *Pooley*, 33 W. R. 709, 10 App. Cas. 210. Therefore, if I had before me distinct evidence contradicting paragraph 7, I should admit it and act on it. It is, in my judgment, vexatious, and an abuse of the process of the court, to endeavour to maintain an action, and especially an action of this character, which must be exceedingly troublesome and costly, by means of an allegation having no real foundation and inconsistent with all the history of the title with which the action is concerned. It is not without regret that I come to the conclusion that the evidence in this case is insufficient. The evidence of the two defendants, who have put in no statement of defence, is not distinct enough to make it inconceivable, though it is highly improbable, that the other defendants, or some of them, may be trustees within the meaning of the allegation in the statement of claim. The other defendants have filed no evidence at all, but they have taken another step which I think is fatal to their motion—viz., by delivering a defence and traversing paragraph 7 of the statement of claim. Having put the point in issue by pleading, they cannot now be allowed to say that it is one which ought not to be in issue at all. The motions will be refused, and the costs be costs in the action.

Solicitors, *Nicol, Son, & Jones; Harrison & Powell*, for *Harrison & Milne*, Kendal; *F. A. K. Doyle*.

Q. B. Div.
(Charles and Vaughan Williams, JJ.) May 16.

YOUNG (*Appellant*) *v.* SOUTHWARK AND VAUXHALL WATER CO. (*Respondents*). (*a.*)

Local government—Water supply—Metropolis—Cutting off water supply—Temporary stoppage by water company to stop leakage—Whether this is a "cutting off"—Notice to vestry—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 49.

A water company, which supplied a certain dwelling-house with water, turned off the water by turning down the stopcock in the service pipe, and this was done solely to prevent waste of water through a certain leak in the service pipe. The stopcock and service pipe were the property of the landlord of the house, and, when the leak was repaired by the landlord, he turned on the water again by opening the stopcock.

Held, that, upon the facts, a magistrate was justified in coming to the conclusion that there was no "cutting off" of the water supply by the company within the meaning of section 49 *of the Public Health* (*London*) *Act*, 1891, *and, therefore, no necessity for the water company to give notice under that section to the sanitary authority.*

Case stated by the metropolitan police magistrate sitting at the South-Western Police Court, in the county of London.

The respondents were summoned for having, on the 3rd of November, 1892, in the parish of St. Mary, Battersea, failed to give notice in writing to the vestry of the parish, as the sanitary authority of the parish, that they had cut off the water supply to a certain inhabited dwelling-house, and had ceased to supply water to the said dwelling-house, contrary to the provisions of the statute 54 & 55 Vict. c. 76 (the Public Health (London) Act, 1891), whereby they had rendered themselves liable to a fine, as provided by the said statute.

The magistrate dismissed the summons, but agreed to state the present case.

The summons was taken out by the appellant on behalf and by the directions of the vestry of the parish, which vestry is the sanitary authority of the district. The respondents are a water company supplying water for profit in the district, and, among other houses, they have been in the habit of supplying water to the house in question, and they were at the time in question providing a constant supply to the district, pursuant to the provisions of the Metropolis Water Act, 1871.

The mode by which water is supplied by the respondents is by means of mains running under the street or roadways, and by service or communication pipes, which are connected with the mains, and which carry the water from the mains to the various houses having a supply of the water. The house in question was until the date in question supplied with water from the respondents' main by means of a service pipe and stopcock which were the property of the landlord of the house, and over which the customer had a right of control.

On the 12th of October, 1892, the landlord of the house, at his own expense, caused a stopcock to be inserted in the service pipe at a point about eleven feet from the point where the service pipe is connected with the main. On the 2nd of November, 1892, the servants of the respondents were engaged in fixing a covering over the stopcock when they ascertained that there was a leakage from the service pipe at a point between the stopcock and the house, and they informed the tenant and occupant of the house of the existence of the leak, and that she had better communicate with her landlord and get the pipe repaired and that they must shut down the stopcock. The respondents' servants thereupon shut down the stopcock, the effect of which was to stop the leak and also to prevent any further supply of water to the house, and the respondents did not, in fact, supply any water to the house from the 2nd of November to the 25th of November, when, the leak having been repaired by the landlord, the supply was renewed by the landlord's plumber opening the stopcock.

It was admitted on behalf of the appellant that

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

there was good reason for so cutting off the water from the house.

The respondents did not give any notice to the vestry that they had cut off the water supply to the house, or that they had ceased to supply the house with water, but on the 8th of November they gave notice to the landlord. The water could have been turned on again at any time by turning the stopcock, which, however, could only be done by means of a key; but it was proved that keys could be purchased by consumers, and that it was a common practice for the water to be turned on and off by them.

On behalf of the appellant it was contended that, upon the facts, the respondents were, as a matter of law, bound to give notice in writing to the vestry within twenty-four hours that they had so cut off the supply of water from the house and ceased to supply it with water, as required by the 49th section of the Public Health (London) Act, 1891, and that the respondents, not having given any such notice, were liable to a fine in accordance with the provisions of the said section.

On behalf of the respondents it was contended that, on the facts, as found, there was no obligation in law on the respondents to give any notice to the vestry, and that the summons should be dismissed.

The magistrate found that it was a matter of urgency, and that it could not have been more than a temporary inconvenience if the occupier had communicated with the landlord at once, and that there was no intention on the part of the respondents to withdraw the supply from the premises, except for the immediate purpose of stopping the leak. The magistrate was of opinion that the contention of the respondents was right in law, and he dismissed the summons, but without costs.

The question now was whether the magistrate was right in holding that there was no cutting off of the water supply within the meaning of the section.

Section 49 of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), provides: (1) "Where a water company may lawfully cut off the water supply to any inhabited dwelling-house and cease to supply such dwelling-house with water for non-payment of water rate or other cause, the company shall in every case, within twenty-four hours after exercising the said right, give notice thereof in writing to the sanitary authority of the district in which the house is situated. (2) Any company which neglects to comply with the foregoing provision shall be liable to a fine not exceeding ten pounds, and it shall be the duty of the sanitary authority to take proceedings against any company in default."

Earle, for the appellant.

McCall, Q.C., and *Horton*, for the respondents.

CHARLES, J.—I think it is quite clear that the mere cessation of the supply of water by the water company does not of itself necessarily cast upon the company the obligation of giving notice to the sanitary authorities. I think it is plain that the mere cessation cannot be in itself an act which renders it incumbent on the company to give notice. If that be so, then the question whether or not the water company has cut off the water supply and ceased to supply a dwelling-house with water is a question of fact rather than a question of law, and, it being a question of fact, and having regard to the findings of the learned magistrate in this case, I am quite unable to overrule the decision at which he arrived. He might have taken another view of the matter, but it is impossible for me, sitting here to review decisions on questions of law, to say that he came to a wrong conclusion on a question of law upon the facts which he states in the case, and on which he decided the case.

There was very considerable delay in repairing a leakage on this particular occasion, but it is equally true that the water company cut off the water as a matter of immediate urgency and solely for the purpose of the immediate reparation of the leak. Further, it is proved as a fact that the servants of the company told the tenant that she had better communicate with the landlord at once and get the pipe repaired.

Under these circumstances I feel unable to say that the magistrate was wrong in the conclusion to which he came. It is quite impossible to say that the cutting off the water for the purpose of curing a leak is in itself a matter which comes within this section.

The magistrate has found, under circumstances which he states, that there was no cutting off or ceasing to supply within the meaning of this section, and I cannot say that he was wrong.

VAUGHAN WILLIAMS, J.—I am of the same opinion. I do not think my brother Charles' decision is in the slightest degree a decision which will enable the water company to say that there has been any decision by this court which relieves the water company generally from the obligation of giving notice, because the alleged cutting off of the supply of water is effected by means of turning down a stopcock of the sort which has been described. All we say is that upon the facts found by the magistrate in this case we do not think we can say it is a finding that there was a cutting off and ceasing to supply within the meaning of the 49th section of the Public Health (London) Act, 1891. This appeal, therefore, will be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant, *W. W. Young & Son.*

Solicitors for the respondents, *Lanfear, Tanner, & Lanfear.*

IN BANKRUPTCY.

Q. B. Div.
Vaughan Williams, J. } April 21; May 19.

In re BRALL.
Ex parte NORTON. (a.)

Bankruptcy—Voluntary settlement—Avoidance—Mortgage of settled property by donee before settlement declared void—Bonâ fide purchaser for valuable consideration—Title of trustee in bankruptcy—Construction of statute—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.

The true meaning of the word "void" in section 47 *of the Bankruptcy Act,* 1883, *is "voidable." The title of a purchaser for valuable consideration in good faith from the donee under a voluntary settlement prior to the avoidance of such settlement cannot afterwards, therefore, be defeated by the trustee in bankruptcy of the settlor.*

Application by the trustee in the bankruptcy of Louis Brall and W. H. Brall that a certain indenture of assignment dated the 14th of April, 1892, and made between the said Louis Brall of the one part and Ada Brall of the other part, whereby certain leasehold hereditaments, No. 206, Tufnell Park-road, Islington, were assigned by the said Louis Brall to the said Ada Brall; and also a certain memorandum of charge dated the 14th of September, 1892, and executed by

(a.) Reported by C. F. MORRELL, Esq., Barrister-at-Law.

the said Ada Brall, whereby it was declared that the said hereditaments and the fixtures thereon for the time being should be charged with the payment to the directors of the London and Westminster Bank (Limited) of all moneys due to the said bank from the above-named W. H. Brall, or his estate, might be set aside on the ground that the said indenture of assignment was a voluntary settlement within section 47 of the Bankruptcy Act, 1883; and that the trustee might be declared to be entitled to the said hereditaments.

The debtor, Louis Brall, carried on business in partnership with his son, W. H. Brall, but the leasehold house, No. 206, Tufnell Park-road, was his separate property, and on the 14th of April, 1892, he assigned these premises to his daughter, Ada Brall, the consideration of the assignment purporting to be natural love and affection.

On the 14th of September, 1892, Ada Brall, by the persuasion of her brother, W. H. Brall, and without the knowledge of her father, Louis Brall, deposited the lease and assignment with the London and Westminster Bank as security for a loan of £400, a joint promissory note by Miss Brall and her brother being also given at the same time. The proceeds of the advance were carried to the partnership account.

In October, 1892, a receiving order was made against the firm; and application was now made by the trustee of the estate for an order setting aside the assignment as being a voluntary settlement and "void" under section 47, and directing the London and Westminster Bank to deliver up the deeds in their possession.

Farwell, Q.C., and *Broomfield*, for the trustee.—The settlement was clearly a voluntary settlement without valuable consideration. Such a settlement is "void" by section 47, and the bank cannot, therefore, make title through or under the donee of the settlement. The settlement is void under section 47, and the bank, taking with notice that it was a voluntary settlement, cannot claim any better title than Ada Brall had to give them. In the recent case of *In re Vansittart, Ex parte Brown, ante*, p. 286, it is true that under somewhat similar circumstances the court held that the trustee could not defeat the title of the purchaser. But the distinction between that case and this is that in that case the purchaser had no notice that the settlement was a voluntary one. Here the bank clearly had notice, because the lease and the assignment were deposited with them.

They also referred to *Patman* v. *Harland*, 29 W. R. 707, 17 Ch. D. 353; *Ex parte Hillman, In re Pumfrey*, 27 W. R. 567, 10 Ch. D. 622; *In re Briggs & Spicer*, 39 W. R. 377, [1891] 2 Ch. 127.

Herbert Reed, Q.C., and *Muir Mackenzie*, for the London and Westminster Bank.—The bank gave valuable consideration, and that valuable consideration relates back so as to prevent the settlement being without valuable consideration, as has always been held with reference to conveyances under the 27 Eliz. Especially must this be so where, as in the present case, the estate of the settlor has had the benefit of the consideration subsequently given. Further, the word "void" in section 47 really means "voidable," and, that being so, a purchaser for valuable consideration without notice prior to the avoidance of the settlement has a better title than the trustee.

They referred to *George* v. *Milbanke*, 9 Ves. 190; *Daubeney* v. *Cockburn*, 1 Mer. 626; *Clarke* v. *Willott*, L. R. 7 Ex. 313, 20 W. R. C. L. Dig. 95, citing *Prodgers* v. *Langham*, 1 Sid. 133; *In re Holden, Ex parte Official Receiver*, 36 W. R. 189, 20 Q. B. D. 43; *Hance* v. *Harding*, 36 W. R. 629, 20 Q. B. D. 732; *In re Vansittart, Ex parte Brown; In re Briggs & Spicer*.

Farwell, Q.C., replied.

Cur. adv. vult.

May 19.—VAUGHAN WILLIAMS, J.—In this case Mr. Brall, senior, settled on his daughter, Miss Ada Brall, a leasehold house in April, 1892. The consideration of the settlement purported to be natural love and affection. Mr. Brall carried on business in partnership with his son, Mr. W. H. Brall, but the leasehold house in question was the separate property of Mr. Brall, senior. In September, 1892, the partnership being in financial difficulties, Mr. Brall, junior, without the knowledge of his father, induced his sister to mortgage the leasehold house to secure a sum of money advanced to him on the joint promissory note of himself and his sister. The proceeds of this advance were carried to the partnership account, but it does not appear that Mr. Brall, senior, had any knowledge of this, although as partner he in fact took the benefit of the advance. Mr. Brall, senior, having become bankrupt, the trustee in his bankruptcy claims as against the respondent bank a declaration that he is entitled to the leasehold house.

It is said on his behalf that the settlement was a voluntary settlement without valuable consideration, and that as such a settlement is void by section 47 of the Bankruptcy Act, 1883, the bank cannot make title through or under the donee of the settlement.

It is contended by the bank that the valuable consideration given by them relates back so as to prevent the settlement being without valuable consideration, as has been held with reference to conveyances under the 27 Eliz., and that especially is this so in a case where the estate of the settlor has had the benefit of the subsequent consideration given by the bank. It is contended further that the word "void" in this section means "voidable," and that therefore a purchaser for valuable consideration without notice prior to the avoidance of the settlement has a better title than the trustee; and that the fact that this section contains no proviso in favour of purchasers for value like that contained in sub-section (2) of section 48 is accounted for by the fact that the necessity for such a proviso in section 48 arises from the fact that a conveyance by way of fraudulent preference is an act of bankruptcy, whereas a voluntary conveyance under section 47 is not an act of bankruptcy.

On the whole, I have come to the conclusion that the word "void" in section 47 of the Bankruptcy Act, 1883, means "voidable," and that consequently anyone who claims, under a settlement affected by this section, as a purchaser for valuable consideration without notice, has a good title as against the trustee in bankruptcy. It is quite plain that the word "void" may mean "voidable," and there are several reasons why it should receive that construction in this Act. The test, to my mind, is whether the object of public policy in view in this section requires the strict construction.

Now it is to be observed that the object of this section is one for which the Legislature has made provision in a long series of Bankruptcy statutes, and that in all the Bankruptcy statutes prior to 1883 the wording of the section was such as to make the settlement voidable and not void, because under those statutes the avoidance of voluntary settlements was effected by an order in bankruptcy for the sale by the trustee of the subject-matter of settlement, and neither the word "void" nor the word "voidable" was used. It may be said that the object of the alteration in the words of the section was to make such settlements void and not voidable, but I think that the object of the Legislature has remained unchanged, and that the purpose of the alteration in the wording was merely convenience of drafting, and to

make it clear that the title of the trustee could not be avoided by anything done between the commencement of the bankruptcy and the declaration of the trustee's title.

It seems to me that the judgment in the case of *In re Holden, Ex parte the Official Receiver* in effect decides that a settlement declared void under section 47 is not void *ab initio*, because in that case the court decided that the trustees of a settlement which became void on the bankruptcy of the settlor by reason of the provisions of section 47 were entitled as against the trustee in bankruptcy to a lien on the trust property for expenses incurred in the performance of their duties as trustees, that is to say, in resisting an action brought to set the settlement aside, for had the settlement been void *ab initio* it would never have had a legal existence, and trustees could not have established a lien.

I am further of opinion that the mere fact that the bank had notice—as I think they in fact had—that the mortgagor claimed under a voluntary settlement is not sufficient to prevent them claiming as purchasers for value in good faith. The bank had no notice of any fact avoiding the voluntary settlement. The bank had no notice that the settlor was insolvent; and the bankruptcy which brought the settlement within the operation of the section had not occurred at the time of the advance and mortgage.

Moreover, the moment it is assumed that the settlement is not void *ab initio*, all those authorities apply under which it was decided under the 27 Eliz. that a purchase for valuable consideration from a person making title under a voluntary conveyance relates back so as to prevent the original conveyance being a voluntary conveyance within the meaning of the Act. And even if this were not so, I should have been inclined to hold that the fact that the settlor's estate got the benefit of the advance made by the bank was itself sufficient to prevent this settlement being a voluntary settlement within the meaning of section 47. I have only to add that in my opinion the argument on behalf of the trustee based upon the absence from section 47 of any clause in favour of purchasers for value like that appearing in section 48 is fallacious. The necessity of the clause in section 48 arises from the fact that fraudulent preference is an act of bankruptcy. The result will be that this motion fails, and the trustee must pay the costs.

Application refused.

Solicitors for the trustee, *Harris & Chetham.*

Solicitors for the London and Westminster Bank, *Ford, Lloyd, Bartlett, & Michelmore.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Bowen and Kay, L.JJ.) — June 7.

PATTLE *v.* ANSTRUTHER. (*a.*)

Frauds, Statute of—Memorandum in writing—Interest in land—Mortgage—Description of mortgagee—Solicitors to "proposing lender"—29 Car. 2, c. 3, s. 4.

Upon a contract for a mortgage of land, the solicitor for the intending mortgagor wrote a letter in which he said that he had called on "the solicitors to the proposing lender and had arranged the proposed loan as follows."

Held, that this was not a sufficient description of the intending mortgagee to satisfy section 4 of the Statute of Frauds.

Appeal from the judgment of A. L. Smith, L.J., at the trial of the action without a jury.

The defendant being desirous of obtaining a loan of £1,000 upon mortgage of certain land, her solicitor entered into negotiations for that purpose with a firm of solicitors, who were acting on behalf of an unnamed client. On the 6th of November, 1891, the defendant's solicitor wrote to the defendant a letter in which he stated: "I called on the solicitors to the proposing lender, and have arranged the proposed loan as follows," &c., setting out the terms of the advance. Eventually the mortgage was not completed, and the plaintiff, who, it appeared, was the person about to advance the money on mortgage, and who alleged that he was always ready to advance the money, but that the defendant refused to execute the mortgage, brought an action to recover damages for breach of contract by the defendant in refusing to complete the mortgage to him. The defendant pleaded that no concluded contract had been entered into, and alternatively that the 4th section of the Statute of Frauds had not been complied with. At the trial the question of the Statute of Frauds was not argued, and the learned judge came to the conclusion that there was a concluded contract for a mortgage, and gave judgment for the plaintiff.

The defendant appealed.

Bowen Rowlands, Q.C. (*Firminger* with him), for the defendant.—Assuming, as the learned judge found, that there was a concluded contract for a mortgage, there is no memorandum in writing sufficient to satisfy section 4 of the Statute of Frauds. The description of the proposed mortgagee is insufficient. The words "proposing lender" in the letter of the 6th of November do not describe him with sufficient certainty to satisfy the statute. [He was stopped.]

Manisty, for the plaintiff.—The words "proposing lender" describe the plaintiff with sufficient particularity. The "proprietor" of an estate is a sufficient description: *Sale* v. *Lambert*, 22 W. R. 478, L. R. 18 Eq. 1; *Rossiter* v. *Miller*, 26 W. R. 865, 3 App. Cas. 1124. Here the proposing lender is described with sufficient certainty as the person who was then instructing a particular firm of solicitors to carry out the mortgage. That at once identifies the lender.

He also referred to *Skelton* v. *Cole*, 1 De G. & J. 587, 6 W. R. Ch. Dig. 84; *Potter* v. *Duffield*, 22 W. R. 585, L. R. 18 Eq. 4; *Morris* v. *Wilson*, 5 Jur. N. S. 168, 7 W. R. Ch. Dig. 91.

Lord ESHER, M.R.—It seems to me that this is not a sufficient description of the mortgagee to satisfy the Statute of Frauds. The question is really concluded by authority. In *Rossiter* v. *Miller* Lord Cairns stated the law on the subject:—"In point of fact the question is, is there that certainty which is described in the legal maxim *Id certum est quod certum reddi potest.* If I enter into a contract on behalf of my client, on behalf of my principal, on behalf of my friend, on behalf of those whom it may concern, in all those cases there is no such statement, and I apprehend that in none of those cases would the note satisfy the requirements of the Statute of Frauds. But if I, being really an agent, enter into a contract to sell Blackacre, of which I am not proprietor, or to sell the house, No. 1, Portland-place, on behalf of the owner of that house, there, I apprehend, is a statement of matter of fact, as to which there can be perfect certainty." Therefore it re-

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

quires a statement of fact as to which there is perfect certainty, or perfect certainty such as is described in the maxim *Id certum est quod certum reddi potest.* That is the principle of law stated by the House of Lords, and that is the principle which was previously applied by Sir George Jessel, M.R., in *Potter* v. *Duffield*, where he said:—"The counsel for the plaintiff contends that you may describe one of the parties as the vendor of the estate; but the statute cannot mean that. It requires the parties to be described in such a manner as that there can be no fair or reasonable dispute as to the person who is selling or buying." That is an application of the principle to the description of one of the parties as "the vendor," and that case shows that such a description will not do. The law is summed up by Kay, J., in *Jarrett* v. *Hunter*, 35 W. R. 132, 34 Ch. D. 182, where he deals with the cases as follows:—"The law on this subject at present is this: If the vendor is described in the contract as 'proprietor,' 'owner,' 'mortgagee,' or the like, the description is sufficient, although he is not named; but if he is described as 'vendor' or as 'client' or 'friend' of a named agent, that is not sufficient; the reason given being, in the language of Lord Cairns, that the former description 'is a statement of matter of fact, as to which there can be perfect certainty, and none of the dangers struck at by the Statute of Frauds can arise': *Rossiter* v. *Miller*, *Sale* v. *Lambert*, *Potter* v. *Duffield*; the reason against the latter description being that, in order to find out who is vendor, client, or friend, you must go into evidence on which there might possibly, as in *Potter* v. *Duffield*, be a conflict, and that, says the late Master of the Rolls in the last named case, 'is exactly what the Act says shall not be decided by parol evidence.' 'I should be thrown,' he continues, 'on parol evidence to decide who sold the estate, who was the party to the contract, the Act requiring that fact to be in writing.'"

Let me now apply that principle of law to this case. "The solicitors for the proposing lender" are the words relied on as being a sufficient description of the mortgagee. It seems to me that it would be breaking through the rule if we were so to hold.

With regard to *Morris* v. *Wilson*, that case was decided upon another principle. The headnote states that "when an agent contracts, it may be proved by parol evidence who is his principal." That case, to my mind, means this: the agent had signed a document so as to make himself personally liable; therefore there was a contract in writing in which both parties were named. That being so, it followed that it could be shown by parol evidence who the agent's principal was, the agent having rendered himself personally liable. That seems to be the meaning of that decision, and it does not affect this case. The appeal must therefore be allowed and judgment entered for the defendant, though I must add that this point was not brought to the attention of the learned judge.

BOWEN and KAY, L.JJ., concurred.

Appeal allowed.

Solicitors for the plaintiff, *Maudes & Tunnicliffe.*

Solicitors for the defendant, *Sawyer & Ellis.*

Q. B. Div.
(Lord Esher, M.R., and Bowen and Kay, L.JJ.) June 9.

LISTER v. LANE AND NESHAM. (a.)

Landlord and tenant—Covenant to repair—Defects due to age and character of demised premises.

In determining whether there has been a breach of a covenant to repair, regard must be had to the age and character of the demised premises; and if the premises through their own inherent defects fall in the course of time into a particular condition, the results of their being in that condition are not breaches of a covenant to repair.

Appeal of the plaintiffs from the judgment of Grantham, J., at the trial in favour of the defendant Nesham.

The plaintiffs were the lessors, and the defendants, Lane and Nesham, were the lessees of certain premises in Lambeth. The action was brought for damages for alleged breach of a covenant in the lease to repair the demised premises. After delivery of defence the defendant Lane died, and the action was continued against Nesham alone.

By a lease dated the 22nd of November, 1883, the plaintiffs demised to the defendants for a term of seven years from the 23rd of September, 1883, certain premises in Lambeth consisting, *inter alia*, of a messuage called The Cottage. The defendants covenanted that they would at their own costs and charges, when and where, and as often as occasion should require, well, sufficiently, and substantially repair, uphold, sustain, maintain, amend, and keep the said premises and yield up the same at the end of the term in such good and substantial state and condition as the lessors might be bound to deliver up the same premises to their superior landlord. The defendants entered and remained in possession of the premises until the end of the term. In August, 1890, the plaintiffs delivered to the defendants a notice requiring them to execute certain repairs specified. By their statement of claim the plaintiffs alleged that the defendants did not do the said repairs pursuant to the said notice and that in consequence the cottage fell into a dangerous condition and had to be pulled down. The plaintiffs claimed £700, the chief item in which was a sum of £569, the cost of rebuilding the cottage. The defendant Nesham by his defence pleaded that the defendant was not bound by his covenant to do the repairs mentioned in the notice; that there had been no breach of the covenant; and that the house had not been pulled down in consequence of any default on his part.

From the evidence given at the trial on behalf of the plaintiffs it appeared that the house was at least 100 years old, and was built on what was called a "mud cill," that is to say, the soil being of a boggy nature, a platform of timber was placed on the muddy soil and the house was built on the timber. The mud was about seventeen feet deep and beneath that was gravel. In consequence of the mud cill being of timber instead of concrete, it gradually decayed and caused the foundations of the house to sink, and this caused the south wall of the house to bulge. The plaintiff's surveyor stated that if the wall had been pointed and underpinned no difficulty would have arisen. In August, 1890, he gave notice to the defendants to pull down the wall, but he did not think this could have been done without pulling down the whole house. In this latter opinion he was corroborated by the district surveyor, who inspected

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

the house in November, 1891, and condemned it as a dangerous structure, and it was then pulled down. The cost of putting the house right was estimated at about £520. All the repairs specified in the notice of August, 1890, were executed with the exception of the repairs to the wall.

Grantham, J., held that there had been no breach of the covenant, and gave judgment for the defendant Nesham.

The plaintiffs appealed.

T. Terrell, for the plaintiffs, argued that, although in construing a covenant to repair regard must be had to the age of the demised premises, yet the language of this covenant was wide enough to include the repairs required.

He cited *Bullock* v. *Dommitt*, 6 T. R. 650; *Payne* v. *Haine*, 16 M. & W. 541; *Easton* v. *Pratt*, 12 W. R. 157, 805, 2 H. & C. 676; *Proudfoot* v. *Hart*, 38 W. R. 730, 25 Q. B. D. 42; *Gutteridge* v. *Munyard*, 7 C. & P. 129, 1 Mood. & Rob. 334. [BOWEN, L.J., referred to *Soward* v. *Leggatt*, 7 C. & P. 613.]

McCall, Q.C., and *Stewart-Smith*, for the defendant Nesham, were not called upon.

Lord ESHER, M.R.—In determining this case we have to consider by what rules our inquiry is to be governed. In Smith's Landlord and Tenant, 3rd ed., at p. 302, the result of the cases on the subject is correctly stated to be as follows: "These cases established that where there is a general covenant to repair, the age and general condition of the house at the commencement of the tenancy are to be taken into consideration," not only in considering the amount of repair which the tenant is bound to do, but "in considering whether the covenant has been broken." I do not cite that passage as an authority, but I adopt it as being a correct statement of the rule to be deduced from the cases. The passage is based on the observations of Tindal, C.J., in his summing up in *Gutteridge* v. *Munyard*, which is always cited on this point, where he said: "Where a very old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term, or of greater value than it was at the commencement of the term. What the natural operation of time flowing on, effects, and all that the elements bring about, in diminishing the value, constitute a loss which, so far as it results from time and nature, falls upon the landlord." Therefore the nature and condition of the house at the time of the demise must be looked at. If it is a wooden house, the tenant, in repairing, is not bound to make it a brick house, or, if the house is built on wooden piles driven into soft ground, the tenant is not obliged to replace the wooden piles by concrete. That is laid down by Lord Abinger in *Soward* v. *Leggatt*, where he points out that the repairs done usually exceeded the amount of the estimate, "because, when the work is actually done, improvements are made for which the tenant is not liable, of which the improved mode of laying the joists in the kitchen is an example; and if the joists have now been laid in a manner which will make them more durable, and last longer, before new ones are again wanted, that is a thing for which the tenant is not liable on the covenant to repair." The cases therefore show that if a person takes a house which is of such a kind that by its own inherent nature it will, in course of time, fall into a particular condition, then the natural consequences of its being in that condition are not within the tenant's covenant to repair, however large the words of the covenant may be, because a covenant to repair a house is not a covenant to deliver up at the end of the term something different from that which the tenant took at the commencement of the term.

In this case the evidence shows that the house is a very old house in Lambeth. In former days, whenever there was an unusually high tide, Lambeth was often under water, and the soil became saturated with water, and was converted into mud. Therefore, before building the house a platform of timber was constructed on the muddy, shifting soil, and on this platform the house was built. That is the nature and condition of the house, and the effects of anything which happens in course of time through natural causes to such a house are results from time and nature which fall upon the landlord, and are not breaches of the covenant to repair, though they are matters which must be taken into account in considering whether the covenant has been broken.

That seems to me to be the state of things in this case, and therefore Grantham, J., was right in holding, on the plaintiffs' evidence, that there was no breach of the covenant. The tenant from time to time did the proper repairs, and now the plaintiffs want him to do something which he is not bound to do, and which would be of no avail unless he built a house of an entirely different kind.

BOWEN, L.J.—I am of the same opinion.

KAY, L.J.—I agree, and have only a few words to add. In construing this covenant regard must be had to the character of what was demised. Assuming that the terms of this covenant were in the widest language, and imposed upon the tenant the liability to put the premises into repair, as well as to keep them in repair, still the case of *Payne* v. *Hayne* shows that the age and character of the house must be taken into account. The character of this house has been described by the Master of the Rolls, and the only way of repairing it during the tenancy would have been by means of what is called underpinning—*i.e.*, it would have been necessary to dig down through the seventeen feet of mud until the solid gravel was reached, and then build up from that to the brickwork of the house. That would not be repairing or upholding or maintaining a house of the same character as was demised. It would be making an entirely new and different house, and, besides that, it is doubtful whether it could be done at all without pulling down the house and rebuilding it. It is not suggested that the repairs could have been done by putting in a new timber foundation in the place of the old one; underpinning such as I have described was the only means of repairing the house, but such work as that does not, in my opinion, come within the covenant to repair, and there has, therefore, been no breach.

Appeal dismissed.

Solicitors for the plaintiffs, *Venning, Sons, & Manning.*

Solicitors for the defendant, *Parson, Lee, & Holmes.*

From Chan. Div. (Lindley, Bowen, and Kay, L.JJ.) — April 21, 27.

In re POWELL'S TRADE-MARK. (*a.*)

Trade-mark—Registration—Action for infringement of one mark—Motion by defendant to expunge a different mark from register—"Person aggrieved"—Isolated

(*a.*) Reported by ARTHUR LAWRENCE, Esq., Barrister-at-Law.

user—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 64 (3), 90.

Under section 90 *of the Patents, Designs, and Trade-Marks Act,* 1883, *requiring an applicant for rectification of the register of trade-marks to be a "person aggrieved," any person who is in the same trade as the person who has registered the mark which is alleged to be wrongfully registered, and who may at some future time in the ordinary scope of his business desire to deal in the article covered by the registration, even though at the time of making the application to rectify he has no present or immediate intention or desire to deal in it, is* primâ facie *a "person aggrieved."*

In 1884 *P., on behalf of G. & Co., a firm of sauce manufacturers, registered the words "Yorkshire Relish" as a trade-mark for a certain sauce, on the ground of user of those words as a trade-mark before the* 13*th of August,* 1875. *P. had previously, in* 1876, *on behalf of the firm, registered two other trade-marks, the characteristic feature of which was the device of a willow pattern plate, claiming for them (as subsequently in the case of the words "Yorkshire Relish") user as trade-marks prior to* 1875. *In* 1891 *P. brought an action against the B. Co., who were also sauce manufacturers, to restrain them from using what he alleged to be a colourable imitation of his registered willow pattern mark. The B. Co. then moved to expunge from the register P.'s "Yorkshire Relish" trade-mark, on the ground that they were "aggrieved" by it being there. The words "Yorkshire Relish" alone had, prior to* 1875, *only been used by P. on packing cases containing bottles of the sauce; the bottles of sauce were put upon the market with the willow pattern mark upon them. The B. Co. had not formed any definite intention or desire to deal in "Yorkshire Relish."*

Held, that the B. Co. were "persons aggrieved" within section 90 *so as to be entitled to apply to rectify the register; and that upon the evidence the user of the words "Yorkshire Relish" upon the packing cases had not constituted user as a trade-mark prior to the passing of the Trade-Marks Registration Act,* 1875, *and the words must accordingly be expunged.*

Decision of Chitty, J., *affirmed.*

Principle in In re Apollinaris Co.'s Trade-Mark, [1891] 2 *Ch.* 186, 39 *W. R. Dig.* 237, *extended.*

Appeal from a decision of Chitty, J.

In 1876 William Powell, on behalf of the firm of Goodall, Backhouse, & Co., who were manufacturers of sauces at Leeds, registered two trade-marks—Nos. 3,101 and 3,102—the former consisting of a label with the words "The Celebrated Yorkshire Relish," and the device of a willow pattern plate, the latter, the device of the willow pattern plate alone—claiming many years' user as a trade-mark prior to the 13th of August, 1875, the date of the passing of the Trade-Marks Registration Act, 1875.

In 1884 Powell, in the name of the firm, registered as a trade-mark, No. 37,030, the words "Yorkshire Relish" alone, user as a trade-mark for about eleven years previous to the 13th of August, 1875, being claimed in respect of it.

In 1891 Messrs. Goodall, Backhouse, & Co. brought an action against the Birmingham Vinegar Co., who were manufacturers of sauces at Birmingham, to restrain them from using a label for a sauce of theirs called "London Relish," which they alleged was a colourable imitation of their willow pattern registered trade-mark. The defendant company thereupon moved to expunge from the register the plaintiff's trade-mark No. 37,030, on the ground that they were "aggrieved persons" who were hampered in their business by the retention of that mark on the register, and contending that the trade-mark was bad because the words "Yorkshire Relish" alone had never been used as a trade-mark before 1875.

It did not appear from the evidence that prior to August, 1875, the words "Yorkshire Relish" alone, were used by the plaintiffs except upon packing cases containing bottles of the sauce, the words being stencilled on the cases. The bottles containing the sauce were put upon the market with the words "Yorkshire Relish" and the name of the firm "Goodall, Backhouse, & Co." impressed on the bottles themselves in the making, and also with labels with the willow pattern mark on them placed on the side of the bottles and over the corks. It did not appear that the defendant company had formed any definite present intention or immediate desire to manufacture or sell sauce under the name of "Yorkshire Relish"; a Mr. Thompson, the manager of the defendant company, made an affidavit in which he stated that "the said firm of Goodall, Backhouse, & Co., by means of their said wrongly registered trade-mark, have narrowed and are narrowing the area of business open to the said Birmingham Vinegar Brewery Co., and are excluding the said company from a portion of the trade into which they desire to enter, and the rights of the said company as persons who are engaged in the same trade as the said Goodall, Backhouse, & Co. are restricted by the retention on the register of the said wrongly registered mark, and damage is thereby caused to the company"; but, on his being put in the witness box for cross-examination when the appeal was heard, it appeared that the question of competing in respect of the particular article "Yorkshire Relish" had never been dealt with or discussed by the directors of his company.

Section 64 of the Patents, Designs, and Trade-Marks Act, 1883, provides (3) that "any special and distinctive word or words, letter, figure, or combination of letters or figures, or of letters and figures used as a trade-mark before the 13th day of August, 1875, may be registered as a trade-mark."

Section 90 provides as follows:—"The court may, on the application of any person aggrieved by . . . any entry made without sufficient cause in any such register," *i.e.*, any register kept under the Act, "make such order for . . . expunging or varying the entry, as the court thinks fit."

Chitty, J., held that the applicants were "persons aggrieved" within section 90 of the Patents, Designs, and Trade-Marks Act, 1883, so as to be entitled to apply for the trade-mark to be expunged, and that the words "Yorkshire Relish" alone, had not been used as a trade-mark prior to the passing of the Trade-Marks Registration Act, 1875, and they must be expunged from the register.

From that decision Powell appealed.

Sir Horace Davey, Q.C., Aston, Q.C., and *J. Cutler,* for the appellant.—The first question is whether the respondents are "persons aggrieved" by our mark "Yorkshire Relish" being on the register: the second is whether, if they are, they have made out that the mark is wrongly on the register. As to the first point, the respondents are not "persons aggrieved"; in order to be such, they must be hampered in their trade: *In re Apollinaris Co.'s Trade-Mark,* [1891] 2 Ch. 186, 224, 228, 39 W. R. Dig. 237, which they are not. As to the second point, the words "Yorkshire Relish" were used alone, on the packing cases as a trade-mark, as "distinctive words" indicating that the contents were Goodall & Co.'s goods. *Richards* v. *Butcher,* [1891] 2 Ch. 522, 39 W. R. Dig. 237, is distinguishable, as in that case there was no independent or isolated use of the word "Monopole"; but here the user of the words

"Yorkshire Relish" on the cases was an isolated user, no other words were used. A man may have more than one trade-mark, one for use on packing cases in the wholesale trade, and the other for use on bottles in the retail trade.

They also referred to *Montgomery* v. *Thompson*, [1891] A. C. 217, 39 W. R. Dig. 235.

Moulton, Q.C., Farwell, Q.C., and *P. H. Fothergill*, for the respondents.—The name "Yorkshire Relish" was put on the cases as the name of the thing, to show what was inside the cases, and not as a trade-mark. [They were stopped by the court.]

LINDLEY, L.J.—The first question which here arises is whether the applicants, the respondents on this appeal, are "persons aggrieved," that is to say, whether they have any *locus standi* at all to complain of this trade-mark No. 37,030, even if it should be wrongfully on the register. In order to consider that question we must turn to the authorities which have decided the true construction to be put on the expression "person aggrieved." The real state of things appears to be this: The applicants are a company—they make sauces, they make Worcester Sauce and they make London Relish. They have not considered, as I understand Mr. Thompson, whether they will or will not make Yorkshire Relish; and their position is this, that so long as Yorkshire Relish is on the trade-mark register it is no use considering that, because they cannot do it; but if it were removed it is possible for anything I know that they might; and having regard to the tests which were laid down in the *Apollinaris case* it strikes me that they are persons aggrieved in this sense, that we cannot refuse to hear the case on the merits at their instance. They have such an interest in this matter—they are not common informers, they are not persons who have nothing on earth to do with the sauce trade—and it may well be (I do not know whether it is well founded or not) that if they can get rid of this mark they will sell Yorkshire Relish. Therefore I think the first point fails, notwithstanding that it is true that there is no evidence forthcoming that they really will or do intend to make Yorkshire Relish. It is sufficient for them to say, "We should like to consider that, when we are in a position to do it if we wish."

The next point is whether this entry is improperly made on the register. In order to determine that we must go back to the 64th section, clause 3; and now comes the question whether the words "Yorkshire Relish" were used as a trade-mark before the 13th of August, 1875. Now the evidence shows that this term "Yorkshire Relish" has been used by the appellants to denote some kind of sauce made by them ever since 1862, and they have got a reputation for it; but what is most important to observe is this, that they have no exclusive right to the use of the words "Yorkshire Relish" unless they can maintain his particular registered mark. Their right apart from that, is to prevent anybody from selling "Yorkshire Relish" in such a way as to pass off their goods as the appellants' goods.

Now, in what sense and to what extent was it used before 1875? Cases beginning with the *Braided Fixed Star case* (*Re Palmer*, 32 W. R. 306, 24 Ch. D. 504), and going down to the *Diamond Cast Steel case* (*Re Spencer*, 3 Rep. Pat. Cas. 73, 34 W. R. Dig. 200) and the *Monopole case* (*Richards* v. *Butcher*), all show that the user as a trade-mark must be the user of that which is registered as a trade-mark by itself, and not user of it in combination with something else. What is the user here relied upon? In this case a sauce is sold in bottles, and the bottles are not marked "Yorkshire Relish" alone, far from it. The appellants have put upon their bottles a label, which has been in use for a great number of years containing a willow pattern plate, their own names, and other things; and there is a general look about the bottles which would protect the appellants against anybody who sold similar sauce, or any other sauce of a similar name, in bottles similarly got up; but they have never used on their bottles the words "Yorkshire Relish" alone. The only use they have ever made of these words alone, before 1875 was this, that "Yorkshire Relish" was put on the packing cases in which these bottles were sold, and sold in considerable quantities. Upon those packing cases, and upon those alone, the words "Yorkshire Relish" did appear—"Yorkshire Relish" pure and simple, apart from the names of the makers, apart from a plate, and apart from everything else. There may have been, and I believe there were on the packing cases some numbers for booking purposes, but that is not material. Therefore, to that extent they used the words "Yorkshire Relish" alone, on the packing cases, and that is the user on which they rely.

Now, was that user as a trade-mark? Against the appellants' contention there is this fact which is very extraordinary, that in 1876 Powell registers what he calls his trade-mark, and he registers, not "Yorkshire Relish," either alone or in combination with anything else, but he registers the willow pattern plate, and in the interval between 1876 and 1884 he sells his bottles with the old label, as I understand it, but with the addition of a label which runs thus: "Yorkshire Relish," with the willow pattern plate at the corner, "Trade-mark registered, willow pattern plate." Therefore, upon the bottles at all events, and upon the register in 1876 and between 1876 and 1884, he tells you that his trade-mark is the willow pattern plate. Now if, notwithstanding that, it appeared that the packing cases sold the sauce in the same sense in which packing cases do sometimes sell their contents—as when you buy a box of cigars with a peculiar brand on the framework of the box that is the trade-mark of the cigar, although the trade-mark is not repeated on each cigar—if those words were used on the packing cases in the same sense and with the same meaning as we find brands and marks on cigar boxes or eau de Cologne cases or chocolate cases, and so on; if the packing case sold the article there would be a great deal in it; but to my mind it is perfectly hopeless for anybody to come to the conclusion which is requisite in order to pull this contention through, and to show that "Yorkshire Relish" on packing cases sold the article. What sold the article was what appeared on the bottle, not the words "Yorkshire Relish" put on the packing cases once on each of four sides. No doubt they were put there to indicate the contents—that they were bottles of "Yorkshire Relish." It appears to me, therefore, that the proof in fact of the user of these words as a trade-mark before 1875 breaks down. For these reasons I am of opinion that this mark ought to be removed, and that this appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion, and I shall take first the last question my brother has treated, namely, the question whether there is evidence here to satisfy us that the term "Yorkshire Relish" had been used as a trade-mark before the 13th of August, 1875. The term "Yorkshire Relish" has been impressed on packing cases on the outside of the four sides. Is that user a user as a trade-mark of the term "Yorkshire Relish"? It seems to me that the answer is to be given by the simplest consideration of what is really the function of a trade-mark, about which there really can be no question. The function of a trade-mark is to give an indication to the purchaser as to the manufacture or

quality of the goods, to give an indication to his eye of the trade source from which the goods come, or the trade hands through which they pass on their way to the market. It tells the person who is about to buy, or considering whether he shall buy, that what is presented to him is either what he has known before under the similar name as coming from a source with which he is acquainted, or that it is what he has heard of before, as coming from that similar source. A trade-mark in that sense is impressed upon or connected with articles which have to be sold. It is obvious that if it is to be an indication to the purchaser's eye of what I have stated, it must either be impressed on the goods or accompany the goods in such a sense as to produce that effect upon the purchaser. Accordingly it may be either marked on the goods themselves, or, if that is not possible or convenient, it may be marked on the vehicle of the goods, and may be, and sometimes, I dare say, is, marked upon the covering or exterior of the packing case of the goods. But when you are considering a mark upon the vehicle as distinct from a mark upon the goods, or, indeed, just as you would if you were considering the mark on the goods, but, *à fortiori*, when you are considering the mark on the vehicle that conveys the goods—especially an outer covering, like a packing case—you must ask yourself carefully, Is this mark, though it is a mark used by these particular persons, used as a trade-mark? Is its object and use to indicate to the purchaser what I have suggested?

The alternative view of what is put outside a packing case is that its object is not to indicate anything at all to the purchaser, but to indicate to those who are handling the packing case either for the purpose of carriage or storage, or otherwise, what the contents are. We have to decide which of those views is the true view.

It seems to me, though it is perfectly possible that a mark on a packing case may be intended to be used as a trade-mark, it can only as a rule be so, when the packing case is intended to sell the goods, and the packing case is intended to be the thing shown to the purchaser by which he is to judge. I feel very great doubt indeed myself as to whether it would be reasonable to come to the conclusion in such a case as this, that the packing cases were intended to be used in that way for the sale of the goods. Certainly nobody is going to lay down as a matter of law—and it would be impossible to lay down as a matter of law without a universal knowledge of trade, both all trades present and all trades to come—that there may not be trades, and may not be conditions of particular trades, in which marks on packing cases may be and are marks used as trade-marks. I am not going to lay down anything of the sort. I sum up the evidence in this case by saying that so far as the evidence goes I very much doubt whether this was one of that class of cases.

But the balance of judgment falls in one direction most heavily as soon as we learn the history of this case. It is on the bottles, in the case of a sauce, that I should particularly look to find a trade-mark if there is one. Though I do not say as a matter of law it must be so, as a matter of business I should have expected to find it on the bottle. The appellants use on the bottle a different mark altogether, and have used this different mark on the bottle as long as they have used the term "Yorkshire Relish" on the cases, and in 1876 when they came to register, having the power at law, if "Yorkshire Relish" really was a trade-mark of theirs at that time, to register "Yorkshire Relish" as a trade-mark, they do not register "Yorkshire Relish" as a trade-mark at all, but they register this other mark; and on the outside of their bottle is a willow pattern plate device, with "Trade-mark registered, willow pattern plate" upon it; so that they indicate to the world who use these bottles that the trade-mark is not "Yorkshire Relish," but the willow pattern plate. It is not a question of estoppel at all; do not let it be supposed for a moment I am putting it on that. But when we are making up our minds as to the true inference of fact to be drawn and find that in 1876, so far from stating to the world that they were looking upon "Yorkshire Relish" as their trade-mark, they state to the world exactly what their trade-mark is—the willow pattern plate—and do not register at the same time "Yorkshire Relish," I think we may be pretty certain that the conclusion of fact at which we have arrived is the correct one—namely, that the use of this term stamped on the packing cases was not a user of the term as a trade-mark at all. The explanation of it is the simple one that it was put on the packing case to show what was inside the packing case. On these grounds it appears to me that this appeal must so far fail.

But then there is the other point of the appellants, that the respondents to this appeal are not persons who are aggrieved. Persons who are aggrieved are persons who are in some way or other persons interested substantially in having the mark removed from the register or persons who would be substantially damaged if the mark remained. It is very difficult to get a nearer definition than that. In the *Apollinaris case* it was pointed out, not as a complete or exhaustive identical proposition, that people would be aggrieved if they were in the same trade and dealt in the same article. To my mind it is equally true that persons would be aggrieved if they are in the same trade, and if they are persons who might reasonably be expected to deal in the same article, though not prepared to declare at the moment a positive determination to do so, and for this reason: Supposing that this mark ought not to be on the register it hampers those who are in the trade not to be able to consider the question of embarking in another branch of the trade, if lawfully entitled to do it. It would be, to my mind, an unbusinesslike construction to place on the term "aggrieved" to say that it could be only applicable to those who actually manifested and had formed a fixed and crystallized intention of dealing in the particular article. There may be fluctuating moments in which business men have to make up their minds upon the future and the prospective chances of their affairs, and they are not bound to say definitely, "I intend to do this, or to do that," in a contingency which has never yet been determined. If it is on the whole a substantive damage to a man, as hampering him in the conduct of his affairs—not merely in the dealing with the article he is selling, but in the arranging his busines for the future—if it hampers him in his arrangement of business matters in the future that a trade-mark is on the register which ought not to be there, he is a person who, to my mind, is sufficiently aggrieved to come within the section. In this particular case it is perfectly true that "Yorkshire Relish" denotes the article which is, and has been for many years, made by the appellants, and to my mind it looks extremely unlikely that any person, even the respondents, could use the term "Yorkshire Relish" without running great risks. If "Yorkshire Relish" is not a term to which the appellants have the exclusive right, it is conceivable that the respondents or any other persons in the trade might, by an honest and strong endeavour, carried out effectually, so distinguish the sale of the article which they were making from the sale of the appellants', or so distinguish the manufacture of the article which they manufacture from the manufacture of the appellants,

as to prevent the possibility of the outside customer being deceived. It is impossible for a court of law to say that might not be done, and it is impossible for a court of law to say, if that can be done, that the trade has not a right to have that door left open to them. On that ground it seems to me that, though "Yorkshire Relish" be an article which up to this time has been made by the appellants, and which up to this time has been identified with their manufacture, nevertheless, unless this trade-mark is rightly upon the register, it cannot be said that the respondents are not interested in having it taken off.

It is admitted that if an action were brought against them for infringing this trade-mark they then would be "persons aggrieved," and would then have a right to take it off. Look at the absurdity to which that leads us. We say to people in the trade who are prevented by this trade-mark, amongst other things—not the only thing, but amongst other things—from using it as theirs: "If any action is brought against you, you then will be sufficiently aggrieved to remove this from the register, but as long as no action is brought against you it may stay on the register so as to terrify you." That is impossible. The true view, to my mind, is that we must look to see, not merely, as we had in the *Apollinaris case*, whether people are in the same trade and actually intend to carry on the business, but whether, in the reasonable scope of the conduct of their affairs, they may want to carry it on, excluding remote possibilities and attaching oneself to real and substantial business chances. I had formed an opinion even before I heard Mr. Thompson in the box, that sauce manufacturers manufacturing relishes of the kind which the respondents are manufacturing would be sufficiently within the area of grievance to become persons aggrieved; and on hearing his evidence in the box I was more than ever satisfied that the possibility is within a reasonable distance of being realized that if this is taken off the register some attempt may be made—a risky attempt, perhaps, but some attempt may be made—which might honestly be made to manufacture "Yorkshire Relish," distinguishing the manufacture from that of the appellants. In this case it seems to me the appeal fails, and ought to fail with the usual result.

KAY, L.J.—I am of the same opinion on both points.

As to the question whether the respondents are "persons aggrieved," in the *Apollinaris case* Fry, L.J., said: If you are actually suing the persons who apply to have the mark taken off the register you might sue them on two grounds: you might sue them first because they were infringing your registered trade-mark, and, as to that, you would have only to prove that your trade-mark was registered, and if there was no application to take it off you would succeed at once if you showed that the use they were making, was of any substantial part of your trade-mark; and you might sue them in the same action, if you liked, for using words calculated to pass off their goods as being the goods of the plaintiff in the action. If you were actually suing, the man who is being sued has a right to say that it is not a proper trade-mark, and has a right to defend himself by applying to have it expunged as being improperly on the register. I agree that the language of Fry, L.J., is confined to the case of an actual pending action for that purpose. If an action were brought against the person who was using the trade-mark for an injunction to prevent an infringement of that trade-mark, that person is a "person aggrieved"; but I entirely deny that the case is confined to that. If he be a person engaged in the same trade, who, in the development of his trade hereafter, may find it necessary or expedient to use these words, and who might be able to use them either alone or in conjunction with some other words, if it were not that there was a trade-mark on the register, then, to my mind, he is a person aggrieved by having this trade-mark on the register, which prevents his using those words in any kind of way. Therefore I think the respondents, being persons in the same trade, as to whom I am not at all satisfied it may not be expedient in the development of their trade hereafter to use the words "Yorkshire Relish" either alone or in conjunction with some other words, and, not being at all satisfied that they may not, for anything that appears to the contrary in this case, have some right to do that, I say that they are "persons aggrieved" by the fact of this trade-mark being on the register if it is improperly there.

Then as to the question of the mark being improperly on the register, I agree entirely with what Fry, L.J., said in the *Monopole case*. You would not expect to find the trade-mark of goods like a sauce which is sold in bottles with labels on the bottles, on the packing cases containing numbers of those bottles which are sent out to retail dealers. They are sent out wholesale in cases to retail dealers packed in those cases. You would not expect those to be the cases on which the trade-mark would be put; but what to my mind is quite conclusive is this: in 1876 the persons who made this "Yorkshire Relish" and sent it out in such cases did register a trade-mark, which they represented they had been using from about the year 1864; but they did not then register the words "Yorkshire Relish" either as part of that trade-mark or as a separate trade-mark. They waited until 1884, and in 1884 they registered the words "Yorkshire Relish" as a trade-mark which they had been using contemporaneously—namely, from 1864. I do not think that any evidence that could be given could be more satisfactory than the act which they themselves did in 1876 to show that they thoroughly understood that the use they had made of the word "Yorkshire Relish" was not the use of a trade-mark. In my opinion the only meaning of the words on the outside of the cases was to indicate that the cases contained "Yorkshire Relish." I think that this appeal should be dismissed, with costs.

Appeal dismissed.

Solicitors for the appellants, *J. S. Salaman.*

Solicitors for the respondents, *Cowper, Thorowgood, & Tabor.*

High Court of Justice.

Chan. Div. } March 10, 16, 29.
Kekewich, J. }

In re MANCHESTER, MIDDLETON, AND DISTRICT TRAMWAYS CO. (*a.*)

Tramway company—Abandonment of undertaking—Paper company—Application of parliamentary deposit — Depositors — Solicitors — Parliamentary agent — Creditors—Parliamentary Deposits and Bonds Act, 1892 (55 & 56 *Vict. c.* 27), *s.* 1.

The undertaking of a tramway company, incorporated by Act of Parliament, and in respect of which the necessary parliamentary deposit had been made, was abandoned, no land having been acquired or work done.

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

Held, that, under the Parliamentary Deposits and Bonds Act, 1892, *s.* 1, *sub-sections* 1 *and* 2, *all the creditors of the company, including the solicitors and parliamentary agents concerned in the promotion of the Bill, were entitled to payment out of the deposit in priority to the depositors; but,*

Held, that, the company being a "paper company," neither the solicitor nor the parliamentary agent was entitled to payment of his costs out of the parliamentary deposit.

The Manchester, Middleton, and District Tramways Co. was incorporated by a special Act of 1885, section 10 of which was as follows:—"If the company do not, previously to the expiration of the period limited for the completion of the tramways, complete the same and open them for the public conveyance of passengers, then and in every such case the deposit fund, or so much thereof as shall not have been paid to the depositors, shall be applicable, and after due notice in the *London Gazette* shall be applied towards compensating any landowners or other persons whose property has been interfered with or otherwise rendered less valuable by the commencement, construction, or abandonment of the tramways, or any portion thereof, or who have been subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company by this Act, and for which injury or loss no compensation or inadequate compensation has been made, and also in compensating all road authorities for the expense incurred by them in taking up any tramways, or materials connected therewith, placed by the company in or on any road vested in or maintainable by such road authorities respectively, and in making good all damage caused to such roads by the construction or abandonment of such tramways, and shall be distributed in satisfaction of such compensation as aforesaid, in such manner and in such proportions as to the Chancery Division of the High Court of Justice in England may seem fit; and if no such compensation is payable, or if a portion of the deposit fund has been found sufficient to satisfy all just claims in respect of such compensation, then the deposit fund, or such portion thereof as may not be required as aforesaid, shall either be forfeited to her Majesty, and accordingly be paid or transferred to or for the account of her Majesty's exchequer in such manner as the Chancery Division thinks fit to order on the application of the solicitor to her Majesty's Treasury, and shall be carried to and form part of the Consolidated Fund of the United Kingdom; or, in the discretion of the Chancery Division, if the company is insolvent and has been ordered to be wound up, or a receiver has been appointed, shall wholly or in part be paid or transferred to such receiver or to the liquidator or liquidators of the company, or be otherwise applied as part of the assets of the company for the benefit of the creditors thereof. . . ."

The promoters of the company were Richard Robinson, Joseph Cunard Morrow, and Isaac Jackson Morrow, who provided the necessary parliamentary deposit of £2,710 3s. 3d., having borrowed the sum from Messrs. Dimsdale, Fowler, Dimsdale, & Barnard, a firm of bankers, and given them a charge on the fund.

The time for completing the tramways was extended by various special Acts, but the company's powers expired in August, 1891. No lands were ever acquired by the company, and no work was ever done. Two of the promoters, Richard Robinson and Joseph Cunard Morrow, held meetings of the company, and purported to pass resolutions, but the company had merely a parliamentary existence.

Four summonses were taken out by (1) Messrs. Elmslie, Forsyth, & Elmslie, the solicitors who acted for the company in the passing of the Bills through Parliament; (2) The Globe Industrial and General Trust Corporation (Limited) who advanced money to the company for the expenses of one of their Bills, and who were judgment creditors on a Lloyd's bond; (3) the widow and legal personal representative of C. J. Hanly, the parliamentary agent of the company, claiming to have a judgment for costs against the company, and contending that her husband had been appointed by a resolution of the company; and (4) Messrs. Dimsdale, Fowler, Barnard, & Dimsdale, who claimed as assignees of the depositors.

The Parliamentary Deposits and Bonds Act, 1892, enacted as follows:—

Section 1. "(1) Where in pursuance of any general or special Act of Parliament, or of any rules made thereunder, moneys or securities have been deposited with, or are standing in the name of, the Paymaster-General, to secure the completion by any company of any undertaking authorized by Parliament, or by any certificate issued under the authority of an Act of Parliament, and the undertaking has not been completed within the time limited in that behalf, the High Court may, notwithstanding anything in any such general or special Act or rules, order that the moneys or securities (in this Act called the deposit fund), or any part thereof, be applied towards compensating any landowners or other persons whose property has been interfered with or otherwise rendered less valuable by the commencement, construction, or abandonment of the undertaking, or any portion thereof, or who have been subjected to injury or loss in consequence of any compulsory powers of taking property given in connection with the undertaking, and have received no compensation, or inadequate compensation, for such injury or loss; and also, in the case of a tramway company, towards compensating the road authorities for the expenses incurred by them in taking up any tramways or materials connected therewith placed by the tramway company in or on any road vested in or maintainable by the road authorities, and in making good all damage caused to such roads by the construction or abandonment of the tramway.

"(2) Subject to payment of any such compensation, and notwithstanding any provision as to forfeiture to the Crown, the High Court may, if a receiver has been appointed, or the company is insolvent and has been ordered to be wound up, or the undertaking has been abandoned, order that the deposit fund, or any part thereof, be paid or transferred to the receiver or to the liquidator of the company, or be applied as part of the assets of the company for the benefit of the creditors thereof.

"(3) Subject to such application as aforesaid, the High Court may, after such public notice as to the court seems reasonable, order that the deposit fund, or any part thereof, be paid or transferred to the depositors or the persons claiming through or under them."

It was contended by Messrs. Dimsdale that the depositors were entitled to the deposit in priority to all the creditors, and the case was argued in the first place on that contention, the contest between the various creditors being reserved for subsequent decision.

Warmington, Q.C., and *C. E. E. Jenkins,* for Messrs. Elmslie.—The Act of 1892 has abolished the distinction between "meritorious" and "non-meritorious" creditors.

They referred to *In re Colchester Tramways Co.,* *ante,* p. 169, [1893] 1 Ch. 309.

Renshaw, Q.C., and *Lyttelton Chubb*, for the Globe Industrial and General Trust Corporation.

Swinfen Eady, for Mrs. Hanly.

Alexander, Q.C., and *J. G. Fawcus*, for Messrs. Dimsdale.—The distinction between "meritorious" creditors and "non-meritorious" creditors has not been affected by the Act of 1892, and still forms the only ground on which the court can exercise the discretion given to it by section 1, sub-section 2, of that Act. We rely on *In re Lowestoft, Yarmouth, and Southwold Tramways Co.*, 25 W. R. 525, 6 Ch. D. 484, and *In re Birmingham and Lichfield Junction Railway Co.*, 33 W. R. 517, 28 Ch. D. 652, cases under Board of Trade rules substantially identical with our special Act. The Act of 1892 merely substituted the depositors for the Crown, and enabled the abandonment of an undertaking without an application to Parliament.

They referred also to *In re Barry Railway Co.*, 25 W. R. 201, 4 Ch. D. 315.

KEKEWICH, J.—To my mind there really is no reasonable doubt on this point, though, as Mr. Alexander has pointed out, it would have been easy for the Legislature to alter the law by express words. It did not see fit to do so, though it has introduced provisions to which I can only give effect by conceiving an implied intention to alter the law, and to give a class of creditors a claim which they had not before. Mr. Alexander's statement of the principle which he relied on was accurate, but the more accurate the more suicidal it is. The principle as stated by counsel is, in substance, that the depositors belong to a class of persons who have had a hand in bringing into existence a paper company, or a company which had not been competent to fulfil the undertaking of a public character which deserved and obtained the sanction of the Legislature. The depositors themselves taking nothing under the old Acts and the Board of Trade Rules, it follows that those who have joined hands with the depositors are to be placed in the same category as the depositors themselves. Therefore, the solicitors who promoted the Bill, the other promoters of the Bill, the parliamentary agents employed by the solicitors, or anyone else who takes the pains to spend money and time in bringing the company before the Legislature, ought not to be paid out of the deposited funds, whereas meritorious creditors, outside the promotion of the Bill, ought to be paid. Subject to that, the deposit was forfeited to the Crown as a warning to promoters, whether depositors, parliamentary agents, or others, that they would get nothing out of such promotion as I have mentioned.

Then the Legislature passed this Act of 1892, every word of which deserves particular attention, and leads up to the conclusion at which I have arrived. The Act is entitled, "An Act to authorize the release of certain deposits, and the cancellation of certain bonds, made or given to secure the performance of undertakings authorized by Parliament," and therefore the Legislature had before it not only the deposits which were to be released, but the exact character of the deposits. They are all "made or given to secure the performance of undertakings authorized by Parliament," not necessarily to secure the Bills being passed, but to give tangible effect to the undertakings sanctioned by Parliament; and they are not to be forfeited or dealt with in any other way, but they can be released; and so, in the 3rd sub-section of section 1, I find that, instead of the deposits being forfeited to the Crown, what is not wanted for the payment of creditors may (subject, of course, to the exercise of a discretion by the court if a proper case requires it) be transferred to the depositors. It does seem a strange thing for the depositors to say, "The Act was passed for our benefit. We who promoted this paper company, who in fact did more than anyone else, because we found the cash, without which nothing could have been done at all, are to have our money back, but the solicitor and parliamentary agent who worked with us, and were as guilty as we were, are to be left out in the cold." That does seem to me to be manifestly unfair. I observe that—partly, no doubt, as has been pointed out, because the Legislature did not wish to be burdened with abandoned Bills, but partly also because the old form of conditions was insufficient—the Legislature has introduced the provision that, when the company is insolvent, and an order to wind up is made, "or the undertaking has been abandoned" (the very event we have now to contemplate), the whole matter has to be considered, and this deposit has to be dealt with. No doubt the words authorizing the application of the fund "for the benefit of the creditors" are the same as before. The fund may still be applied "for the benefit of the creditors"; and those words were construed before, and no doubt would in similar cases be construed again, as applying to meritorious creditors, because there was an ultimate appropriation in favour of the Crown; but now, under this Act, the Crown not coming in, and having nothing whatsoever to say in the matter, and the ultimate gift being to the depositors, on that ground, quite apart from the question of participation in guilt, to my mind all the creditors are intended to take. It would be monstrous to say that the depositors are to be allowed to take this fund away and put it in their own pockets without satisfying all the creditors so far as the fund will go. *In re Colchester Tramways Co.*, the only case on the Act, has very little to do with the case before me, except that it was the case of an abandoned tramway, and that this Act was mentioned.

I am not deciding now—and I must be taken as leaving this open—the question whether, where there is a contest between "meritorious" and "non-meritorious" creditors, the "non-meritorious" will share rateably, or in any proportion at all, with the "meritorious." I leave that open for discussion hereafter. What I do decide is that all creditors, "meritorious" and "non-meritorious," come in before the depositors.

The court then proceeded to hear the claims of the various creditors.

Warmington, Q.C., and *C. E. E. Jenkins*, for Messrs. Elmslie, referred to *Wyatt* v. *Metropolitan Board of Works*, 11 C. B. N. S. 744, 10 W. R. C. L. Dig. 56, and *In re Skegness and St. Leonards Tramways Co., Ex parte Hanly*, 37 W. R. 225, 41 Ch. D. 215.

Swinfen Eady, for Mrs. Hanly.

Renshaw, Q.C., and *Lyttelton Chubb*, for the Globe Industrial and General Trust Corporation.—We rely on the judgment on our bond; but, in any case, we are entitled as having advanced money to meet the expenses of obtaining one of the company's Acts.

They referred to *Bowes* v. *Hope Life Assurance and Guarantee Co.*, 13 W. R. 790, 11 H. L. Cas. 389.

Alexander, Q.C., and *J. G. Fawcus*, for Messrs. Dimsdale.—Messrs. Elmslie looked to Morrow, not to the company, for payment. No regular meeting of the directors or shareholders of the company was ever held: *In re Sanitary Carbon Co.*, W. N., 1877, p. 223. Mrs. Hanly's judgment was obtained after an inquiry was directed in these proceedings, and went by default. The court can go behind such a judgment: *Chambers* v. *Manchester and Milford*

Railway Co., 12 W. R. 980, 5 B. & S. 588; *In re Onslow, Ex parte Kibble*, 23 W. R. 423, L. R. 10 Ch. App. 373.

Warmington, Q.C., in reply, referred to *In re Kensington Station Act*, 23 W. R. 463, L. R. 20 Eq. 197; and *In re Brampton and Longtown Railway Co., Shaw's claim*, 23 W. R. 813, L. R. 10 Ch. App. 177.

Renshaw, Q.C., in reply, referred to *Cunliffe, Brookes, & Co.* v. *Blackburn and District Benefit Building Society*, 33 W. R. 309, 9 App. Cas. 857.

Cur. adv. vult.

KEKEWICH, J.—Having already decided that, as between the depositors and those hitherto styled non-meritorious creditors of the company, the latter are entitled to claim against the deposit which, by the Act of 1892, is directed to be applied "as part of the assets of the company for the benefit of the creditors thereof," I am now called upon to determine whether the claimants are creditors of the company. Some minor points require consideration; but the main question as regards each of these claimants is whether he is entitled to sue the company. The answer to that depends on the established relation between the claimants and the company. It is a question of law, dependent, of course, on the admitted or proved facts, but still a question of law only. Many cases bearing on it were cited in argument, and I have studied them all; but there is no occasion particularly to refer to any but that of *In re Skegness and St. Leonards Tramways Co., Ex parte Hanly*, where all the earlier authorities come under review, and the law is fully discussed and expounded. On behalf of the claimants that case was said to establish that all a solicitor, parliamentary agent, or other person who has rendered services in connection with the company has to prove in order to maintain his claim as a creditor is, that he has no other paymaster to look to but the company. The phrase just used is taken from the judgment of Lindley, L.J., in the case cited, and similar or equivalent language is to be found in the judgments of the other Lords Justices, and also in that of Chitty, J., from whom the appeal was brought.

It must be granted, then, that this absence of any other paymaster is an essential condition to the maintenance of a claim against the company. It does not follow that this is the only essential condition of such claim, and, in my opinion, it is not the only one. It may very well be that a solicitor or parliamentary agent has intentionally or unintentionally, wisely or unwisely, omitted to take such precautions as will enable him to maintain an action for his costs against any other person, and yet he may not be a creditor of the company. That is, positive relations are required to be proved in the ordinary way to the satisfaction of the court, and cannot depend only on the negation of the creditor and debtor relations as regards other persons. It is therefore necessary, in this or any other case, to inquire under what circumstances the claimant rendered the services in respect of which he claims; and whether these circumstances, which of course include all relevant documents, justify the conclusions—first, that he looked to the company for payment, and, secondly, that the company contracted an obligation to pay him.

As regards services rendered in promoting the original Bill for the incorporation of the company, the first inquiry only is needed. The company, not being then in existence, could not directly or indirectly contract an obligation to pay; and, on the other hand, the equivalent of such a contract is upheld by the statute of incorporation, provided only the claimant can be said to have looked to the company for payment, by which I mean to the company and to no other paymaster. Persons who promote Bills in Parliament in the sense of being themselves petitioners for the Bill, or perhaps supporting the petition by contribution, actual or promised, to the costs incurred, may fairly be said, in the absence of any agreement or other indication to the contrary, to look to the company, that is, to the capital of the company, for reimbursement; and it might be assumed, in the absence of evidence of indemnity by others, that they had no other paymaster. They therefore would be entitled to rank as creditors of the company under the usual provision to which I have above referred. But is it reasonable to suppose that a solicitor or parliamentary agent promotes a bill in this sense? To my mind nothing can be more unreasonable. It may be that solicitors and parliamentary agents are occasionally engaged in speculative business to a certain extent, that is, they undertake work which they hope and believe will be successful and remunerative, and they are content to run some risk of losing their costs should the event not fulfil their expectations; but it is not the business or the habit of solicitors or parliamentary agents to promote Bills. Their business is to act on instructions to work as the agents or attorneys for others, who are their principals, and to look to those principals for payment. This is only expressing in my own language what is forcibly put by Lindley, L.J., in the *Skegness case*. I am satisfied that the Lord Justice did not intend to exclude from the view there expounded a case such as I am now considering, viz., one where the solicitor and parliamentary agent say that they have no claim against the promoter, and that therefore they have one against the company. As the Lord Justice says, "The idea will not work." To my mind there is nothing here to show that the solicitor and parliamentary agent had not a claim against the promoters, and everything points to an entirely different conclusion.

Mr. Elmslie says that his firm were solicitors "for the Bill," and the phrase is used to show that he had no client, or at best an incorporeal one.

It is obvious that they were really instructed by Messrs. Robinson and Morrow, the real promoters of the Bill. Of course they took their instructions from someone, and there was nobody else to give them. The bill of costs has been furnished to me, and if confirmation of this view were needed the bill of costs largely confirms it. True, it is not made out to any particular person, and is stated to be "Messrs. Elmslie, Forsyth, & Elmslie's charges in reference to promoting and passing the Manchester, Middleton, and District Tramways Bill"; but the first item of charge is for several attendances upon Mr. Morrow in reference to the proposed application to Parliament, and conferring thereon, and advising, and every page of a somewhat lengthy document illustrates the accuracy of that item. With whom did the solicitors confer? Whom did they advise? There is but one answer—Mr. Morrow and those who co-operated with him in the promotion of the company. Therefore, even if the solicitor has no other paymaster, into which I do not further inquire, he is not, in my opinion, a creditor of the company in respect of the costs incurred about the original Bill. And the parliamentary agent is in the like position. There is no occasion to reason his case out. He was no more a promoter of the Bill than the solicitor was. He acted throughout in a professional character only, received his instructions and fulfilled them as agent, and must look to his principal for payment. At my request his bill of costs also has been furnished, and a perusal of it equally confirms the view above expressed. Indeed, it is compiled on similar lines. It might be said that the promoters

are creditors by virtue of the statute, and that to prevent circuity of action the solicitor and parliamentary agent might claim directly against the company. This is quite possible; but the solicitor and parliamentary agent have come here to say that they have no claim against the promoters; that they looked to only one paymaster, namely, the company, and I must deal with the case on that footing. If they have thus defeated themselves the fault is their own.

This course of reasoning does not necessarily dispose of claims founded on services rendered subsequently to the incorporation of the company. It will be presently seen that in my view it does dispose of them also; but of course it does not do so necessarily, because one might find a liability of the company after incorporation and independently of statutory provision founded on retainers, agreements, or the like, rendering the company liable in its corporate character. Such things are, in fact, put forward both by the solicitor and parliamentary agent as supporting their claim to subsequent costs. But what are they worth? There are documents purporting to be sealed, and in fact sealed, with the common seal of the company. There are documents purporting to be signed on behalf of the company in pursuance of resolutions passed, and if the company could be regarded as having had any real existence for such purposes, it might not be right to go behind those documents, and they might be treated as authoritative, and binding the company even though there was some question touching their propriety. There were addressed to the court, in opposition to this part of the claimants' case, arguments founded on the provisions of the general and special Acts by which this company is governed respecting the election of directors, the number required to constitute a board, and so forth. Far be it from me to say that these arguments, and the statutory provisions on which they rest, do not deserve attention; but, in my opinion, it is not necessary to go so far to find an answer to the claims. Let me say boldly and plainly that, for such purposes as are now under consideration, the corporation did not exist at all. This is, of course, somewhat paradoxical. The corporation was in fact constituted by the Act of 1885 as consisting of "Richard Robinson, Joseph Cunard Morrow, and all other persons and corporations who have already subscribed to or shall hereafter become proprietors in the undertaking," and it is paradoxical to say that the corporation, having been thus constituted, did not for some purposes exist at all. But it is a statutory corporation called into existence by a special Act of Parliament (in which certain general Acts are incorporated) for special purposes, and according to the special and general Acts there is required for the fulfilment of those purposes certain machinery which cannot be set in motion until the original corporation has been enlarged beyond the promoters, Messrs. Robinson and Morrow. The Legislature did not intend that those two gentlemen should by themselves exercise the powers vested in the corporation.

This, to my mind, is of the essence of all that vast body of legislation which is familiar to us through the railway companies, canal companies, and many other companies of a like character, in which the capital and industry of the country are so largely embarked.

Possibly no decision goes quite so far as this; but we are familiar with companies existing only for the purposes of liquidation and devoid of active powers; and the principle upon which I rely is recognized in the already cited case of *In re Skegness and St. Leonards Tramways Co., Ex parte Hanly*, and especially by the judgment of Cotton, L.J., who says: "It is true that in one sense it was called into existence by Act of Parliament; but it never had any existence except upon paper and by Act of Parliament." Mr. Warmington says that Messrs. Robinson and Morrow, in passing resolutions, making agreements, sealing retainers, and so forth, did so, not as directors, but as proprietors; but the answer is that they had no rights as proprietors, that they had no powers other than those conferred by statute, and that the powers conferred by statute could not be exercised but on the lines and according to the terms which the statutes prescribe.

Two subsidiary arguments must be noticed. First, it is said that this reasoning fails because there must be a step or steps towards the extension of the corporation and the performance of its duties, which could only be taken by Messrs. Robinson and Morrow, inasmuch as, in the first instance, they alone were members of the corporation. This may be conceded. The earlier members of the company would be added to the list, consisting, first, of two only by co-optation, and in the first instance Messrs. Robinson and Morrow would be the only co-optators; but, because some such powers were necessarily vested in them, it does not follow that they were intended to exercise the larger powers for which corporate action was required.

Then it is urged that in the last Act, that of 1890, there is a recital that the company have entered into a contract for the construction and completion of the tramways, and that this is a parliamentary recognition of the existence of a company having power to contract. It behoves me to speak carefully and in guarded language. I suppose that Parliament was satisfied that a contract had been entered into, and deemed it right that an opportunity should be given to the company to carry that contract into effect; but it would be pressing the recital too hard to make it say that the contract was one to be fulfilled by Messrs. Robinson and Morrow, or with the proper and effective constitution of the machinery required by statute to work the undertaking.

A separate agreement deserves separate notice. Judgments have been obtained against the company for the sums alleged to be due. It is conceded that, notwithstanding these judgments, the amounts for which they were recovered are not conclusive, and bills of costs are still liable to taxation; but it is insisted that they are conclusive that some amount is due, and due in repect of the services comprised in those bills of costs.

Further, it is argued that if the judgments are not for all purposes conclusive they are so in these proceedings, and that they must be treated as binding on the company until set aside in an action for that purpose. I entertain no doubt that I am entitled to inquire in this matter whether these judgments can be supported or not. Mr. Alexander referred me to a case, *Ex parte Kibble*, where that view was upheld in bankruptcy; and I am sure that like cases might be found in administration proceedings in Chancery. It may well be that if in any given case there arose on a judgment a question of difficulty depending on the study of documents and argument of intricate points of law, and, still more, if it depended on a conflict of evidence requiring oral examination, and possibly the verdict of a jury, the court would decline in administration proceedings to disregard a judgment, and would give the parties an opportunity of contesting it by independent action. This was what occurred in *Bowes v. Hope Life Assurance Co.*, where, be it observed, the petitioners had declined to go into evidence in support of their claim, and there were no materials enabling the court to determine whether the judgment was impeachable or not. But here all

the facts are before us. It is not intended that anything worth attention can be added. The judgments were obtained under order 14, and no defence was offered by the company, which on these occasions, as on all others, was really only another name for Messrs. Robinson and Morrow. If what I have already held is sound, the judgments can be of no more avail to the claimants than retainers under seal, or agreements purporting to be entered into with a paper company.

What has been said applies directly to the claims of the solicitor and parliamentary agent, the clients of Mr. Warmington and Mr. Swinfen Eady; but in truth it governs also the claims of Mr. Renshaw's clients, the Globe Industrial and General Trust Corporation. So far as this latter claim rests on a judgment there is nothing to add. It rests also on a bond intended to be in the form of what is generally styled a "Lloyd's bond," but really given for money advanced. I do not propose to examine the case of *Chambers* v. *Manchester and Milford Railway Co.*, or any other cases bearing on statutory powers of borrowing. Haply they would suffice to show that the Globe Corporation could not sue on the bond. My judgment, however, is founded on the more general principle that it was not competent to such a corporation, or rather to Messrs. Robinson and Morrow, purporting to act on behalf of the corporation, either to borrow money or give a bond. This claim fails with the others and on like grounds. But it is said that although the Globe Corporation cannot recover on their judgment or on their bond, they are entitled to stand in the place of those who really had the money advanced, and that it was expended in paying the costs of the Act of 1890, in which the usual provision for payment of costs, charges, and expenses of and incident to applying for, obtaining, and passing the Act is found. Granted that they are subrogated to the rights of the persons to whom the money was paid, they cannot be in any better position than those persons, and my decision is that the latter could not themselves sue the company. This argument, therefore, also fails, and the result is that all three claims will be rejected.

It remains to deal with the costs. The contest here is entirely between the claimants and the depositors. The latter would have it thought that they appear in a representative character to defend the deposit for the sake of other claimants against it. There is some truth in this; but it is not the whole truth. They are fighting for their own hand. The Act of 1892 allows them to claim the deposit so far as it is not required to be applied as part of the assets of the company for the benefit of the creditors thereof. There is not a word to be said against bankers who in the ordinary course of business find money to satisfy the Standing Orders of Parliament requiring deposits on the application for private Bills; but they must be taken to be aware, and those gentlemen were, in fact, aware, of the circumstances under which the money was required and found. Bankers providing money for such a purpose must know that they must incur some risk, and it is for them, as a matter of business, to make their own terms to cover that risk. Coming into this court to protect and recover the deposit, they can scarcely be said to have meritorious claims, whether against the solicitor, parliamentary agent, or other persons who have also incurred their own risk in the same matter. That they have incurred costs in resisting these claims may assist their application for what is ultimately left of the deposit after such debts, if any, as may be established against the company have been satisfied; but there for the moment the matter must rest.

The order will simply be one for the refusal of all the summonses, and nothing will be said about costs of any party.

Solicitors for Messrs. Elmslie, *Trinders & Capron.*

Solicitors for the Globe Industrial and General Trust Corporation, *Barraud, Legge, & Jupp.*

Solicitor for Mrs. Hanly, *J. W. Watkin.*

Solicitors for Messrs. Dimsdale, *Spyer & Sons.*

Chan. Div. } June 1, 2.
Romer, J. }

THORNE v. HEARD. (a.)

Mortgage — Sale—Proceeds of sale — Negligence—Payment of interest by agent—Trustee Act, 1888.

The defendants were first mortgagees and the plaintiff second mortgagee of a property called "The Nest." The defendants in 1878 *sold the property under their power of sale, the purchase-money being received by one J. S., a solicitor, who acted usually for the plaintiff and also for the defendants in any legal business. He gave the defendants a receipt for the balance of the purchase-money after payment of the sum due to them, the receipt stating that the balance was due to the plaintiff. J. S. never handed over the balance to the plaintiff, but continued to pay him interest as if from the defendants down to the year* 1891, *when he became bankrupt, and it was then discovered he had applied the surplus of the sale moneys to his own use.*

Held, that the defendants were not liable to the plaintiff for the balance of the sale moneys, since, even if they had been guilty of negligence in not seeing that J. S. had authority from the plaintiff to receive the money for him, and in not seeing that J. S. paid it to him, section 8 *of the Trustee Act,* 1888, *barred the claim, and the payment of interest by J. S. until* 1891 *did not keep the right of action alive against the defendants.*

Trial of action.

The defendants, Henry Ellis Heard and William Marsh, were the transferees of two indentures of mortgage dated respectively the 5th of August, 1868, to secure £1,000 charged on a leasehold property called "The Nest" held under a lease for ninety-nine years from the 24th of June, 1869.

The plaintiff, Henry Thorne, was the transferee of a subsequent mortgage on the same property to secure £333.

James Searle, a solicitor, acted in these mortgage transactions both for the plaintiff and the defendants.

In the year 1878 the defendants in exercise of the power of sale contained in the mortgages of the 5th of August, 1868, sold the leasehold premises to Eliza Stewart for £1,700, and the premises were conveyed to her. The purchase-money amounted to £1,700, and the defendants retained £1,000 in satisfaction of their own mortgage and handed the remainder to Searle to be dealt with as to £333 for the plaintiff's benefit, Searle having fraudulently represented himself to them as the plaintiff's agent.

Searle handed two receipts to them, which were in the following terms, and dated the 5th of February, 1878:—

"Received of Messrs. Henry Ellis Heard and William Marsh the sum of £333 being principal money due to Mr. Henry Thorne on two further charges by way of mortgage on 'The Nest,' Torquay, Devon, dated respectively the 25th of June, 1868, and the 22nd of November, 1870, and I undertake to deliver to them the indentures dated the 15th and

(a.) Reported by J. W. GREIG, Esq., Barrister-at-Law.

18th of March, 1872, being transfers of such mortgages, and Mr. Thorne's receipt indorsed thereon within fourteen days from this date.

"JAMES SEARLE."

"Received of Messrs. Henry Ellis Heard and William Marsh the sum of £375 3s. 6d., being the balance of the purchase-money of 'The Nest,' Torquay, Devon, sold to Mrs. Eliza Stewart for £1,700 (after their retaining the sum of £1,000 due on their first mortgage, and paying to Mr. Henry Thorne the sum of £333 due to him on mortgage of the same premises, subject to the first security to them), the sale thereof having been carried out by Messrs. Henry Ellis Heard and William Marsh with the approval of Mr. Henry Thorne, and at my request.

"JAMES SEARLE."

Searle did not pay the £333 over to the plaintiff, but made use of it for his own purposes, though he continued to pay interest to the plaintiff as if on his mortgages down to 1891. On the 18th of February, 1892, Searle presented his petition in bankruptcy, and it then transpired that he had used the moneys so received for his own purposes. This action was then brought by the plaintiff, claiming as against the defendants the sum of £333, or for an account of the surplus moneys realized by the sale after satisfying the moneys due to the defendants.

The writ was issued on the 30th of August, 1892.

The defendants by their defence alleged that the plaintiff's claims were in the nature of a stale demand, and that the plaintiff's right to any relief was barred by the Statute of Limitations (21 Jac. 1, c. 16), and they also relied on section 8 of the Trustee Act, 1888.

The plaintiff pleaded that the solicitor acted as agent for the defendants in paying the interest on the second mortgage, and that, therefore, the case was taken out of the Trustee Act, 1888.

The mortgage under which the defendants sold contained a provision that the moneys arising from any sale in pursuance of the power should be held upon trust, in the first place thereout to pay all the expenses incurred on such sale or otherwise in relation to the premises, and in the next place to apply such moneys in or towards satisfaction of the moneys for the time being owing on the security of the mortgage, and then to pay the surplus (if any) to the mortgagor, his executors, administrators, or assigns.

Neville, Q.C., and *Borthwick*, for the plaintiff.—The debt was kept alive by Searle having paid interest, even though he had no authority: *Rew* v. *Pettet*, 1 Ad. & Ell. 196. Searle's acts were fraudulent, and time did not begin to run until the discovery of the fraud, and that was when Searle became bankrupt in 1892: *Gibbs* v. *Guild*, 30 W. R. 591, 9 Q. B. D. 59. The surplus sale money was "retained" by the defendants within the meaning of the Trustee Act, 1888.

Chadwyck Healey, Q.C., and *Creed*.—Searle acted throughout as the business man of the plaintiff, and therefore, defendant cannot by any possibility be liable.

ROMER, J.—The facts are not substantially in dispute, and the only real question in the case is whether the plaintiff's claim is not barred by lapse of time and the operation of the Trustee Act, 1888, s. 8. I think it is. The plaintiff's first point is that his claim is kept alive by the payment of interest by Searle. But this interest was admittedly not paid with the defendants' knowledge, and in my opinion was not paid on their behalf or by their agent or under such circumstances as would keep on foot the claim as against them. What happened was really this. Searle acted as solicitor for the defendants in the sale. He was trusted by them and left to do what was right in the matter. He received the purchase-money and discharged himself of it as between himself and the defendants, as to the balance after paying defendants' first mortgage debt, by paying it to himself on behalf of the subsequent mortgagees. In particular, as to the mortgage due to the plaintiff, he gave the receipt of the 5th of February, 1878, relating to the £333. That receipt, to my mind, shows that, as between Searle and the defendants, he held the £333 no longer for them or as their agent, but he held it on behalf of the plaintiff, Thorne, and I think it would have been impossible for Searle to say, as against the defendants, after this receipt, that he did not represent himself as having authority to receive the same for Thorne. As a matter of fact he had no such authority, and instead of paying over the £333 to the plaintiff, for whom he held it, he gradually used it for his own purposes, and paid Thorne interest on it, as if the mortgage debt was still existing. But I cannot see how, under these circumstances, it can be successfully contended that such payment of interest was a payment by the defendants or their agents on their behalf, or kept alive the plaintiff's claim as against the defendants. The defendants were no doubt negligent in not inquiring as to the solicitor's authority, and in not seeing that the plaintiff got his money, and as against the plaintiff himself they would remain liable if no Statute of Limitations applied, but this negligence could not be held in any sense fraud by them or prevent their claiming the benefit of any Statute of Limitations, if such statute would protect them from the plaintiff's claim if made after the prescribed lapse of time. This leads me to the consideration of the question whether the Trustee Act, 1888, s. 8, applies in defendants' favour. I think it does. The claim is not founded on any fraud or fraudulent breach of trust to which they were party or privy. Searle's fraud was not theirs, nor were they party or privy to it, nor is the property the subject of the action still retained by them, nor has it been converted to their use. The circumstances under which the balance of the proceeds of sale was dealt with I have already indicated, and I cannot see how, under those circumstances, it can be fairly said that they retained that balance by Searle as their agent, or that they received it and converted it to their own use within the meaning of that phrase as used in section 8. Under these circumstances sub-section (6) applies, and the plaintiff's claim is barred. The action must be dismissed with costs.

Solicitors for the plaintiff, *Mear & Fowler*, for *G H. Thorne*, Nottingham.

Solicitors for the defendants, *Yarde & Loader*, fo *Prickman & Risdon*, Exeter.

Q. B. Div.
(Lord Coleridge, C.J., and Hawkins, J.) — March 2; June 26.

WARDEN AND GOVERNORS OF HIGHGATE SCHOOL v. SEWELL AND OTHERS. (a.)

Landlord and tenant—Relief against forfeiture—Bankruptcy of lessee—Application by underlessee for vesting order—Mode of application—Defence and counter-

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

claim in lessor's action of ejectment—Conveyancing and Law of Property Acts, 1881 (44 & 45 *Vict.* c. 41), *ss.* 14, 69, *and* 1892 (55 & 56 *Vict.* c. 13), *ss.* 2, 4.

Where a lessor has brought an action against the lessee and his underlessees claiming possession of the demised premises under a proviso for re-entry upon the bankruptcy of the lessee, it is competent for the underlessees to set up by way of defence and counter-claim in that action a claim for an order vesting in them the property in question for the remainder of their lease under section 4 of the Conveyancing and Law of Property Act, 1892. *It is not necessary that the application for such an order should be made by summons at chambers.*

Summons under ord. 25, r. 4, to strike out the defence and counter-claim in an action on the ground that they disclosed no reasonable answer or cause of action.

The summons was referred by the judge at chambers to the court.

The facts and arguments are sufficiently stated in the judgment.

March 2.—*William Graham*, for the plaintiffs.

Whitehorne, Q.C., and *Wightman Wood*, for the defendants Nicholson.

The following cases were cited in addition to those refered to in the judgment: *Smeeton* v. *Collier*, 1 Ex. 457; *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong*, 28 W. R. 217, 13 Ch. D. 310; *Quilter* v. *Mapleson*, 31 W. R. 75, 9 Q. B. D. 672; *Frodsham* v. *Frodsham*, 29 W. R. 165, 15 Ch. D. 317.

Cur. adv. vult.

June 26.—The judgment of the COURT (Lord COLERIDGE, C.J., and HAWKINS, J.) was delivered by

HAWKINS, J.—I have to deliver the judgment of the Lord Chief Justice and myself in this case, argued some time ago.

This is a summons referred to us from chambers. It prays that judgment may be entered for the plaintiffs for possession of the premises known as "The London Coffee House," or, in the alternative, first, that the defence may be struck out, on the ground that it discloses no reasonable answer to the plaintiff's claim. Secondly, that the counter-claim may be struck out or disallowed, on the grounds that it is embarrassing and discloses no reasonable cause of action, and cannot be conveniently disposed of in this action.

The plaintiffs are lessors of the premises in question, and the object of this action is to recover from the defendants, who are underlessees thereof, possession under a proviso contained in the original lease for re-entry in case of the bankruptcy of the lessee, his executors, administrators, or assigns.

The object of the defence and counter-claim is to obtain relief against such forfeiture by means of a vesting order under the Conveyancing Act, 1892. The plaintiffs contend that such relief can only be obtained upon application by summons at chambers. The defendants contend that, even assuming it may be obtained at chambers, it may also be obtained by resisting, either by plea or counter-claim, the plaintiffs' action for possession.

The statement of claim delivered on the 3rd of January, 1893, alleges that by a lease granted on the 14th of June, 1878, the plaintiffs demised "The London Coffee House" to John Jones for fifty years, subject to a proviso for re-entry if the lessee, his executors, administrators, or assigns, or any of them, should be adjudged bankrupt; that by various assignments the interest of Jones became vested in one Richard Sewell (a defendant); that in September, 1890, Sewell sublet the premises by way of mortgage to the defendants Nicholson, and subsequently, by way of second mortgage, to the defendants Flower & Son; that on the 19th of July, 1892, Sewell was adjudicated bankrupt, and the defendant Wildy was appointed trustee under the bankruptcy; that the Nicholsons are in possession, claiming title under the underlease, and refuse to give possession though requested so to do.

The plaintiffs claim, first, a declaration that they are entitled to possession; secondly, possession; and thirdly, rent apportioned and mesne profits.

The statement of defence by the defendants Nicholson admits the lease, the assignments, and the mortgage (which was to secure £24,500), and alleges that on the 31st of May, 1892, they took possession in accordance with the underlease, and that they paid the quarter's rent due at Midsummer, 1892, and have always been willing and ready to pay the rent which has accrued due, but the plaintiffs have refused to accept it.

They deny that the plaintiffs are entitled, as against them, to possession or to any apportionment of rent or mesne profits, and submit that they are entitled to relief from the alleged right of re-entry under the provisions of the statute 55 & 56 Vict. c. 13.

They also counter-claim an order vesting in them the property in question for the term of their underlease on such conditions as to the court may seem fit.

By the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 14, sub-section 2, it is enacted that "where a lessor is proceeding, by action or otherwise, to enforce a right of re-entry or forfeiture, the lessee" (this includes an underlessee, sub-section 3) "may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit," and the relief, if granted, is to be upon such terms as the court thinks fit. By sub-section 6 (i.) the section already mentioned was not to extend to a condition for forfeiture on the bankruptcy of the lessee; but the Conveyancing Act, 1892, by section 2, sub-section 3, enacts that sub-section 6 of section 14 of the Act of 1881 shall not apply to a condition for forfeiture on bankruptcy in such a case as the present.

The same statute (1892) also enacts in section 4 that "where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease the court may, on application by any person claiming as underlessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor's action (if any) or in any action brought by such person for that purpose, make an order vesting for the whole term of the lease or any part of the term the property comprised in the lease or any part thereof in any person entitled as underlessee to such estate or interest in such property upon such conditions, &c., as the court in the circumstances of the case shall think fit, but in no case shall any such underlessee be entitled to require a lease to be granted him for any longer term than he had under his original sublease."

Mr. Graham, for the plaintiffs, in his argument before us contended that the defence and counter-claim were both bad: the defence, as disclosing no defence to the plaintiffs' action; the counter-claim as disclosing no reasonable cause of action in the defendant, and also on the ground that it is em-

rassing and could not be conveniently disposed of in this action.

As to the first and second of these points, it would be rash to suggest that they are absolutely free from doubt—for, as regards the defence, it is obvious that at the present moment there is no actual and complete legal answer to the claim for possession, simply because hitherto no relief from the plaintiffs' right to re-enter has yet been obtained. It must, however, be observed that if the defendants' case, as disclosed on the pleadings, be found or admitted to be true in fact and the court shall think fit to grant such relief as is claimed, there will, before the judgment in the action is given, be brought into existence a perfect defence, both to the claim for a declaration that the plaintiffs are entitled to possession and to the claim for actual possession. At this moment it is but an inchoate defence impliedly given by the statute 55 & 56 Vict. c. 13, which will or will not be perfected according to the view taken by the court before which the action is tried.

Both defence and counter-claim depend on the true interpretation of the sections in the statutes of 1881 and 1892 (which are to be read as one Act), to which we have already referred. The 4th section of the Act of 1892 expressly enables an underlessee to apply by way of relief in the lessor's action (if any), or in an action to be brought by himself. It does not, it is true, prescribe how or in what form that application is to be made, but it is clear, if it is to be made "in the lessor's action," that it must be made to the court in which that action is pending, and it seems to us that, in the absence of any enactment to the contrary, it may be conveniently made in the form of a counter-claim, which is in substance an application for a vesting order, which if granted would put an end to plaintiffs' right to possession.

It is necessary to refer to the 69th section of the Act of 1881, which enacts (sub-section 1) that "all matters within the jurisdiction of the court under this Act shall, subject to the Acts regulating the court, be assigned to the Chancery Division of the court," and (sub-section 3) that "every application to the court shall, except where it is otherwise expressed, be by summons at chambers."

It is difficult to suppose that the Legislature intended these sub-sections to be applicable to proceedings for relief under section 14. The lessor has a right to bring his action in either division of the Supreme Court. In the present case he has brought it in the Queen's Bench Division. The defendants propose to apply for relief, as the 14th section gives them a right to do in such action. We do not see how the sub-sections requiring applications to be made in chambers in the Chancery Division can be applied to them. So, again, supposing an underlessee were minded—as the section allows him—to apply for relief in an action brought by himself, in such an action his claim must be for relief in the shape of a vesting order, and if he could so claim in an action brought by himself, why should he not, in the lessor's action, counter-claim for relief against the forfeiture sought to be enforced by that action?

We think there is good reason for the contention that the course taken by the defendants is sanctioned by the not too clear language of the enactments. The vesting order mentioned in the 4th section of the Act of 1892 is a novel form of relief expressly given by that section, and that section points to the necessity of the application for that form of relief being made in an action—whether such action be brought by the lessor for possession or by the underlessee for the purpose of claiming relief. The Legislature could scarcely have contemplated the bringing of an action by the underlessee for the mere purpose of enabling him to make an application at chambers, and we do not think there is any objection to the course adopted by the underlessees in this case who desire to have the important link in their title placed on record if the court thinks fit to grant the vesting order claimed.

In *Ruttledge* v. *Whelan*, 10 L. R. Ir., before Palles, C.B., and Fitzgerald, B., in a lessor's action for possession the court refused a motion for relief from right of re-entry under section 14 of the Act of 1881, upon the ground that the defendants' proper course was to have filed a counter-claim seeking equitable relief. We do not feel called upon to determine whether or not application for relief might, after action brought, be made by motion or summons as well as by counter-claim, as to which see *In re Peach*, North, J., 33 SOLICITORS' JOURNAL, 575. Nor do we feel it necessary to our decision in the present case to discuss any of the various enactments, orders, and rules mentioned and referred to in the arguments addressed to us other than those we have discussed. They do not, in our opinion, materially assist us to determine the sole question before us—viz., whether the defence and counter-claim ought to be struck out: the one because it discloses no defence, the other because it is embarrassing and inconvenient. We think they ought not. See *The Attorney General of the Duchy of Lancaster* v. *London and North-Western Railway Co.*, [1892] 3 Ch. 274. They are pleaded *bonâ fide*, and in our judgment are warranted by the statute of 1892.

We therefore dismiss the summons with costs.

Summons dismissed.

Solicitors for the plaintiffs, *Wilmer & Reeves.*

Solicitors for the defendants, *Nash & Field.*

Q. B. Div.
Lord Coleridge, C.J., and Cave, J. — Jan. 13.

In re ILKLEY HOTEL CO. (*a.*)

Company—Winding up—County court—Jurisdiction—Title to property—Stranger—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 98—*Companies (Winding-up) Act,* 1890 (53 & 54 *Vict. c.* 63), *s.* 1.

Before the date of presentation of a petition in a county court, for the winding up of a company, under the Companies (Winding-up) Act, 1890, *s.* 1, *sub-section* 3, *the manager of the company transferred certain wine to a stranger. The judge of the county court made an order for the delivery up of the wine to the liquidator, on the ground that, the manager having acted* ultrà vires, *the transfer was void.*

Held, that the county court judge had no jurisdiction to decide a question as to the title of property which arose before the date of the winding up between the company and a stranger, and that the order was therefore bad.

Appeal from an order of his Honour Judge Greenhow at the Leeds County Court declaring the transfer of certain wine to the appellants, the Ilkley Brewery Co., to be void, and directing them to deliver it up to the liquidator of the Ilkley Hotel Co. The manager of the hotel company had transferred the wine in question to the appellants shortly before the date of the presentation of a winding-up petition which was presented in the county court against the company under the Companies (Winding-up) Act,

(*a.*) Reported by JOHN P. MELLOR, Esq., Barrister-at-Law.

1890 (53 & 54 Vict. c. 63), in satisfaction of a debt owing to them.

An application was then made by the liquidator of the hotel company under the winding up to the county court judge for an order declaring the transfer void on the ground that it was a fraudulent preference within section 164 of the Companies Act, 1862 (25 & 26 Vict. c. 89).

The county court judge held that it was not a fraudulent preference, inasmuch as the transfer was void as being made by the manager without the authority of the hotel company. But the transfer being void, he made the order appealed from.

The material sections of the Companies (Winding-up) Act provides as follows:—

By section 1, sub-section 3, it is enacted that "where the amount of the capital of a company paid up or credited as paid up does not exceed £10,000, and the registered office of the company is situate within the jurisdiction of a county court having jurisdiction under this Act" as provided in sub-section 1, "a petition to wind up the company or to continue the winding up of the company under the supervision of the court shall be presented to that county court."

By sub-section 6: "Every court having jurisdiction under this Act to wind up a company shall, for the purposes of that jurisdiction, have all the powers of the High Court."

Yate Lee, for the appellants.—The county court judge had no jurisdiction to make an order of this kind, which decides a question of title as to property arising out of a transaction which took place previously to the winding up. There was a specific enactment in bankruptcy giving such jurisdiction to county courts (46 & 47 Vict. c. 52, s. 102, sub-section 1), but not in the Winding-up Act.

Muir Mackenzie, for the liquidator.—I rely on the on the 98th section of the Companies Act, 1862 (25 & 26 Vict. c. 89), by which jurisdiction is given to "cause the assets to be collected and applied in discharge of its liabilities," extended to county courts by the Act of 1890, and upon section 13 of the latter Act and rule 90 made under it, which in effect is similar to section 50 of the Bankruptcy Act of 1883, and provides that the liquidator shall apply to the court to enforce the acquisition of property. The county court judge found out that the wine in question was, in point of fact, an asset of the hotel company.

He referred to *In re Liverpool and London Guarantee and Accident Insurance Co., Mason and Others' case*, 30 W. R. 378; *In re Civil Service and General Stores*, 57 L. J. Ch. 119, 36 W. R. Dig. 42. [CAVE, J.—The point as to jurisdiction was not taken in either of those cases.] *In re Inns of Court Hotel Co.*, L. R. 6 Eq. 82, 16 W. R. Dig. 65.

CAVE, J.—In this case I have been asked by my lord to give my opinion first, as it is a matter with which I am, perhaps, especially familiar. It appears to me to be quite clear that the county court judge had no jurisdiction to make the order appealed against. An application was made to him to declare that the transfer of this wine was a fraudulent preference. A question was raised in the course of the argument as to whether he had any jurisdiction to hear that application. But it is not necessary to decide that, and I do not propose to express any opinion upon the point. Now the learned county court judge came to the conclusion that the manager had no authority to make it, and that there was therefore no valid transfer of the wine. He consequently directed the wine to be given up.

The question is whether the judge had jurisdiction to make that order. Under the Bankruptcy Act of 1883 (46 & 47 Vict. c. 52), s. 102, sub-section 1, the judge of the High Court in Bankruptcy has authority to make such orders as this. So has the county court judge within certain limits; he may entertain such questions where the amount in dispute does not exceed £200. But that jurisdiction is subject to an appeal to the High Court on questions both of law and of fact. So that the whole circumstances may come before the High Court, and the jurisdiction is subject also to a limit.

But under the Winding-up Acts, things are altogether different. In the first place, there is nothing to be found approaching, in wideness of scope, to the sections of the Bankruptcy Act to which I have referred. Then, again, section 98 of the Companies Act, 1862, is simply a general statement of the powers which the court is to have of collecting and applying the assets. Where there is no dispute obviously the official liquidator will take possession of and distribute the assets. But that is quite consistent with the view that the Legislature has not given the jurisdiction to county courts which has been exercised here. The functions of the court are necessarily administrative, and unless an intention to give such power to the court as has been exercised here is to be clearly gathered from the Acts, it cannot be assumed. In my opinion no such intention can be extracted from the Acts—and the other sections which have been referred to are all of them capable of being construed without giving to the court such extensive powers. What would be the consequences of the opposite view? The county court judge would then have power in cases of dispute to entertain a jurisdiction without any limit whatever between the company and another party, and there would be no appeal from his decision, except on questions of law, even though it might involve a matter of £20,000. It could not have been the intention of the Legislature to create such a state of things as that, so careful as it has been to limit the jurisdiction of the county courts in other matters, a state of things which would give him a jurisdiction not possessed by any judge of the High Court. I am of opinion, therefore, for these reasons, that the appeal must be allowed with costs.

Lord COLERIDGE, C.J.—I concur.

Appeal allowed.

Solicitors for the appellants, *Farmer, Carpenter, & Rawson.*

Solicitors for the respondent, *Field, Roscoe, & Co.*, for *Taylor, Jeffery, & Jessop*, Bradford.

Lunacy.

Lindley, Lopes, and A. L. Smith, L.JJ. — June 5.

In re GREGSON. (*a*.)

Trustee — Practice — Appointment of new trustees — Government stock—Form of vesting order—Lunacy Act, 1890 (53 *Vict. c.* 5), *s.* 136, *sub-sections* 2, 5, 6; *s.* 139.

Upon the appointment of new trustees by the court the common form of vesting order in the case of Government stock is to be adhered to, which vests in the trustees the right to call for the transfer of the same, and to receive the dividends due and to accrue due thereon, and which further directs the trustees to transfer the same "into their own names," but if in any particular case a judge thinks it proper to depart from the usual form, and to make a special order, it is perfectly competent for him to do so.

In re New Zealand Trust and Loan Co., ante, *p.* 457, [1893] 1 *Ch.* 403, *explained.*

Motion.

This was a motion for an order directing the Governor and Company of the Bank of England to act upon and in accordance with an order made in this matter, and dated the 15th of May, 1893. Prior to the date of the said order J. Sharp and W. M. Gregson were the trustees of a certain indenture of settlement, dated the 9th of August, 1848, and were as such trustees jointly entitled to a sum of £2,135 4s. 7d. 2¾ per Cent. Consols standing in their names, that being the fund then subject to the settlement upon a trust within the meaning of the Lunacy Act, 1890. William May and Mary Garbett were beneficially interested in the said fund. W. M. Gregson was a person of unsound mind not so found by inquisition, and upon the petition of the beneficiaries and of J. Sharp and H. Garbett, Kay, L.J., made the order in chambers of the 15th of May, 1893, appointing H. Garbett trustee of the settlement of the 9th of August, 1848, in substitution for the said W. M. Gregson, and he ordered that the right to call for the transfer of the said sum of Consols standing in the names of J. Sharp and W. M. Gregson, and to receive any dividends due and to accrue due thereon, should vest in the said J. Sharp and H. Garbett as trustees of the settlement. This order was in the form adopted by the Lords Justices in the case of *In re New Zealand Trust & Loan Co., ante*, p. 457, [1893] 1 Ch. 403.

The order was lodged with the officials of the Bank of England, but they declined to act upon it unless it was amended by the insertion of the words, "and that they do transfer the same into their own names to be held by them upon the trusts of, &c.," and they further stated that they could not accept the order made in *In re New Zealand Trust & Loan Co.* as being a general precedent, but only as applying to that particular case. It appeared that it was the intention of the trustees to distribute the fund among the persons entitled thereto, and not to hold it upon the trusts of the settlement. The applicants applied to the court for directions in the matter.

Farwell, Q.C., and *Hornell*, for the applicants.—This point came before the court in *In re New Zealand Trust & Loan Co.*, but the Bank of England were not concerned in that case. [LINDLEY, L.J.—No, that was a case of shares in a company upon which there was a liability for calls. That made all the difference. I may say that I have been speaking to Kay, L.J., about it. He tells me that his attention was not called to the form of the order, and that he intended to make the usual order. On inquiry it appears to me that these are two totally distinct classes of cases. If the order is intended to be to the effect that the trustees shall hold the stock or shares themselves, then the old form of order is quite right, and there is no reason for departing from it. If, on the other hand, that is not intended (and of course in a case where there is a liability on shares that is not intended), then the other form of order is quite right. On looking at the Trustee Act, 1850, it strikes me that it is perfectly competent for a judge to make an order in either form, and if for any reason he thinks it right to make an order in this form I take it for granted that it would be obeyed; but there was nothing here to call the attention of the Lord Justice to the matter, and he would not have made the order in this form if his attention had been called to it.] Here the trustees do not want to hold the stock. The fund being now divisible under the trust, they desire merely to divide it among the beneficiaries, but inasmuch as one of the trustees is of unsound mind they are obliged to come to the court for an order to make the transfer.

Latham, Q.C., and *Howard Wright*, for the Bank.—There should be some direction in the order that the trustees should distribute the fund if it is immediately divisible. The order we now ask for has been the only one in use since 1850 in the case of Government stock. It simplifies the book-keeping of the Bank to have the stock transferred into the names of the new trustees before they transfer it. The point has therefore been raised in the public interest, for the more simple the method by which the Bank administers the debt the cheaper it can be done. The order in *In re New Zealand Trust & Loan Co.* was only intended to apply to that particular case, and not to be a precedent. In that case your lordships were discussing the form of the order in *In re Peacock*, 28 W. R. 801, 14 Ch. D. 212. Of course, if a judge should make a special order the Bank would obey it, but there was no intention in the present case to depart from the common form. That form contains a direction to the trustees to transfer into their own names: Seton on Decrees, 4th ed., p. 509, 5th ed., vol. 2, pp. 1033 and 1040. In the case of *In re Joliffe's Trusts*, W. N., 1893, p. 84, Kekewich, J., commented on *In re New Zealand Trust & Loan Co.*, and made a vesting order in respect of Consols according to the form in Seton.

Farwell, Q.C., in reply.—This case is governed by section 136, sub-sections 2, 5, and 6 of the Lunacy Act, 1890, and the order is in accordance with that section. The Bank, relying on its practice since 1850, contends that it can disregard the provisions of the Act of 1890, but if they had wished to preserve their former practice they could have obtained the insertion of a proviso in the Act to that effect. In the case of the death of a man in whose name Consols are standing, the Bank enter in their books the death and the names of the executors, and they could, under an order such as the present, make an entry of the vesting order against the name. In *In re New Zealand Trust & Loan Co.* the court followed the form given in Tripp's Chancery Forms, p. 222-3, in preference to that in Seton. None of the orders made since that order have directed a transfer into the names of the trustees. Section 139 of the Act of 1890 enables the judge in Lunacy to make declarations and give directions as to the manner in which the right to any stock or *chose in action* vested under the Act is to be exercised. But it would not be proper for the court to give any directions as to the distribution of the

(*a*.) Reported by W. A. G. WOODS, Esq., Barrister-at-Law.

fund on the mere new appointment of a trustee. The order was consequently rightly made.

LINDLEY, L.J.—I will speak to Kay, L.J., about the order, and we will give our decision later.

In the course of the day the judgment of the court was delivered by

LINDLEY, L.J., who said:—In this matter I have inquired of Kay, L.J., and I find that he never intended to make an order departing from the old form; and the order was drawn up in the present form simply by, I think, attaching importance to to what I said in *In re New Zealand Trust & Loan Co.*, (which is a different case) and applying it to ordinary stock, as to which there is no necessity to depart from the common form. Therefore what we propose to do is this. We have ascertained that there are two or three appeals in lunacy upon this question—not more—and we propose to alter the orders back into the old form and date them as of to-day (of course they will be signed), and then it must be understood that if in any particular case a judge thinks right to depart from that old form and make a special order, as Chitty, J., did in *In re New Zealand Trust & Loan Co.*, it is perfectly competent for him to do so. And if the order is so drawn, of course the Bank of England and all other companies must obey the order, but in this particular case, being satisfied that there was no intention to depart from the ordinary form, we will alter the order back into the old form, and date it as of to-day. In similar cases the old form will be adhered to unless the judge sees fit to depart from it. If he does not see fit to depart from it, we shall uphold it as we did before. Mr. Farwell's clients will take their costs out of their own trust fund. I do not think we ought to make the Bank pay costs. I think it was inadvertence really. The new form will be perfectly right when the shares are not paid up. Unless the trustees really intend to become shareholders, and expose themselves to the liability, it is perfectly obvious that the old form must be wrong in such a case; but that is quite another matter, and is not the case upon the motion before us.

Solicitor for the applicants, *William Sturt.*

Solicitors for the respondents, *Freshfields & Williams.*

Court of Appeal.

From Chan. Div. (Lindley, Lopes, and A. L. Smith, L.JJ.) June 8.

In re EDDYSTONE MARINE INSURANCE CO. (*a.*)

Company—Winding up—Syndicate—Opening up of business—Issue of shares as fully paid up—Consideration—Registered contract—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 8, 38 (4)—*Companies Act,* 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

A company limited by shares registered under the Companies Act, 1862, *has no power to issue shares as fully paid up for which no consideration is given. This is so, although the shares are issued under a contract filed in accordance with the provisions of section* 25 *of the Companies Act,* 1867.

The company is not estopped by recitals in the agreement purporting that consideration has been given from showing that there was none.

Appeal from a decision of Wright, J.

The Eddystone Marine Insurance Co. was registered under the Companies Acts on the 14th of September, 1887, with a capital of £20,000 in 200 shares of £100 each. These shares were afterwards subdivided into 1,000 shares of £20 each. The company was a private company, being composed of a small number of persons forming a syndicate. Subsequently it was determined to increase the capital of the company and to invite subscriptions for shares from the outside public. It was arranged as part of the scheme for throwing open the company to the public that 300 shares of £20 each should be allotted as fully paid up to the directors and shareholders, sixteen persons in all, who held all the shares up to that time issued, and constituted the company. Resolutions were passed to carry the arrangement into effect. On the advice of a registration agent it was decided that the shares should be issued under an agreement to be filed in accordance with the provisions of section 25 of the Companies Act, 1867. An agreement was accordingly drawn up, dated the 15th of June, 1888, and made between the company of the one part and the sixteen directors and shareholders of the other part, which recited that the company was indebted to the parties of the second part "for services rendered and expenses incurred" by them in the formation of the company and establishing its business, and that the company (being desirous to remunerate them for such services and expenses) had unanimously passed a special resolution at an extraordinary general meeting, and afterwards confirmed the same, that 300 shares of £20 each, to be credited as fully paid up and free from any liability for such payment, should be allotted to them in the proportions therein set forth (which was to directors and shareholders in the proportion of three to one); and it was agreed that immediately after execution the agreement should be filed with the Registrar of Joint-Stock Companies, pursuant to section 25 of the Companies Act, 1867, and that the company would thereupon issue the shares referred to. The agreement was executed and registered, and the shares were subsequently issued. The shares were, by the evidence, estimated to be of the value of the goodwill of the undertaking and the cash in hand. It did not appear to have been contemplated at first to have a registered agreement at all, and it was with a view to meet the 25th section of the Act of 1867 that such a method of carrying out the plan was employed; in the same way the agreement was drawn in the terms in which it was, purporting that the issue of shares was in consideration of "services rendered," though, in fact, no attempt seemed to have been made to estimate the value of any such services and allot the shares in proportion to such services, nor did it appear that when the "services" were rendered it was with any idea of being thus paid for them.

On the 22nd of November, 1890, a compulsory order in the usual form was made for winding up the company, and the official liquidator placed the names of Messrs. John and Henry Greenway, who were two of the sixteen directors and shareholders to whom the 300 shares as fully paid up were issued, on the list of contributories in respect of such of those shares as had been issued to them. Each certificate for such shares was marked with the word "Bonus." Originally, and at the date of the winding up, Mr. J. Greenway had ten of these shares; Mr. H. Greenway originally had thirty, but at the date of the winding up he had only fifteen, having transferred the other fifteen in 1889. The matter came before the chief clerk on

(*a.*) Reported by ARTHUR LAWRENCE, Esq., Barrister-at-Law.

notice to settle the list of contributories. Evidence was filed, and in May, 1892, the chief clerk ordered the cases as to the Messrs. Greenway to be placed in the list of witness actions for trial as *quasi*-test cases.

Wright, J., held that there had been nothing which could be treated as consideration given for the shares, and that the names were properly placed upon the list of contributories.

Messrs. Greenway appealed.

Neville, Q.C., and *G. Henderson*, for the appellants.—The issue of fully paid-up shares, such as has been made here, is valid, there having been a registered contract, whether there is consideration for the shares or not. The court cannot go behind the recitals in the agreement and say there was no consideration or no adequate consideration. If the transaction is to be invalidated it must be done by the company applying to have the contract set aside or to make the allottees trustees for the company. The company is estopped by the agreement and the certificates, from saying the shares are not fully paid up.

They referred to *Ooregum Gold Mining Co. of India* v. *Roper*, *ante*, p. 90, [1892] A. C. 125; *Spargo's case*, 21 W. R. 306, L. R. 8 Ch. App. 407; *Henderson* v. *Bank of Australasia*, 37 W. R. 332, 40 Ch. D. 170; *Hutton* v. *West Cork Railway Co.*, 31 W. R. 542, 827, 23 Ch. D. 654; *In re British Seamless Paper Box Co.*, 29 W. R. 690, 17 Ch. D. 467; *In re Wedgwood Coal and Iron Co., Anderson's case*, 26 W. R. 442, 7 Ch. D. 75, 93.

Chadwyck Healey, Q.C., and *Younger*, for the respondent, were not called on.

June 12.—LINDLEY, L.J.—This case is in some respects a hard one on the appellants, because I quite agree with Wright, J., that everything that has been done in this case has been done openly and honestly and *bonâ fide*. There is no attempt to conceal, or to take anybody in, or anything of the kind.

Now the question is whether what has been done is authorized by the Act of Parliament which relates to limited companies. This was a small company—what is called a private company—that is to say, the persons who composed it were not numerous, but there were some fifteen or sixteen of them. They did not contemplate appealing to the public to take up a large issue of shares, and they came to the conclusion that they all might have some paid-up shares for nothing. They resolved by special resolution, which was duly confirmed, to give each other, and to allot to each other, fully paid-up shares for nothing. I say distinctly for nothing, because, having gone through the correspondence and seen how the expression "in consideration of services" got into the agreement, it is obviously a mere blind. There is nothing dishonest in that that I know of, but can it be done? Having passed those resolutions, these gentlemen, the directors, allot, and the other shareholders accept, shares in this company which purport to be fully paid-up shares, and for which nothing has been paid. Now unfortunately the company has got into liquidation, and the liquidator finds these gentlemen registered as shareholders in respect of these shares, which purport to be fully paid up. He looks into it and says, "They are not paid up at all. Therefore pay up." They say, "We are not liable to pay up because these shares have been allotted to us as fully paid in consideration," as it is expressed, "of services." I put the services out of the question. I treat it as a simple proposition of law, new, so far as I know, in detail, but I do not say new in principle. Can a limited company give its members fully paid-up shares for nothing, so that when the company is wound up those shareholders are not liable to pay calls in respect of those shares? It is a simple question, and so far as I know (I have had a great deal of experience in these things) I do not think it has ever come before the court—I mean the decision in that simple naked form.

Now the answer to that question of law, to my mind, is as clear as the sun at noonday, and it is, It cannot be done. It is contrary to the Act of Parliament. To make that out we must look, not at the Companies Act, 1867, but we must go behind that, and beyond that, to the Companies Act of 1862, and see what it is that a shareholder in a company becomes liable to do, when he takes shares.

The sections which are important are section 8 and section 38 (4). When a man takes shares in a company—I do not care whether limited or unlimited—what is his liability? His liability is upon winding up to contribute in proportion to his share, to the liquidation of the debts and expenses of winding up. If it is an unlimited company he must do so to his utmost farthing. If it is a limited company there is a restriction put upon that liability The restriction is expressed in section 38 (4), which says, "In the case of a company limited by shares no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable." Now, pausing there for a moment, if he has paid nothing what is he liable for? Only the nominal amount of the shares he has taken up in the limited company. He must pay it if he has paid less. If he has paid something he must pay the difference. I agree, under the Act of 1862, payment may not have been in cash, for it was decided in a great many cases to the effect that it might have been paid in land, goods, or services. That state of the law led to considerable abuses, which are perfectly well known to those who have had much experience in company matters, and the law was altered by the Act of 1867. The Act of 1867 says (section 25) that shares are to be paid up in cash, unless it is otherwise agreed by a registered agreement. But the Act of 1867 does not affect the liability to pay in some shape or other. You must pay. The liability to pay is imposed, not by the Act of 1867, but by the Act of 1862. The difficulty here is that nothing has been paid, and although there is an agreement registered to the effect that nothing shall be paid, that is contrary to the Act of Parliament. That is the whole solution of this case.

I do not propose to refer to the authorities, because, although the case is new in point of detail, it is covered in point of principle by a string of authorities.

The leading case is, after all, *Trevor* v. *Whitworth*, 36 W. R. 145, 12 App. Cas. 409; but the later case of *Ooregum Gold Mining Co. of India* v. *Roper*, which shows that you cannot issue shares at a discount so that a person taking shares at a discount is not liable to pay the proportion of the shares which has not been paid, is conclusive to show that if you paid nothing at all you must pay in full. To my mind the case is as plain as plain can be. Mr. Henderson has argued that some proceedings must be taken to get rid of the contract. But if once you arrive at the solution that this stipulation about payment up in full was *ultrà vires*, the company cannot be estopped by putting into the document an untruth. You cannot estop a company from saying that it is acting *ultrà vires*, in that way. That would be evading the law in every possible view. I have no doubt that the decision is right, though I think it is hard upon these gentlemen, who did not know the law, and thought they were keeping on the right side, and found they were on the wrong side.

The appeal must be dismissed, with costs.

LOPES, L.J.—It appears to me that this case is an easy case, if, as I think, that which took place was a gift of these paid-up shares. I have come to the conclusion that, in truth and in fact, it was nothing more than a mere gift.

Now Mr. Neville boldly asserted that paid-up shares might be given in the way that these were given to directors or to shareholders. Now I cannot think that that is good law. Mr. Buckley, in his treatise on companies, speaking of the limited liability Acts, describes them in this way:—"The dominant and cardinal principle of these Acts is that the investor shall purchase immunity from liability beyond a certain limit." How? "On these terms, that there shall be and remain a liability up to that limit." Now how can that liability be got rid of? It appears to me that that may be answered by reading a few lines from the judgment of Lord Halsbury in the case of *Ooregum Gold Mining Co. of India* v. *Roper*, where he says: "The whole structure of a limited company owes its existence to the Act of Parliament, and it is to the Act of Parliament one must refer to see what are its powers, and within what limit it is free to act. Now confining myself for the moment to the Act of 1862"—I think it is not necessary to go beyond that Act for the purpose of deciding this case which we have now before us—"Now confining myself for a moment to the Act of 1862, it makes one of the conditions of the limitation of liability that the memorandum of association shall contain the amount of capital with which the company proposes to be registered divided into shares of a certain fixed amount. It seems to me that the system thus created by which the shareholder's liability is to be limited by the amount unpaid upon his shares, renders it impossible for the company to depart from that requirement, and by any expedient to arrange with their shareholders that they shall not be liable for the amount unpaid on the shares." Now it seems to me that that passage is a complete answer to this case. The only other point that was made was with regard to the estoppel, which has been dealt with by Lindley, L.J., and I entirely agree with what has been said by him on that subject, that in the circumstances of this case there is no estoppel.

A. L. SMITH, L.J.—I am of the same opinion. The issue of fact in my judgment had to be tried by Wright, J., and he was perfectly right in coming to the conclusion that these shares had been given by the company to the Messrs. Greenway, and that there were no services rendered or expenses incurred as consideration for which those shares were given to these gentlemen. With regard to that conclusion of fact I think he is quite right. Now what is the result? After the case of *Ooregum Gold Mining Co. of India* v. *Roper* the matter is unarguable, as it is seems to me, because in that case their lordships said the company could not issue to shareholders shares at a discount, or in other words could not issue to shareholders £1 shares when only 15s. was paid. If they cannot do that I suppose they cannot issue to a shareholder a £1 share with nothing paid. Therefore these two gentlemen are liable. They are liable to be placed on the list of contributories, which is as good as a call on these shares, on which nothing in fact has been paid. I think the judgment of my brother right, and I agree with him.

Appeal dismissed.

Solicitors, *Gibbs, White & Crocker; Davidson & Morriss.*

High Court of Justice.

Chan. Div. } Jan. 12, 17, 31; Feb. 4, 25;
Stirling, J. } March 4.

In re MARQUIS OF AILESBURY AND LORD IVEAGH. RIDDELL *v.* RIDDELL. (*a.*)

Settled land—Sale free from incumbrances—Settlement—Tenant for life—Jointures created under prior settlements—Restraint on anticipation—Settled Estates Act, 1877 (40 & 41 *Vict. c.* 18), *s.* 2—*Conveyancing Act,* 1881 (44 & 45 *Vict. c.* 41), *s.* 5—*Settled Land Act,* 1882 (45 & 46 *Vict. c.* 38), *ss.* 2, 3, 10, 20-22, 31 *sub-section* 3, 44.

The S. Estate was by deed in 1826 *settled to such uses as C., Marquis of A., and G., afterwards Marquis of A., should jointly appoint, with remainder in default of appointment to the use of C., Marquis of A., for life, with powers of jointuring a future wife, with remainders over. In* 1833 *and* 1836 *jointure rent-charges were, in exercise of these powers, created in favour of M., Marchioness of A. The estate was, in exercise of the joint power of appointment, by deed in* 1837 *settled, subject to the jointure rent-charges, to the use of C., Marquis of A., for life, with remainder to G. for life, with remainder to his first and other sons in tail male, with remainder to the use of E., afterwards Marquis of A., for his life, with remainder to his first and other sons in tail male. G. B. was the eldest son of E., and by a deed in* 1883 *the estate was limited to the use of E. for life, with remainder to the use of G. B. for life, with remainder to the uses for securing a jointure rent-charge to Lady E. C. for life, with remainder to the first son of G. B. in tail male. G. B. died in* 1868, *leaving the present marquis his only son. In* 1884 *the present marquis converted his estate tail into a base fee, which was in June,* 1885, *enlarged into a fee simple. In July,* 1885, *the estate was by deed limited to the use of E. for life, in restoration of his former life estate, with remainder to the use of the present marquis for life. E. died in* 1886, *and the present marquis had contracted, as tenant for life, to sell the estate.*

Held, that the present marquis was tenant for life of the settlement created by the series of deeds executed between 1826 *and* 1885; *and that he had power, under section* 20 *of the Settled Land Act,* 1882, *to convey the estate discharged from the jointure rent-charges.*

Adjourned summons.

This was a summons taken out under the Vendor and Purchaser Act, 1874, by the Marquis of Ailesbury asking for a declaration that he had power under section 20 of the Settled Land Act, 1882, to convey the Savernake Estate, which he had contracted to sell to Lord Iveagh discharged from two several jointure rent-charges of £1,000 and £500 a year created in favour of Maria, Marchioness of Ailesbury, by indentures dated the 19th of August, 1833, and the 21st of January, 1836, respectively, and also from a similar charge of £3,000 a year created in favour of Lady Evelyn Riddell by an indenture dated the 3rd of January, 1863. This last-mentioned rent-charge had upon the second marriage of Lady Evelyn Riddell been settled so that she was restrained from anticipation in respect of it.

By an indenture of settlement dated the 13th of July, 1826, the Savernake Estate was limited to such uses as Charles, Marquis of Ailesbury, and George, afterwards Marquis of Ailesbury, should jointly appoint, with remainder in default of

(*a.*) Reported by W. A. G. WOODS, Esq., Barrister-at-Law.

appointment to the use of Charles, Marquis of Ailesbury, for life, with powers of jointuring a future wife, with remainders over. The rent-charges in favour of Maria, Marchioness of Ailesbury, were created in exercise of those powers. By an indenture of settlement dated the 10th of May, 1837, the estate was in exercise of the joint power of appointment reserved by the indenture of the 13th of July, 1826, and subject to the jointure rent-charges, limited to the use of Charles, Marquis of Ailesbury, for life, with remainder to George, Marquis of Ailesbury, for life, with remainder to the use of his first and other sons in tail male, with remainder to the use of Ernest, afterwards Marquis of Ailesbury, for his life, with remainder to his first and other sons in tail male. George John Brudenell Bruce was the eldest son of Ernest, Marquis of Ailesbury, and the estate tail so limited to him was duly barred and resettled by the said indenture of the 3rd of January, 1863.

By this indenture, which was the settlement made upon the marriage of the said G. J. B. Bruce (the father of the present Lord Ailesbury) with Lady Evelyn Riddell (then Lady Evelyn Craven) the Savernake Estate was, subject to certain charges, limited, among other uses, to the use of Ernest, Lord Ailesbury, for life, with remainder to the use of G. J. B. Bruce for life, with remainders to uses to secure the said jointure rent-charge of £3,000 a year to Lady Evelyn for her life, with remainder to the first son of G. J. B. Bruce, in tail male.

G. J. B. Bruce died in 1868, leaving the present marquis, his only son, and he in 1884 converted his estate tail into a base fee, which by a disentailing deed, dated the 25th of June, 1885, he enlarged into a fee simple. By an indenture dated the 16th of July, 1885, the estate was limited among other uses to the use of Ernest, Lord Ailesbury, for life in restoration of his former life estate under the settlement of 1836, with remainder to the use of the present Lord Ailesbury, with remainders over. Ernest, Lord Ailesbury, died in 1886.

In June, 1891, the present marquis, as tenant for life, contracted under the Settled Land Acts, 1882-1890, to sell the Savernake Estate to Lord Iveagh. Clause 3 of the contract provided that "the vendor shall . . . apply to the court under the provisions in that behalf of the Conveyancing Act, 1881, for the discharge of all incumbrances having priority to the settlement of the Ailesbury estates under which the vendor is tenant for life, and the persons entitled to which shall not consent in writing to concur in the conveyance to the purchaser, and shall bear the expense of and incidental to and consequent on every such application."

Lady Evelyn Riddell had applied to the court by summons to remove her restraint on anticipation, but Lord Iveagh was not a party to those proceedings, and Stirling, J., directed the matter to stand over to give Lord Iveagh an opportunity of considering his position. The Marquis of Ailesbury was unwilling to apply to the court under the Conveyancing Act, 1881, but insisted that he was able to make a good title without having recourse to the court, and he thereupon took out this summons.

Buckley, Q.C., and *T. Cyprian Williams*, for Lord Ailesbury.—Under section 2, sub-section 1, of the Settled Land Act, 1882, a settlement is created by an instrument, or any number of instruments, whether made before or after, or partly before or partly after, the commencement of the Act under or by virtue of which any land stands for the time being limited to or in trust for any persons by way of succession. Here the settlement is created by the whole series of deeds, beginning with the deed of the 13th of July, 1826, and ending with that of the 16th of July, 1885. Lord Ailesbury is the tenant for life in possession (section 2, sub-section 4), and can, therefore, under section 20, sub-sections 1 and 2 convey the estate to Lord Iveagh free from the jointure rent-charges for which the purchase-money arising from the land will become a security in the place of the land, under section 22, sub-sections 5 and 6, and section 24, sub-section 4. Under section 31, sub-section 1 (vi.), which enables a tenant for life to enter into a contract to do any act for carrying into effect any of the purposes of the Act, he may enter into an arrangement with a jointress, if necessary, to enable him to dispose of the land. The case comes within the letter, and is in accordance with the spirit and policy of the Act as explained in *Bruce* v. *Marquis of Ailesbury*, *ante*, p. 318, [1892] A. C. 356. The object of the Act is to enable the tenant for life to sell every estate in the land so as to give clear possession to the purchaser. Every interest in the land is included in the sale, and every instrument creating an interest or imposing a fetter on the land is included in the settlement: section 3, sub-section 1. The tenant for life can grant leases in priority to jointures: sections 6, 7, 8. The court will give the widest construction possible to the word "settlement" in order to carry into effect the intention of the Act. If the deed of 1826 forms part of this settlement all the jointures are interests under the settlement and not prior to it, and Lord Ailesbury can, therefore, make a good title and complete the sale which is for the benefit of all concerned.

Spencer Butler, for Lord Iveagh.—The contention that all instruments effecting a settlement, however old they may be, are part of the same settlement is surprising, and even revolutionary. The definition of a settlement in the Act of 1882 is substantially the same as the definition in the Leases and Sales of Settled Estates Acts, 1856 and 1877. The jointure must either be an interest in land or an incumbrance. If the jointress is not to be looked upon as having a life interest concurrent with that of the tenant for life, she must be an incumbrancer with a charge on land prior to his interest. [STIRLING, J.—Under section 2, sub-section 4, of the Act of 1882 the determination of the question whether land is settled or not must be governed by the state of facts, and the limitations of the settlement at the time that the settlement takes effect.] If the Act is read in the way contended for there never could be any estate taking precedence of the settlement. In cases under sections 2 and 4 of the Succession Duty Act, 1853, the courts have held that a disposition of property takes effect once, and once only: *In re Lovelace's Settlement*, 7 W. R. 575, 4 De G. & J. 340; *In re Barker*, 7 H. & N. 109, 10 W. R. C. L. Dig. 85. The word "incumbrance," which, according to the definition in section 2 (vii.) of the Conveyancing Act, 1881, includes a charge of a portion, annuity, or other capital or annual sum, would clearly include a jointure rent-charge; and section 5 of that Act contains a provision for the discharge of incumbrances on the sale of land upon payment into court of money sufficient to meet such incumbrances. Lord Iveagh could no doubt by that means get a good title, but it would not be according to the contract, which provides for completion in six weeks' time and gives the purchaser the right to rescind if there is delay caused by anyone but himself. Should the settlement be held to be the compound settlement that is contended for, trustees of it will have to be appointed, and delay will be caused thereby. Section 20, sub-section 2, which provides that the deed executed by a tenant for life to give effect to a sale shall operate subject to all estates, interests, and charges having priority to

the settlement, is against the theory of the compound settlement. Under section 2, sub-section 5, a tenant for life is the person for the time being under a settlement beneficially entitled to possession of settled land for his life; but Lord Ailesbury is not so entitled under the settlements by which the jointures were created, and has, therefore, no power to convey the estates freed from those jointures. [STIRLING, J.—If there is this compound settlement, trustees of it must be appointed to receive the money. Should the trustees of the settlement of July, 1885, consent to act as trustees of such compound settlement, if I hold that there is one, the matter might be carried out. *Sir R. Cust.*—I have no instructions as to that.] Lord Iveagh considers that there has already been unreasonable delay, which is causing inconvenience to the persons interested in the estate. Tenants want reductions of rent, and as neither the receiver nor anyone else can give such reductions they are throwing up their farms. If an order cannot now be made which will protect Lord Iveagh he will have to consider whether he will exercise his option to rescind or bring an action for specific performance.

Sir Reginald Cust, for the trustees of the settlement of 1885.—On a sale under the Act all the charges on the estate are not *ipso facto* transferred to the purchase-money. If a jointress releases her jointure both the estate and the purchase-money are freed. Lord Ailesbury is tenant for life under the settlement of 1885; under the settlement of 1863 he was tenant in tail, and that settlement came to an end on the death of Ernest, Marquis of Ailesbury. The question is under which settlement he acquired power to sell as tenant for life. He did so under the deed of 1885, only, for at most the former settlements impose fetters on the land, and are not instruments under which the estate stands limited by way of succession. A tenant for life cannot do more than trustees for sale could have done. Section 21, sub-section 2, does not imply a power to sell free from incumbrances. Section 22 deals merely with wills under the particular settlement. Section 31 is only auxiliary to the powers given by the Act, and gives no fresh powers. The power to make contracts is introduced as a protection in case the tenant for life should die before completion. It will be difficult to protect the jointresses unless the money is paid into court.

Graham Hastings, Q.C., and *Tremlett*, for Lady Evelyn Riddell, referred to *Frewen* v. *James*, 36 W. R. 840, 38 Ch. D. 383.

Vernon R. Smith, for Captain Riddell and the trustees of his settlement.

Williams, in reply.—A tenant for life within the Act of 1882 is, under section 2, sub-section 7, of that Act, to be deemed to be such notwithstanding that under the settlement or otherwise the settled land or his estate and interest therein is incumbered or charged. He can displace a charge or incumbrance though he could not displace an estate of freehold. [STIRLING, J.—Is there any definition of what is a charge in the Act of 1882?] No, but the policy of the Act is to enable a tenant for life, for the purpose of carrying out a sale, to displace interests prior to his own which are only interests in a limited part of the rents of the land. The interest of a jointress is such an interest; she does not take concurrently with the tenant for life. It was the intention of the contract that the vendor should apply to the court for the discharge of any incumbrances which he could not get rid of himself.

STIRLING, J., after stating the facts, continued:—Section 20 of the Settled Land Act of 1882 provides in sub-section 1 that, "on a sale . . . the tenant for life may, as regards land sold . . . convey . . . the same by deed for the estate or interest the subject of the settlement to the uses and in manner requisite for giving effect to the sale"; and according to sub-section 2, "such a deed . . . is effectual to pass the land conveyed . . . discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of (1) all estates, interests, and charges having priority to the settlement." Now, in order to ascertain what is the power of the tenant for life under that section, and the effect of the deed executed by him in pursuance of such power, it is necessary to determine what constitutes "the settlement" within the meaning of the section. This is to be ascertained from section 2, the definition clause, the material sub-sections of which are as follows:—Sub-section 1.—"Any deed . . . or other instrument or any number of instruments, whether made before or after the commencement of this Act, under or by virtue of which instrument or instruments any land or any estate or interest in land stands for the time being limited to or in trust for any persons by way of succession, creates, or is for the purpose of this Act a settlement, and is in this Act referred to as a settlement or as the settlement, as the case requires." Sub-section 3.—"Land and any estate or interest therein which is the subject of a settlement is for the purposes of this Act settled land." Sub-section 4.—"The determination of the question whether land is settled land for the purposes of this Act or not is governed by the state of facts and the limitations of the settlement at the time of the settlement taking effect." Sub-sections 1 and 3 are in substance taken from the Settled Estates Act of 1856 (19 & 20 Vict. c. 120, s. 17), under which it was held by the Court of Appeal in *In re Birtles' Settled Estates*, 11 W. R. 739, decided in 1863, that in determining the question whether or not an estate was to be treated as settled for the purposes of that Act, regard was to be paid to the state of facts existing at the time when the provisions of the Act were sought to be put in operation, and not to that which existed at the date of the settlement. This led to the passing in 1864 of an enactment substantially identical with sub-section 4. The enactments embodied in sub-sections 1, 3, and 4 were repeated in the Settled Estates Act of 1877, section 2. It plainly appears, therefore, that the Legislature intended that the powers conferred by the Settled Estates Acts should be applicable in cases where the land was settled at the time of the settlement taking effect, even though most of the limitations might be spent at the time when the exercise of those powers was invoked. The Settled Land Act, 1882, contains analogous enactments, expressed in almost identical language, and it seems right to attribute to the Legislature a like intention with respect to them, unless there is discovered something in the nature of the provisions of the Act to prevent such a conclusion from being arrived at. It has been established by the decision of the House of Lords in this very case (see *Bruce* v. *Marquis of Ailesbury*), that the Settled Land Act of 1882 is founded on a broader policy and has a wider scope than the Settled Estates Acts. In the Settled Land Act it is said the wellbeing of settled land is the paramount object, in the Settled Estates Acts the interests only of the persons interested under the settlement.

There is nothing therefore in the scope of the Settled Land Act which would lead one to suppose that the powers conferred by that Act were to be applied within a narrower ambit than those conferred by the Settled Estates Acts. On the contrary, it

tends to the well-being of settled land, and is for the benefit of those interested in it under the settlement that the persons vested with the powers conferred by the Act should be able to give a title to the land, and not merely to some limited estate or interest in it. The machinery, however, of the Settled Land Act differs from that of the Settled Estates Acts, as does also the mode in which that machinery is put in operation. Under the Settled Land Act the powers are given directly to the tenant for life of the settled land, as defined by section 2, sub-section 5, and section 58. Under the Settled Estates Act of 1877 (as under the previous Acts) the powers are to be exercised by the court upon the application (see section 23) of any person entitled to the possession or receipt of the rents and profits of the settled estate for a term of years determinable on his death, or for an estate for life or any greater estate. Regard being had to this difference of language, it may well be that a person entitled to apply to the court under the Settled Estates Acts is not vested with the powers of a tenant for life under the Settled Land Act.

The conclusion at which I arrive is that, though the question whether land is settled land or not is to be determined under both sets of Acts by the state of facts and the limitations of the settlement at the time when the settlement takes effect, the provisions of the Settled Land Act may cease to be applicable when the limitations have been exhausted to an extent which would not prevent recourse being had to the powers of the Settled Estates Act. Now on the 16th of July, 1885, there was executed an instrument, operating *inter vivos*, under which the Savernake Estate became limited to various persons by way of succession. It was not, however, the only instrument under which at that date the estate stood so limited. There then existed, under and by virtue of the settlement of 1863, the life estate of Ernest, Marquis of Ailesbury, and the rent-charge of Lady Evelyn Riddell. I think that the deeds of the 3rd of January, 1863, and the 16th of July, 1885, are instruments under which (in the language of section 2, sub-section 1) the Savernake Estate, at the date of the latter deed, stood limited to various persons by way of succession, and together created or were a settlement for the purposes of the Settled Land Act. This being so, the powers of the Settled Land Act will be exercisable as regards the estate which forms the subject of the settlement effected by those two instruments, provided there is under that settlement an existing tenant for life within the meaning of the Act. I think the present Marquis of Ailesbury is such. If on the 16th of July, 1885, the Savernake Estate had been vested in Ernest, Marquis of Ailesbury, in fee simple, and had by the deed of that date been for the first time limited to the use of Ernest, Marquis of Ailesbury, for life, with remainder to the present marquis for life, with remainders over, it was admitted (and in my opinion rightly admitted) at the bar that (subject to a question with which I shall presently deal) after the death of Ernest, Marquis of Ailesbury, the present marquis would have been a tenant for life capable of exercising the powers of the Settled Land Act, and, consequently, of conveying the estate under section 20 free from the jointure of Lady Evelyn Riddell; and in my opinion he is equally tenant for life under the settlement constituted by the two instruments of 1863 and 1885.

It was suggested, however, that the present Marquis of Ailesbury was not the sole tenant for life for the purposes of the Act, but that he and Lady Evelyn Riddell together constituted such tenant for life. Sub-section 5 of section 2 provides that the person who is for the time being under a settlement beneficially entitled to possession of settled land for his life is for the purposes of the Act the tenant for life of that land, and, sub-section 6, that if in any case there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for the purposes of the Act. The marquis is beneficially entitled to possession or—see sub-section 10 (i.)—receipt of the profits of the Savernake Estate; but it is said that Lady Evelyn by virtue of her jointure is so entitled for a concurrent estate or interest. I think, however, that so long as her rent-charge remains paid (as I understand it to have been down to the present time) she has merely a charge on the settled land, and not an estate or interest concurrent with that of the marquis. It follows, therefore, that the marquis can convey under section 20 of the Settled Land Act, 1882, discharged from the jointure of Lady Evelyn Riddell.

I now turn to consider whether the marquis can in like manner convey the estate discharged from the jointure of Maria, Marchioness of Ailesbury. As to this I have not so complete information, but, so far as I can ascertain, the title appears to stand as follows. [His lordship referred to the state of the title, and continued:—] It appears, therefore, that the life estate to which Ernest, Marquis of Ailesbury, was entitled on the 16th of July, 1885, was first created by the deed of the 10th of May, 1837, which derives its force from the settlement of the 13th of July, 1826, being made in exercise of the joint power thereby reserved. The limitations in the deed of the 10th of May, 1837, take effect as if they were contained in the deed of the 13th of July, 1826. Upon the principles which I have already applied in dealing with Lady Evelyn Riddell's jointure, I think that if what I have stated as to the title be correct, then upon the execution of the deed of the 16th of July, 1885, the Savernake Estate stood limited to uses in favour of various persons by way of succession, under or by virtue of a series of instruments beginning with the deed of the 13th of July, 1826, and ending with that of the 16th of July, 1885; that the present Marquis of Ailesbury is now tenant for life of the settlement created by those instruments, and can, consequently, convey the estate discharged from the jointure rent-charges of Maria, Marchioness of Ailesbury, as well as from that of Lady Evelyn Riddell.

Under section 22, sub-section 1, of the Settled Land Act, 1882, the purchase-money is to be paid either to the trustees of the settlement or into court, at the option of the tenant for life. The Marquis of Ailesbury does not desire that the money should be paid into court, and there are at present no trustees for the purposes of the Settled Land Acts except those nominated by the deed of the 16th of July, 1885. They are trustees only of the settlement created by that deed, and are not trustees of the settlement made by the deeds of 1863 and 1885, still less of that made by the series of instruments beginning in 1826 and ending in 1885. I understand, however, that they do not object to be appointed such trustees; and, if so, I am willing to appoint them on the present application. By section 31, sub-section 3, the court may, on the application of the tenant for life, or of any person interested in any contract, give directions respecting (amongst other things) the carrying into effect thereof. By section 44, if at any time a difference arises between a tenant for life and the trustees of the settlement respecting the exercise of any of the powers of the Act, or any matter relating thereto, the court may, on the application of either party, give directions respecting the matter in difference. It may be thought desirable that under one or other

of these clauses I should give directions with respect to the conveyance and the application of the purchase-money. I am therefore willing to declare that Maria, Marchioness of Ailesbury, and Lady Evelyn Riddell are respectively bound by the contract entered into between the present marquis and Lord Iveagh; that the latter is not entitled to require the concurrence of either in the conveyance to him; and that upon the payment of the purchase-money to the trustees of the settlement created by the series of instruments to which I have referred, the income of the investments of such purchase-money will be applicable for payment of the rent-charges of Maria, Marchioness of Ailesbury, and Lady Evelyn Riddel respectively, as the income of the Savernake Estate, if not sold, would have been applicable. And I am further willing to direct such trustees to pay these rent-charges out of such income accordingly.

His lordship then made an order on Lady Evelyn Riddell's summons, removing her restraint on anticipation for the purpose of enabling her consent to the payment off out of the purchase-moneys of certain mortgages to which her jointure had priority.

Solicitors for the Marquis of Ailesbury, *G. B. Laurence & Co.*

Solicitors for Lord Iveagh, *Travers Smith, Braithwaite, & Co.*

Solicitors for the trustees of Lord Ailesbury's settlement of 1885, *Nicholl, Manisty, & Co.*

Solicitors for Lady Evelyn Riddell, *Eardley-Holt, Hulbert, & Hubbard.*

Solicitors for the trustees of the Riddell settlement, *Peacock & Goddard.*

Q. B. Div.
(Lord Coleridge, C.J., and Cave, J.) Feb. 9, 10; May 19.

REG. *v.* JUDGE OF THE BROMPTON COUNTY COURT AND VAGUE. (*a.*)

County court—Jurisdiction—Contempt of court—Unqualified person practising before the court—Power to commit to prison—Attorneys and Solicitors Acts, 1843 (6 *&* 7 *Vict. c.* 73), *ss.* 2, 35, 36; *and* 1860 (23 *&* 24 *Vict. c.* 127), *s.* 26—*County Courts Act,* 1888 (51 *&* 52 *Vict. c.* 43), *s.* 162.

The judge of a county court has no jurisdiction to make an order committing to prison a person who has acted as a solicitor in an action in his court without being duly qualified so to act, his jurisdiction to imprison for contempt being confined, by section 162 *of the County Courts Act,* 1888, *to contempts committed in the face of the court.*

Mandamus calling upon his honour Judge Stonor, the judge of the Brompton County Court, and John Alfred Vague to show cause why the judge should not hear and determine the matter of an application by the Incorporated Law Society for the committal to prison of the said J. A. Vague, under the 26th section of the Attorneys Act, 1860, 23 & 24 Vict. c. 127, for his contempt of court in having acted as a solicitor in an action in the said county court of *Burr* v. *Key*, contrary to section 2 of the Attorneys Act, 1843, 6 & 7 Vict. c. 73.

On the 3rd of November, 1892, application (pursuant to notice) was made to the county court judge for an order for the attachment of J. A. Vague on the ground that he had been guilty of the alleged contempt. The judge refused to hear the motion, on the ground that he had no jurisdiction to commit for a contempt which had not occurred in the face of the court as provided by the County Courts Act, 1846, and re-enacted in the County Courts Act, 1888, s. 162, and he thereupon dismissed the application without hearing the evidence contained in the affidavits filed in support of the motion.

The rule *nisi* for a *mandamus* was then obtained upon the application of the Incorporated Law Society.

The following enactments were referred to during the argument:—

The Attorneys and Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 2, which provides that no person shall act as an attorney or solicitor in any court of law in England and Wales unless he shall be "admitted and enrolled and otherwise duly qualified to act as an attorney or solicitor," and section 36, which enacts that an unqualified person who has appeared for any litigant other than himself in a county court shall be incapable of maintaining any action for fees for so appearing, "and such offence shall be deemed a contempt of the court in which such action, suit, or proceeding shall have been prosecuted, carried on, or defended, and shall and may be punished accordingly." This section was repealed by the Statute Law Revision Act, 1874 (No. 2).

The County Courts Act, 1846 (9 & 10 Vict. c. 95), s. 113: "If any person shall wilfully insult the judge or any juror, or any bailiff, clerk, or officer of the said court for the time being during his sitting or attendance in court, or in going to or returning from the court, or shall wilfully interrupt the proceedings of the court or otherwise misbehave in court, it shall be lawful for any bailiff or officer of the court, with or without the assistance of any other person, by the order of the judge, to take such offender into custody, and detain him until the rising of the court, and the judge shall be empowered, if he shall think fit, by a warrant under his hand, and sealed with the seal of the court, to commit any such offender to any prison to which he has power to commit offenders under this Act for any time not exceeding seven days, or to impose upon any such offender a fine not exceeding five pounds for every such offence, and in default of payment thereof to commit the offender to any such prison as aforesaid for any time not exceeding seven days, unless the said fine be sooner paid." This Act was repealed by the County Courts Act, 1888.

The Attorneys and Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 26: "Every person who acts as an attorney or solicitor contrary to the enactment in section 2 of the first hereinbefore mentioned Act" (the Attorneys and Solicitors Act, 1843), "or who, in his own name, or in the name of any other person, in anywise acts as a proctor in or with respect to any proceeding in the Court of Probate or the Court for Divorce and Matrimonial Causes, without being duly qualified so to act, shall be deemed guilty of a contempt of the court in which the action, suit, cause, matter, or proceeding in relation to which he so acts is brought, had, or taken, and may be punished accordingly, and shall be incapable of maintaining any action or suit for any fee or reward for or in respect of anything done or any disbursement made by him in the course of so acting, and shall, in addition to any other penalty or forfeiture and to any disability to which he may be subject, forfeit and pay for every such offence the sum of fifty pounds, to be recovered, with full costs of suit, by action brought with the sanction of her Majesty's Attorney-General in the name of the Incorporated Law Society in any of the superior courts of law at Westminster, or in any county court, and such penalty

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

shall be applied in like manner as fines imposed for practising without a stamped certificate are now by law applicable."

The County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 5: "Every court held under this Act shall have all the jurisdiction and powers at any time prior to the coming into operation of the County Courts Act, 1846, belonging to any county court for the recovery of debts and demands as altered by this Act throughout the whole district for which it is held"; and section 162, which substantially re-enacts section 113 of the County Courts Act, 1846.

Feb. 9, 10.—*Sir Charles Russell, A.G.* (*Henry Sutton* with him), for the county court judge, showed cause against the rule.—The judge of a county court has no jurisdiction to commit a person to prison for contempt of court, except where the contempt has been committed in the face of the court. The powers of the modern county court are defined by statutes commencing with the County Courts Act, 1846, under section 113 of which a limited power to commit for contempt is conferred upon the judge of the court; that section is re-enacted in section 162 of the County Courts Act, 1888. No reference is made in that Act to the contempt of court created by section 26 of the Attorneys and Solicitors Act, 1860, and that section, which expressly refers to the then recently created courts of probate and divorce, is silent as to county courts. There is no inherent jurisdiction in the county court to punish for contempt as there is in the High Court: *R.* v. *Lefroy*, 21 W. R. 332, L. R. 8 Q. B. 134; and the jurisdiction conferred upon it by statute does not cover this case.

He also referred to *R.* v. *Jordan*, 36 W. R. 589 and 797.

Sir R. E. Webster, Q.C., and *Crump, Q.C.* (*Hollams* with them), for the Incorporated Law Society, in support of the rule.—The learned county court judge had jurisdiction. A contempt committed in the face of court has always been punishable by an inferior court of record: *Sparks* v. *Martyn*, 1 Vent. 1; *R.* v. *Clement*, 4 B. & Ald. 218, at p. 232; *Ex parte Pater*, 12 W. R. 823, 5 B. & S. 299; *R.* v. *Lefroy*, L. R. 8 Q. B., *per* Quain, J., at p. 140. Ever since the passing of the Attorneys and Solicitors Act, 1843, it has been a statutory contempt of court for an unqualified person to practise in a county court. By section 36 of that Act—a section which relates solely to county courts—such an offence was made punishable as a contempt of court—that is, as a contempt committed in the face of the court was then punishable, by committal to prison for a period which was left to the discretion of the judge. Section 36 of the Attorneys and Solicitors Act, 1843, was repealed by the Statute Law Revision Act, 1874 (No. 2), having been in substance re-enacted by the more general provisions of section 26 of the Attorneys and Solicitors Act, 1860. Section 162 of the County Courts Act, 1888, does not deal exhaustively with the powers of a county court judge to commit for contempt; it deals with committal for contempt in face of the court, and does not touch the jurisdiction as to offences outside the court such as the present, which are made contempt by statute. It is necessary for the protection of suitors that county court judges should have this power. Otherwise, an unqualified person practising in a county court cannot be punished for his contempt; or where the contempt is committed in the county court the High Court has no jurisdiction to punish: *In re an Application for an Attachment for Contempt of Court*, 2 Times L. R. 351.

Cur. adv. vult.

May 19.—The judgment of the court (Lord HERSCHELL, C.J., and CAVE, J.) was delivered by

CAVE, J.—The question in this case is whether a county court judge has power to deal summarily with the contempt of court created by the 26th section of the Solicitors Act, 1860. In order to answer this question the best plan is to follow the course pursued by Sir R. Webster in his ingenious argument, and take a chronological view of the legislation on the subject. The first enactment which deals with the question is the Solicitors Act of 1843, which enacts (section 35): that "from and after the passing of this Act, in case any person shall in his own name, or in the name of any other person, sue out any writ or process, or commence, prosecute, or defend any action or suit, or any proceedings in any court of law or equity, without being admitted and enrolled as aforesaid, or being himself the plaintiff or defendant in such proceedings respectively, every such person shall and is hereby made incapable to maintain or prosecute any action or suit in any court of law or equity for any fee, reward, or disbursement on account of prosecuting, carrying on, or defending any such action, suit, or proceeding, or otherwise in relation thereto, and such offence shall be deemed a contempt of the court in which such action, suit, or proceeding shall have been prosecuted, carried on, or defended, and shall and may be punished accordingly." And (section 36) that "In case any person shall commence or defend any action, or sue out any writ, process, or summons, or carry on any proceedings in the court commonly called the county court, holden in any county in that part of Great Britain called England and Wales, who is not or shall not then be legally admitted an attorney or solicitor according to this Act, or shall not himself be plaintiff or defendant in such proceedings respectively, such person shall and is hereby made incapable to maintain or prosecute any action or suit in any court of law or equity for any fee, reward, or disbursement on account of prosecuting, carrying on, or defending any such action, suit, or proceeding, or otherwise in relation thereto, and such offence shall be deemed a contempt of the court in which such action, suit, or proceeding shall have been prosecuted, carried on, or defended, and shall or may be punished accordingly."

No new jurisdiction in one sense is hereby given to the county court, but a new subject-matter is brought within the range of an old jurisdiction. The elliptical expression "shall and may be punished accordingly" means, when extended, "shall and may be punished as if it were a contempt of court." Now the county court there referred to is the ancient county court. The contempt of court therefore created by the 6 & 7 Vict. c. 73, s. 36, was punishable by indictment. Possibly, though it is not necessary to decide this point, and we should not like to give an opinion without further consideration, it was also punishable summarily by the judge of the court. The ancient county court is, however, extinct, and the present question arises, not with respect to that court, but to the new county courts constituted by the Act of 1846. In *Reg.* v. *Lefroy* it was decided that the county court, although an inferior court of record (9 & 10 Vict. c. 95, s. 3), had no power to commit for contempt, except in the cases specially provided for by section 113 of the 9 & 10 Vict. c. 95, now re-enacted by the Act of 1888 (section 162). Sections 35 and 36 of the Solicitors Act, 1843, have been repeated by the Solicitors Act of 1860, s. 26. [His lordship read that section, and continued:—] This enactment, however, only leaves the matter where it stood before. It simply provides that any person who does certain things shall be deemed guilty of a contempt of the court, &c., "and may be punished accordingly"—*i.e.*, as if he were guilty of such contempt. In our judgment such contempt,

although punishable by indictment, is not now and never has been punishable summarily in the county court, and the reasoning in *Reg.* v. *Lefroy* applies to and governs this case.

The case, in fact, stands thus. In 1846 the Legislature constituted new courts in the place of the ancient county court, and declared such courts to be courts of record. Under these circumstances it became necessary to decide as a matter of policy whether these courts should or should not have the power ordinarily incident to inferior courts of record of punishing by fine and imprisonment, at the discretion of the judge, contempt committed in the face of the court. The Legislature decided, as was held in *Reg.* v. *Lefroy*, that it would not entrust such a general and unlimited power to the county court judges, but gave them instead a special jurisdiction to punish by a limited fine or by imprisonment of limited duration certain specified offences, all of which were of the nature of contempts of court. Then came the Solicitors Act of 1860, which provided that certain acts therein specified should be deemed to be contempts of court, and should be punished as if they were such. Contempt of a county court, unless it was one of the acts specified by the Legislature to which a limited fine or imprisonment for a limited period was appropriated, was punishable by indictment, but not summarily. The enactment of 1860 has a perfectly legitimate interpretation if it is taken to mean that such acts committed in a county court shall be punishable by indictment. How, then, can it be necessary or even permissible to construe it as giving to a county court judge, in the case of the acts forbidden by section 26, a general indefinite power to fine and imprison, which the Legislature had in 1846 expressly determined it was not advisable that a county court judge should possess? The argument against assuming such a power to be given is strengthened by the fact that the Legislature has in the 26th section of the Act of 1860 imposed on the offender a limited penalty of £50. It was argued by Sir Richard Webster that it was convenient that the county court judge should have power to deal summarily with these cases, and that it would be often sufficient to order the offender to pay the costs of the proceedings. But the power of the county court judge, if it exists at all, cannot stop there. The argument from convenience is one for the Legislature and not for the judges, and in favour of the liberty of the subject we ought not to hold that an indefinite power to fine or imprison without appeal has been given to the county court judges unless it is quite clear that the Legislature has so intended. We are of opinion that the Legislature has not so intended, and that the learned county court judge was perfectly right in refusing to exercise a jurisdiction which had never been conferred upon him. The rule must be discharged, with costs.

Rule discharged.

Solicitors for the county court judge, *Hare & Co.*, for *The Solicitor to the Treasury.*

Solicitor for the Incorporated Law Society, *E. W. Williamson.*

Q. B. Div.
(Day and Wills, JJ.) } April 18, 22.

PROUD *v.* PRICE AND OTHERS. (*a.*)

Ecclesiastical law—Chapel—Pew—Long user—Acts of ownership—Presumption of legal origin—Faculty—Prescription.

In the year 1782 *a chapel upon the first floor of a building the ground floor of which was occupied by a school-house was licensed by the bishop of a diocese, and was constituted a perpetual cure and benefice under* 1 *Geo.* 1, *stat.* 2, *c.* 10, *s.* 4, *pews being allotted to the subscribers. These pew-holders sold and transferred their seats by entries in the chapel-book. In* 1846 *the chapel was removed, and a new chapel was erected upon the site of the school-house, which had then been demolished. The circumstances under which the new chapel was erected were such as to warrant the presumption of a conveyance of the site of the school-house for the purposes of the benefice. On the* 12*th of February,* 1848, *pews in the new chapel were allotted to the holders of pews in the old chapel, and on the* 22*nd of February,* 1848, *the new chapel was consecrated. These pews, and others which were substituted for them upon the re-pewing and repairing of the chapel under a faculty granted in* 1867, *were exclusively enjoyed by the persons to whom they were allotted and their successors in title down to the commencement of this action, and were dealt with by them by way of assignment and devise. There was no evidence of the pews having been repaired by these persons. The plaintiff, in whom the rights of the previous holders of three of these pews were vested, brought an action against the vicar and churchwardens of the parish, claiming a declaration that he was entitled to the pews and an injunction to restrain interference by the defendants.*

Held, that the evidence did not justify the presumption of a legal origin for the user of the pews, and that the plaintiff could not maintain the action.

Special case stated for the opinion of the court by the parties to an action.

The plaintiff claimed a declaration that he was entitled to the pews numbered 68, 77, and 78, in the chapel of St. Ann's, Bishop Auckland, and an injunction to restrain the defendants—the vicar and churchwardens of the parish in which the chapel was situated—from interfering with the pews.

In the year 1781 a subscription was raised to provide more church accommodation for the inhabitants of the parish of St. Andrew's, Bishop Auckland, and in the following year, by an arrangement with the governors of a free grammar school, a chapel was formed upon the first floor of a building the ground floor of which was used as a school-house. This chapel was not consecrated, but was licensed by the bishop for the performance of Divine worship, and augmented by the Governors of Queen Anne's Bounty, and consequently became in the year 1782 a perpetual cure and benefice under 1 Geo. 1, stat. 2, c. 10, s. 4.

The pews in the chapel were allotted to the subscribers, and there was evidence that the pew-holders sold and transferred their seats by entries in the minute-book of the committee who managed the chapel.

In 1846 the chapel and the school were pulled down, and the site of the school was offered by the governors for the purpose of building a new chapel. The present chapel was erected in that year upon the site of the school-house. No conveyance of the site could be found.

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

The owners of pews in the old chapel consented to these alterations before they were effected upon the understanding that if the positions of their pews should be interfered with in consequence of the alterations, arrangements should be made to satisfy them.

On the 12th of February, 1848, the pews in the new chapel were allotted to the owners of pews in the old chapel, and on the 22nd of February the new chapel was consecrated upon the petition of the predecessors in title of the plaintiff and others. There was evidence that from that date the pew-holders had dealt with their pews by will and by assignment *inter vivos*, and had never paid any rent for them.

In 1867 it was proposed to repair and re-pew the chapel, and the original pew-holders (including the plaintiff or his predecessors in title) signed an assent, on condition that it should not in any way prejudice their rights as pew-owners; a faculty was then granted to the vicar and churchwardens of St. Andrew's, on the petition of the plaintiff (then a churchwarden) and others authorizing them to remove the pews and erect new ones and to re-allot the pews, due regard being had to the claims of those who by faculty or prescription were entitled to pews. The pews were so re-allotted, each pew having a door with an interior bolt, and the chapel minute-book contained a "register of the proprietary pews." Ever since then the churchwardens of St. Andrew's had acted as churchwardens of St. Ann's. The three pews in question had come to the plaintiff by assignment or other devolution of title, and had since been exclusively used by the plaintiff and his relatives and friends. It was alleged that one of them, No. 77, which had been exclusively used by a Mrs. Hodgson, through whom the plaintiff claimed, was annexed to the house in which she had resided, which was sold to the plaintiff, and in which he also had lived. The facts upon which that allegation was founded are dealt with in the judgment.

The defendants had petitioned for a faculty to enable them to pull down and remove the pews and substitute chairs, if necessary; they denied that the plaintiff had any private rights in any of the pews.

The plaintiff then brought this action.

A. B. Kempe, for the plaintiff.—The plaintiff is legally entitled to these pews, and the Ordinary, through whom the defendants claim, has no jurisdiction over them. It is clearly shown that these pews have been bought and sold from 1867 onwards, and there is a strong presumption that the same has been the case ever since their allotment in 1848. The plaintiff and his predecessors have had the exclusive enjoyment of these pews since 1848 and of the pews in the old chapel, for which they were substituted, since 1782, and the court ought to presume that that right of enjoyment has a legal origin: *Philipps* v. *Halliday*, [1891] A. C. 228, 39 W. R. Dig. 81. Private rights in these three pews may have been reserved when the site of the chapel was conveyed to the use of the benefice, and that would exclude them from the jurisdiction which the Ordinary exercised over the rest of the rest of the chapel: *Buxton* v. *Bateman*, Sid. 88; *Buzard's case*, 2 Rolle Abr., p. 288, par. 6; *Churton* v. *Frewen*, L. R. 2 Eq. 634, *per* Kindersley, V.C., at p. 651; *Chapman* v. *Jones*, 17 W. R. 920, L. R. 4 Ex. 273. There may be a freehold in a single seat in a church: *Freem* v. *Dane*, Skinner, 33. A grant of the freehold of these seats to the plaintiff's predecessors in title ought to be presumed, whether such a grant is probable or not: *Bryant* v. *Foot*, 16 W. R. 808, L. R. 3 Q. B. 497, at p. 508. In the case of pew No. 77 it has been exclusively enjoyed by the owner of a particular house ever since 1848, and the court must presume that a faculty has at some time been granted annexing the pew to the house: *Halliday* v. *Philips*, 37 W. R. 776, 23 Q. B. D. 48, at p. 57; *Rogers* v. *Brooks*, 1 T. R. 431n. Again, such a right to the user of a pew as annexed to a house is an easement. We have had twenty years' enjoyment of it, and are within the rule in *Dalton* v. *Angus*, 30 W. R. 191, 6 App. Cas. 740. The question whether a right to a pew is within section 2 of the Prescription Act (2 & 3 Will. 4, c. 71) was considered in *Crisp* v. *Martin*, 2 P. D. 15, but not decided. The continuous user of these pews by the plaintiff and his predecessors in title may be due to a legal origin in any of the ways suggested, and it is the duty of the court to presume such an origin.

F. L. Errington, for the defendant.—As to pew No. 77, *Philipps* v. *Halliday* decides that mere possession is not sufficient to support a presumption of a lost faculty, there must also be repairs and other such acts of ownership. Even renewing the linings and cushions of a pew were said by Sir John Nicholl in *Pettman* v. *Bridger*, 1 Phil., at p. 331, to be in no degree inconsistent with the fact of the pews belonging to the parish. The evidence that this pew was annexed to Mrs. Hodgson's house is insufficient, and it is improbable that it was so appropriated in the year 1848, for Sir John Nicholl in *Butt* v. *Jones*, (1829) 2 Hag. Eccl., at p. 425, says that the practice of appropriating pews to houses "is become quite obsolete and injurious." It is impossible to believe that the freeholds of these pews were reserved when the grant of the site of the chapel was made by the governors of the grammar school. A freehold interest in the nave of a church cannot be held by a private person. Any rights which the pew-holders may have had before the consecration of the chapel in 1848 were reduced at the moment of the consecration to mere easements: 3 Salk. 85; *Corven's case*, Coke Rep. pt. 12, 105; *Hinde* v. *Chorlton*, 15 W. R. 226, L. R. 2 C. P. 104; *Brumfitt* v. *Roberts*, 18 W. R. 678, L. R. 5 C. P. 224. *Crisp* v. *Martin* is a clear authority that a pew is not an easement within section 2 of 2 & 3 Will. 4 c. 71, neither does the rule in *Dalton* v. *Angus* apply to pews.

Kempe replied.

WILLS, J.—The question here is whether the plaintiff has any right to pews 68, 78, and 77 in the chapel of St. Ann's, Bishop Auckland, as against the Ordinary who, it may be assumed for the purposes of this case, is willing to grant a faculty for the re-pewing of the church. There can, therefore, be no question of possessory right, which, being a right referable to the consent of the Ordinary or of the churchwardens as his officers, cannot prevail against the Ordinary—a proposition which I take to be elementary. It is suggested that the plaintiff can claim as the owner in fee of the plots of land occupied by the pews, a reservation of those plots in the original grant of the land on which the church was built being, as it is said, to be presumed in order to account for the practice, which has prevailed, of the assignment of the pews from 1846, when the present church was built, downwards. The same state of things has prevailed with respect to between thirty and forty other pews in the church. The present church was built in 1846. Up to that time the only chapel was a room on the first floor of a building then pulled down. The holders of pews in the chapel on the first floor obviously had no rights in respect of the ground floor, which was then occupied as a school. The chapel on the first floor

came into existence as a chapel in 1782. It was not consecrated, but merely licensed by the bishop for the performance of Divine worship. In the same year a grant of an augmentation in favour of the chapel was made by the Governors of Queen Anne's Bounty, and it was thereupon, by virtue of 1 Geo. 1, stat. 2, c. 10, s. 4, constituted a perpetual cure and benefice, and the minsters thereof and their successors were made bodies politic and corporate with a perpetual succession.

Under the circumstances set out in paragraph 18 of the case, a conveyance for the purposes of the benefice of the site of the chapel ought to have been executed on or about the 5th of September, 1846. It clearly ought to be presumed. Such a conveyance would be either to the vicar of St. Andrew's, the mother church, or to the perpetual curate of St. Ann's—probably to the former, inasmuch as the use of the expression "mother church" in the section cited from the Act of 1 Geo. 1 shows that the Legislature intended that the common law relation between a parish church and the church or chapel of a perpetual curacy within the parish should be created, in which case the incumbent of the parish would be the proper person in whom to vest the church.

Now, of course, upon a conveyance of land between ordinary persons there are few rights of property not capable of being reserved; certainly the right to occupy a stall for the purpose of attending lectures or discourses to be delivered within a building could be so reserved. It seems to me to be quite otherwise when land is conveyed for the purposes of a church, especially when the *status* of the building as a church is recognized by Act of Parliament; and a new kind of reservation unknown in the case of an immemorial church cannot, I think, be presumed. No such thing as a reservation to the founder at the time of the foundation of a church, except in a side aisle or the chancel, is known to the law: *Chapman* v. *Jones*, 17 W. R. 920, L. R. 4 Ex. 273, 280; *Fuller* v. *Lane*, 2 Add. 419, 427-8. I therefore put aside the supposition of a reservation, on conveyance, of a pew in the body of the church, as involving a legal impossibility.

If so, it is, apart from any other difficulty, clear that the pews can be claimed only by faculty or by prescription. But prescription and faculty are alike out of the question in respect of the two pews 68 and 78, for the only evidence upon which to found such a claim is that of dealings with the pews, which, if they had really been the subject of faculty, would have been illegal. They appear to have been dealt with apart from any connection with a particular house, and if any faculty can be inferred at all it would be a faculty to some one, his heirs and assigns, which would be bad: *Brabin* v. *Tradum*, Poph. 140, and other cases cited in 1 Burn's Ecclesiastical Law, 9th ed., pp. 359-362; Gibs. Codex 197; *Stocks* v. *Booth*, 1 T. R. 428.

There is a different case in respect of pew 77. No. 77 dates back, so far as that description is concerned, to 1867, when a faculty for reseating the church was obtained. It occupies the same site as a pew numbered 35 on the building of the chapel in 1846, which retained that number till 1867. No. 35 was allotted to Margaret Hodgson in 1848, in substitution for a pew in the old chapel on the first floor and numbered 31, the space of which, after the alterations of 1845, was in the air, and not over any part of No. 35. We therefore know exactly how No. 35 (now No. 77) came to the predecessor in title of the plaintiff. It was, according to paragraph 20 of the case, assigned in 1848 to Margaret Hodgson by a committee appointed by a meeting of the inhabitants of Bishop Auckland. There was nothing to attach the pew to any particular house, and it and all the other pews dealt with by the committee were allotted simply to the persons named in the plan contained in Appendix B. Margaret Hodgson dealt with the pew by her will made in 1861 upon the same footing. She left her house and also her "pew numbered 35" to her five nieces as tenants in common.

In 1867 a faculty for the re-pewing of the chapel was obtained with the consent of the persons who then held the pews which had been allotted in 1848, and on condition that such consent should not prejudice their rights as pew-owners. The faculty empowered the incumbent and churchwardens to re-allot the pews to the various persons according to the plan contained in Appendix C, in which the No. 35 of the plan of 1848 appears as No. 77, and the persons to whom it is to be allotted are described as the representatives of Margaret Hodgson. The consent in question was signed by the then holder of pew No. 35. It seems to me quite impossible in the face of this evidence to suppose that there could be then a faculty in existence by which pew No. 35 of the chapel of 1848 was vested in Margaret Hodgson or her heirs as attached to the house which she had occupied and owned. There could have been no such right acquired by the assignment made in 1848 by the committee. That did not even profess to have been in respect of any messuage. Margaret Hodgson's will contains no intimation of any claim in respect of the messuage, and I can see no circumstance whatever to raise any presumption in favour of a faculty at any time between 1848 and 1867 granting her this pew, either as attached to her mansion-house or in any other way. Her then successors in title assented to an allotment of a pew to them by the Ordinary, which is quite inconsistent with the notion of an existing right by virtue of a faculty. The allotment by the incumbent and churchwardens is, under the circumstances, nothing but an allotment by or on behalf of the Ordinary, revocable by him at any time. The case does not state whether the representatives of Margaret Hodgson—that is, I presume, the five nieces—made any use of the pew, but I will assume for the sake of argument that they did so. In 1873 the house and the pew No. 77, described as usually held by Margaret Hodgson, with her mansion-house, were sold to the plaintiff, who has been in exclusive enjoyment of the pew ever since. No repairs have been done to the pew by Margaret Hodgson or by her successors in title.

The evidence, therefore, in favour of a title by legal origin appears to consist entirely of occupation since 1867 by the owners of a particular house. Liability to repair is the essential condition of a faculty, and no repairs have been done. The absence of such evidence is fatal to the presumption of a faculty, 1 Burn's Ecclesiastical Law, 9th ed., 360-2, and cases there cited; *Fuller* v. *Lane*, 2 Add., at p. 426; *Walter* v. *Gunner*, 1 Hag. Consist., 314; *Churton* v. *Frewen*.

We were much pressed with authorities to show that after twenty years' enjoyment of a right every intendment should be made in its favour, and it was further urged that there was here twenty years' enjoyment, and that, therefore, the right could not be defeated merely by showing that the enjoyment might have originated since the time of legal memory. Lord Penzance said in *Crisp* v. *Martin*, 2 P. D. 1, at p. 27, that the Prescription Act does not apply to a claim to a pew, and I think, upon the language of the Act, 2 & 3 Will. 4, c. 71, s. 1, that there is very good ground for that opinion. If so, prescription is in the present case, absolutely out of the question. There is, however, here a deeper objection. It is (to use the language of Lord Penzance in the case cited) that the evidence does not go beyond occupancy

which, in the case of a claim to a pew, is not sufficient evidence of prescription. There is, no doubt, some evidence that the incumbent and churchwardens supposed there was a proprietary right in the plaintiff's predecessors in title. But these admissions come to nothing when one finds, from the same books which contain them, that they admitted similar rights from 1783 to 1848, when they could not possibly have existed, and that from 1848 to the present time they would furnish equally cogent admissions of the title of persons as to whom evidence of enjoyment would tend to establish rights unknown to the law. It is quite true that it is possible to establish a claim by lost grant or lost faculty, though the instrument, if ever it existed, must have come into existence within a few years. In *Rogers* v. *Brooks*, 1 T. R. 431 n., a lost faculty was presumed, though, if it existed, it must have been granted within forty years. In *Campbell* v. *Wilson*, 3 East, 294, a lost grant was presumed, though twenty-six years before, it could not possibly have existed (see also *Gray* v. *Bond*, 2 Br. & B. 667). But, at all events, where the question relates, not to the ideal grant lost in the mists of antiquity, relied upon as the foundation of a prescription, but to a real grant actually made, but lost, the question whether there was such a grant is always one of fact. In each of the three cases cited it was left to the jury; and in *Campbell* v. *Wilson* Grose, J., said that he should hardly have made the presumption himself. In *The Duke of Norfolk* v. *Arbuthnot*, 5 C.P. D. 390, at p. 393, Bramwell, L.J., said:—"I refuse to find that there was a grant which has been since lost, for I am quite certain that it never existed"; and Brett, L.J., said:—"The question whether a lost grant did exist is one of fact, which must be considered by the tribunal which has to try the action." There are abundant reasons in the present case for the conclusion that there never was a faculty or a grant, and in my opinion there must be judgment for the defendants, with costs.

DAY, J.—I entirely concur.

Judgment for the defendants.

Solicitors for the plaintiff, *Pattison, Wigg, & Co.*, for *John Proud*, Bishop Auckland.

Solicitors for the defendants, *Vincent & Vincent*, for *John Booth*, Durham.

IN BANKRUPTCY.

Q. B. Div.
Vaughan Williams, J. } April 27.

In re HURLEY. (*a*.)

Bankruptcy—Sheriff's costs—Execution—Possession retained without selling, at request of execution creditor and the debtor—Receiving order—Possession money—Costs of the execution—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 11, *sub-section* (1).

After seizure under a writ of fi. fa. *the sheriff remained in possession of the debtor's goods without selling, at the request of the execution creditor and of the debtor. A receiving order was subsequently made against the debtor, and the sheriff handed over the goods to the official receiver, and brought in his bill of costs under section* 11 *of the Bankruptcy Act*, 1890, *in which he claimed possession money for the time he remained in possession. The claim was allowed on taxation by the county court registrar, but on a review at the instance of the Board of Trade the High Court taxing master allowed eight days' possession money only.*

Held, that the possession money claimed by the sheriff was part of the costs of the execution within the meaning of section 11 *of the Bankruptcy Act*, 1890, *and as such ought to be allowed.*

Application by the sheriff of Glamorganshire for review of taxation of costs.

On the 2nd of December, 1892, a writ of *fi. fa.* was delivered to the sheriff, under which he levied execution on the goods of the debtor. Other writs were subsequently handed to the sheriff, under which he also seized.

The debtor was a cabdriver, and it was considered best that he should continue his business.

The sheriff, therefore, at the request of the judgment creditor and of the debtor, remained in possession until the 13th of January, 1893, when a receiving order was made against the debtor.

The sheriff then handed over the goods to the official receiver, and brought in his bill of costs against the estate under section 11 of the Bankruptcy Act, 1890, in which he claimed possession money for 43, 24, and 19 days respectively under the various writs.

This claim was allowed on taxation by the county court registrar, but was objected to by the Board of Trade, who obtained a review before the taxing master of the High Court, under rule 124 of the Bankruptcy Rules, 1886.

The taxing master reversed the registrar's allowance, and allowed only eight days' possession money in each case, and, in consequence of this decision, the sheriff now appealed to the court.

Herbert Reed, Q.C.—The contention of the sheriff is really that he had no option in the matter. He was directed by the creditor not to sell, and asked by the debtor not to sell. The sheriff could not sell, and so remained in possession. These fees, therefore, formed part of the costs of the execution. The taxing master said that eight days was a reasonable and ample time to remain in possession. This case differs from that of *In re Finch, Ex parte the Sheriff of Essex*, 40 W. R. 175, 8 Morrell's Bankruptcy Cases, 284, because there the sheriff remained in at the request of the execution creditor only, and he did not get the consent of the execution debtor. The real question is whether these are costs of execution under section 11 of the Bankruptcy Act, 1890.

He also referred to *Ex parte Lithgow, In re Fenton*, 26 W. R. 834, 10 Ch. D. 169.

Muir Mackenzie, for the Board of Trade.—The question is whether the estate is to pay where the possession is prolonged at the request of the debtor, and it really involves what is the true meaning of the costs of the execution.

VAUGHAN WILLIAMS, J.—I am of opinion that these costs were part of the costs of the execution, and as such ought to have been allowed to the sheriff. All I decided in *In re Harrison, Ex parte The Sheriff of Essex* (see *ante*, p. 512), was that no costs could be allowed after the receiving order had been made and notice of it had been given to the sheriff. In that case the law provides what is to be done. But with regard to costs which are incurred by possession previous to the receiving order, it seems to me that the sheriff is entitled to those costs. The present case is not like that of *In re Finch*, because there the sheriff was doing what he had no right to do. He had no right to remain in possession. But here the sheriff remained in possession at the request of the execution creditor and of the execution debtor. It was really

[a] Reported by C. F. MORRELL, Esq., Barrister-at-Law.

not denied that he was right in so doing, but it is said that when told to remain in possession he ought to have said that he would not do so unless provision was made for payment of his costs in the event of bankruptcy. I think the sheriff would be wrong if he did that. I really agree that the sheriff has no choice in the matter on receiving such instructions. It seems to me, therefore, that this item of possession money is part of the costs of the execution within the meaning of section 11 of the Bankruptcy Act, 1890, and the amount deducted by the taxing master must be allowed, with costs.

Application allowed.

Solicitors for the sheriff, *Helder, Roberts, Son, & Walton*, for *Morgan & David*, Neath.

Solicitor for the Board of Trade, *The Solicitor to the Board of Trade.*

Prob. Div. & Adm. Div. Admiralty. } Jan. 16.

"THE EDENMORE." (*a.*)

Shipping—Salvage—Amount of award.

In a case of salvage, where the services mainly consisted in towing a large steamer, disabled in her machinery, in the Atlantic Ocean in the winter for six and a half days into safety at Halifax, the values of the salved vessel, her cargo and freight, being £90,000, and the owners of the salving vessel having incurred expenses in consequence of deviation and delay, the court made a salvage award of £5,350; awarding to the owners of the salving vessel £4,225, to her master £375, and to her crew £750.

This was an action of salvage brought by the owners, master, and crew of the steamship *Inchmarlo* against *The Edenmore*, her cargo and freight, to recover for salvage services rendered to *The Edenmore* and her cargo in the circumstances stated in the judgment.

The suit was now heard before Barnes, J., assisted by two of the Elder Brethren of the Trinity House.

Aspinall, Q.C., and *Buller Aspinall*, for the plaintiffs.

Sir Walter Phillimore and *Bateson*, for the defendants, owners of *The Edenmore.*

BARNES, J.—The salvage services in this case were rendered by the steamship *Inchmarlo*, which is a screw steamer of 2,967 tons gross and 1,924 tons net, fitted with triple-expansion engines working up to 1,800 horse power, and which was at the time on a voyage from Savannah for Liverpool with a full cargo of cotton, and having on board thirty-one hands all told, to the steamship *Edenmore*, which is a vessel belonging to the port of Liverpool, of 2,459 tons gross and 1,564 net register. She had a full cargo of cotton and oil-cake, and was on a voyage from Galveston to Liverpool. The values on both sides are extremely large. According to the plaintiffs the values of *The Inchmarlo*, her freight and cargo, amount to a little over £155,000; but according to the defendants their value is £134,000. The values of *The Edenmore*, her freight and cargo, have been fixed for the purpose of this action as follows: the value of *The Edenmore*, £20,000, the value of her cargo, £64,636, and the value of the freight, £5,364, making a total of £90,000.

It appears that *The Edenmore* had broken down in the course of her voyage on the 20th of October last, having then broken her tail shaft, which after the breakage was found after examination to be in a state described by one of the engineers on board in the following terms: "After we got all cleared away we found the break in the shaft so near to the stern-bush that we could do nothing towards repairing it, so we closed up the after peak and put the cargo back into its place." The result of that state of affairs was that *The Edenmore* was entirely helpless, and she remained in that helpless position until the 4th of November last, when *The Inchmarlo* came to her assistance, so that she was seven days without being able to do anything, drifting without control. She met no vessels with the exception of one vessel on the 2nd of November, when a steamer going to the westward passed her, but took no notice of her signals for assistance. In this state of affairs she was found by *The Inchmarlo*, having drifted some forty or fifty miles to the north-east of where she broke down, and being at that time about 340 miles, speaking roughly, to the eastward and southward of Halifax. *The Inchmarlo* came up with her early on the morning of the 4th of November, and was unable, owing to the state of the weather, to make fast until towards seven o'clock in the evening of that day, during which time, I think, the vessels had drifted at the rate of about three knots an hour to the southward and eastward. *The Inchmarlo*, having got hold of *The Edenmore* at last, took her in tow and successfully towed her to Halifax, making that port on the 10th of November in the morning. There she left *The Edenmore*, and after coaling proceeded on her voyage the following evening, arriving in Liverpool on the 23rd of November, where, according to her master, she ought to have arrived ten or eight days sooner.

The principal matter to consider in this case is the risk to which *The Edenmore*, her cargo and freight, were exposed. The view I take, and which accords with that of the Trinity Masters, is that her position was a very serious one. She had been drifting about for seven days without being able to obtain assistance, and from her helpless condition her only hope of safety lay in the assistance of a steamer powerful enough to tow her safely into port. Without that assistance this large steamer would in all probability never have been heard of again.

It is suggested on behalf of the defendants that if *The Edenmore* had only been given time she would have drifted across and been found in the English Channel. Well, she would have taken, at the rate of three knots an hour, some two months to have so drifted, and what would have happened in the meantime if her provisions had held out? She would have had to encounter the violent weather of the months of November and December last. Such a suggestion really contains its own answer, because it really means that this vessel must have obtained, in order successfully to relieve her from a disastrous fate, a towage power able to perform a rescue such as was necessary. Another element to be considered in awarding salvage in this case is the risk to the salving vessel. With regard to that it is suggested that the agreement for the services of *The Inchmarlo*, which according to the evidence was made in this case between the masters of the two vessels, would minimise the risk of loss to the salvors in case their services had been unsuccessful. This agreement is as follows:—"It is this day mutually agreed between W. T. Ashby, master of steamship *Inchmarlo*, and myself, C. A. Watson, the master of *The Edenmore*, that the steamship *Edenmore* shall be towed into port, if possible, by *The Inchmarlo*, and whatever services are rendered and loss of time

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

shall be settled between my owners and the owners of *The Inchmarlo*." I have considered that document with some care, and I incline to the opinion that it is possible that the proper construction of it would entitle the salvors to some remuneration, even if their services were not successful. In dealing with the amount of the award in this case I have borne that in mind, though I must say in a case of this character is it very difficult to say what precise amount of effect a consideration of this kind is to have on the reduction of the amount of the award where the services have turned out to be successful. But it does not minimise the danger to the salvors, because they run their risk whether they get paid for their services, or whether they get remunerated by a salvage award, and although no very special risk to the salvors has been proved in this case, except that of a possible collision in making fast, it must not be forgotten that these large vessels always run some risk in making fast, and in the performance of services of this character risk does occur, sometimes of collision and sometimes of straining, in the performance of the towage. Then there is another element, namely, the weather which was encountered. There is no doubt, I think, that the weather was for part of the time extremely severe. It is clear that during the first part of the time they were in company the two vessels could not be connected owing to the state of the weather. Then from the first part of the towage, from 7 to 8 o'clock in the evening of the 4th of November, till the afternoon of the 5th of November, they were only able to make a progress of between two and three knots an hour. From the 5th to the 6th, and from the 6th to the 7th, according to the case of *The Edenmore*, no progress was made at all. There is no entry in her log in the column headed knots, though there is a record on the 7th of November of forty-five miles by observation. But the master of *The Inchmarlo* says their progress was on one of these days only thirty miles, and that on the other days the vessels were losing ground. For the latter part of the time the weather was not apparently so severe, though there was some difficulty in getting into Halifax. It is said that the danger cannot have been so great, because the towage was not performed wi h any parting of the hawsers. I am not quite satisfied, nor are the Trinity Masters, that that is quite the right view to take. They think, and I agree, that it shows very considerable skill in handling the salving vessel, that in face of weather such as there was, the salvors should have been able to perform the services they did without parting the hawsers and without accident.

The salvors suggest that they have been put to certain expenses in consequence of the towage, port expenses, some repairs, docking and hawsers, also that a premium of £342, paid to the underwriters of *The Inchmarlo* for the reinstalment of insurance policies on ships which contained a warranty prohibiting the vessel going to certain North American ports, including, as I understand, Halifax, must be taken into account in considering the expenditure incurred by the owners, as they had to pay this sum to the underwriters of their ship to waive the breach of the warranty. What their position with regard to their cargo owners would have been has not been put before me.

One element of consideration brought to our attention was that the vessel was chartered or agreed to be engaged on terms which would have enabled her to make a profitable voyage to cotton ports and back again, whereas she had to be laid up, her charter being cancelled, and that she made not only no profit, but also made a loss of some £60 a month. That figure does not come to very much. It is said to be a fact that she would have made £300 in the course of the next three months or so, which she lost.

These are not items which are strictly recoverable in the form of actually giving them to the salvors. They form elements for consideration, and the great difficulty in a case of this kind is to give a proper award on a due consideration of all the elements which go to make it up. The great point, to my mind, is that the safety of this large steamer and her valuable cargo, amounting in all to a sum of £90,000, has been brought about by the services of the salvors, and, after giving due weight to the arguments which are properly entitled to be borne in mind in this case, I think the sum of £5,350 is the proper award to make.

Bearing in mind that the expenditure of the owners, to which I have referred, is to be taken into account, because the amount they will receive under the apportionment will not be all money into their pocket, as something will come off it for the expenditure which they have had to make, I apportion the sum in the following way: to the owners, £4,225; to the captain, £375; and to the crew, £750.

Solicitors for the plaintiffs, *Hill, Dickinson, Dickinson, & Hill.*

Solicitors for the defendants, *Bateson, Warr, & Bateson.*

Prob. Div. & Adm. Div. Divorce. } Feb. 11, 15.

GOOCH v. GOOCH. (*a.*)

Divorce—Separation deed—Prior adultery of wife—Mutual covenant not to commence or prosecute proceedings—Subsequent adultery by husband—Prior adultery of wife a bar to relief.

A separation deed contained a clause, "No proceedings shall be commenced or prosecuted by or on behalf of either party against the other in respect of any cause of complaint which now exists or which has arisen before the date of these presents." Prior to the execution of the deed it was known that the wife had committed adultery. Subsequently the husband committed adultery, and the wife filed her petition for a judicial separation.

Held, that the wife's prior adultery was a bar to the court granting her the relief prayed for, and that the husband was not precluded by the covenant from pleading it, as he was not thereby "commencing or prosecuting" proceedings.

Rose *v.* Rose, 30 *W. R.* 736, 31 *W. R.* 573, 7 *P. D.* 225, 8 *P. D.* 98, *considered.*

Trial before Jeune, P., and a special jury of the wife's (Lady Gooch's) petition praying for a judicial separation from her husband, Sir Alfred Sherlock Gooch, on the ground of his adultery during the years 1889 and 1890.

The respondent, in addition to denying the acts of adultery with which he was charged, charged the petitioner with acts of adultery with one Eden before 1886.

The petitioner denied this, pleaded condonation, and that the respondent was not entitled to set up such acts of adultery, if any, by virtue of the covenant contained in clause 10 of a deed of separation executed by him and the petitioner, dated the 9th of July, 1886.

The clause 10 in question was as follows:—"No proceedings shall be commenced or prosecuted by or

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

on behalf of either party against the other in respect of any cause of complaint which now exists, or which has arisen before the date of these presents."

There was one child of the marriage, aged eleven years.

The jury found that both the petitioner and respondent had committed the acts of adultery charged against them in the petition and answer.

Lockwood, Q.C., and *Deane*, for the petitioner.

Sir E. Clarke, Q.C., and *Llewellyn Davies*, for the respondent.

The cases cited are all mentioned and the arguments referred to, in the judgment.

Cur. adv. vult.

Feb. 15.—JEUNE, P.—On the finding of facts by the jury, the respondent was guilty of adultery after the separation deed of July 9, 1886, and the petitioner was guilty of adultery before it. It cannot be disputed that, but for some effect of that deed, the adultery of the petitioner must prevent her from obtaining the decree of judicial separation which she seeks. The case of *Otway* v. *Otway*, 13 P. D. 141, 37 W. R. Dig. 84, is sufficient authority for the proposition that the adultery of a petitioner in a suit for judicial separation is, unless its effect be in some way neutralized, a bar to obtaining the relief asked for. What is there in the present case to neutralize the proved adultery of the petitioner? Whether or no condonation could have such an effect, condonation in the proper, and what, I think, should be the sole use of the word—namely, forgiveness evidenced by conduct, and, according to English law, conditional on future good behaviour—there is none. It was pleaded, but no attempt was made to prove it. The separation deed was executed after accusations of the wife by the husband which he emphatically refused to withdraw, and subsequently to the deed the parties never lived together.

But it is argued that by reason of the 10th clause of the deed I have a discretion to grant, and should exercise it by granting, the judicial separation prayed for. Unless those words, on their true construction, amount to a covenant not to plead the adultery of the petitioner as the respondent has pleaded it, they constitute no imaginable reply to the respondent's plea. I am clearly of opinion that they do not. If it had been intended that such an obligation should be imposed nothing would have been easier than to have used unambiguous language, as in the case of *Rose* v. *Rose*, where the opening words of the clause are identical with those in the present case; but the clause goes on: "and every offence (if any) which has been committed or permitted by either party against the other shall be considered as hereby forgiven and condoned, and in case hereafter either shall commence or prosecute any proceedings against the other in respect of any cause of complaint which may hereafter arise, no offence or misconduct which has been committed or permitted before the execution of these presents, and no act, deed, neglect, or default of either party in relation to any such offence or misconduct shall be pleaded or alleged by either party, or be admissible in evidence." It is difficult to imagine why similar words do not appear in clause 10, unless it was expressly intended to exclude their obvious effect. Nor do the words of the present clause appear to me apt to forbid the use of past misconduct as a defence.

Reliance was placed by Mr. Deane on the phrase "commence or prosecute," and it was suggested that the words "or prosecute" were added to cover the case of a charge being set up by the respondent.

But it was pointed out by Mr. Lockwood, and it is, of course, the case, that as regards charges of misconduct before the date of the deed, the respondent's action is that of commencing as much as of prosecuting them. It would be possible, I think, to suggest more than one reason why the word "prosecute" was subjoined to the word "commence." But I do not think that the significance of the clause turns on these words. It appears to me that the respondent, in putting forward his wife's adultery solely as a defence, and not making it the foundation of any prayer of his own, does not in any proper sense of the word either commence or prosecute proceedings against her. It was urged before me that so to read the deed gives the husband license to commit adultery without fear of interference by his wife. This seems to me a fallacy. No doubt a husband whose wife commits adultery obtains—certainly if he does not condone it, and, perhaps, if he does—immunity from a petition for divorce or judicial separation, whatever be his subsequent conduct. But such immunity results from the provision of the law, and a deed does not confer it by abstaining from taking it away. In short the misconduct of a wife gives the husband two rights—one to sue for relief, the other to resist a claim for relief by the wife. It may well be that a husband is willing and agrees to part with the former right, but not with the latter, and this, I think, is what the respondent in this case has done.

In this view it is not necessary to decide what would be the effect of such a covenant as that contained in the words I have quoted from *Rose* v. *Rose*. No doubt in cases of judicial separation condonation gives to the court a discretion to grant the relief sought for notwithstanding the adultery of the petitioner. The case of *Anichini* v. *Anichini*, 2 Curt. 210, recognized as it is in *Morgan* v. *Morgan and Porter*, 17 W. R. 688, L. R. 1 P. & D. 644; *Goode* v. *Goode and Hamson*, 9 W. R. 552, 2 Sw. & Tr. 253; *McCord* v. *McCord*, 23 W. R. 684, L. R. 3 P. & D. 237; and *Conradi* v. *Conradi*, 16 W. R. 1023, L. R. 1 P. & D. 514, may I think now be taken as establishing such a proposition. An analagous discretion in cases of dissolution was conferred on the court by section 31 of the Matrimonial Causes Act, 1857, although the cases point to the use of it only under exceptional circumstances: see *Seller* v. *Seller*, 8 W. R. 5, 1 Sw. & Tr. 482; *Morgan* v. *Morgan and Porter*; *Goode* v. *Goode and Hamson*; *Collins* v. *Collins*, 32 W. R. 501, 9 App. Cas. 205; *Story* v. *Story and O'Connor*, 36 W. R. 190, 12 P. D. 196; and *Stoker* v. *Stoker*, 37 W. R. 576, 14 P. D. 60; and it appears to me that the argument addressed to me by Mr. Deane that the discretion may be somewhat wider in cases of judicial separation than of dissolutions is well founded in reason, and finds some support in some expressions used in the judgment in *McCord* v. *McCord*. It may also be, though as to this I entertain considerable doubt, that an agreement that past misconduct is to be deemed to be condoned, or a covenant not to set up past misconduct as a defence, confers on the court the same discretion as is conferred by condonation. It is to me by no means clear that the parties can at their pleasure confer by agreement on the court the same discretion which the court founds on their actual conduct. I am not sure that they can give the court a jurisdiction not to refuse the prayer of a petition by agreeing that they should be deemed to have condoned, when in fact they have not, any more than they could give a jurisdiction to grant the prayer of a petition by agreeing that cruelty should be deemed to have been committed when in fact it had not.

But it is clear, I think, that the parties cannot by stipulation produce any higher effect than

they can by condonation, or can impose on the court the necessity of granting a judicial separation notwithstanding the adultery of the petitioner. It is clear from the authorities, ending with the cases of *Rowley* v. *Rowley*, L. R. 1 H. of L. Sc. 63, 15 W. R. H. L. Dig. 6; *Besant* v. *Wood*, 12 Ch. D. 605, 27 W. R. Dig. 95; and *Rose* v. *Rose*, that no rule of public policy, nor any other rule, prevents parties from agreeing that they will not found an application to the court on past misconduct. The view of the law in the present day, no doubt, is that as parties can compromise and agree to compromise a suit, so they can agree not to bring it or can agree not to put forward specified matters as foundation for it. But it is altogether another thing to say, and I do not think that any of the last-mentioned cases show, that the parties can by any arrangement between themselves dictate to the court on what principle relief sought is to be granted. If it is a rule that an adulterous spouse cannot obtain a judicial separation or dissolution except under certain special circumstances recognized by judicial authority, the parties cannot surely by any agreement relax or modify that rule. They may contract themselves out of their right, but they cannot contract the court out of its duty. That would be to make a law for themselves.

I have touched on these points because, having had all the facts of the case before me, it appears to me right to say that if the terms of the deed give me a judicial discretion whether the adultery of the petitioner should bar her claim to a judicial separation, I cannot think that there are any such exceptional circumstances as would justify me in granting the prayer of the petitioner. The respondent has been guilty of adultery since the deed of separation, and some years before it he was guilty of conduct of which I was obliged to express my opinion to the jury in terms I do not wish to repeat. But I do not think that misconduct of the respondent before the deed, nor of course since it, conduced to the petitioner's misconduct. On the other hand, while not forgetting the terrorism exercised at some period over the petitioner by her paramour, and also giving weight to the absence of any charge of misconduct after the separation, I cannot help saying that the misconduct was singularly persistent, and in respect of its open character singularly degrading to the husband, and I think further that her attachment for the man to whom I have referred deepened, if it did not originate, the estrangement between herself and her husband, and, causing as it did that eventual separation, placed him in a position which conduced to, though it does not justify, his recent misconduct. Such a state of things does not fall within the principle of any of the cases in which, notwithstanding the adultery of the petitioner, either dissolution or judicial separation has been granted. I have hesitated whether, as the wife has a substantial income, she should not pay the costs, with a set-off with regard to the point on which she was successful; but on the whole, especially as there were grave faults on both sides, I think there should be no order as to costs.

Petition dismissed.

Solicitors for the petitioner, *Hemsley & Hemsley.*

Solicitors for the respondent, *Lewis & Lewis.*

Court of Appeal.

From Q. B. Div. (Lindley and Lopes, L.JJ.) — July 14.

BUDDEN v. WILKINSON. (a.)

Practice—Discovery—Affidavit of documents—Sufficiency—Production of documents—Privilege—Documents relating solely to the case of the party claiming privilege.

In an action of trespass, to which the defence pleaded was a right of way, the plaintiff made an affidavit of documents in the following terms:—"I have in my possession or power certain documents numbered 1 to 26 inclusive, which are tied up in a bundle marked A, and initialed by me; the said documents relate solely to the title or to the case of the plaintiff, and not to the case of the defendant, nor do they tend to support it, wherefore the plaintiff objects to produce the same, and says they are privileged from production."

Held, that the affidavit sufficiently described the documents so as to enable the court, if it thought fit so to do, to enforce production; and, consequently, that the affidavit was sufficient.

Taylor v. Batten, 27 *W. R.* 106, 4 *Q. B. D.* 85, *followed.*

Held, also, that the documents so described were privileged from production; and that the fact that the affidavit stated that the documents related to the case as well as to the title of the plaintiff, and omitted to state that the documents contained nothing impeaching the case or title of the plaintiff, did not render the affidavit insufficient for the purpose of supporting the plaintiff's claim of privilege from production.

Bewicke v. Graham, 29 *W. R.* 436, 7 *Q. B. D.* 400, *followed.*

McLean v. Jones, 66 *L. T. N. S.* 653, 40 *W. R. Dig.* 182, *not followed.*

Appeal by the plaintiffs from the judgment of a Divisional Court of the Queen's Bench Division (Mathew and Wright, JJ.).

This was an action in which the plaintiffs claimed damages for trespass against the defendant by reason of the defendant's passing through a certain archway passage, which the plaintiffs alleged to be their property. The defendant by his defence alleged that the archway passage was the only access to the defendant's premises, and pleaded a right of way over the *locus in quo;* the defendant also counterclaimed in ejectment.

The defendant applied for discovery of documents, and the plaintiffs made an affidavit in the following terms:—"We have also in our possession or power certain documents numbered 1 to 26 inclusive, which are tied up in a bundle and marked A, and initialed by the deponent G. S. Budden; the said documents last mentioned relate solely to the title or to the case of us, the plaintiffs, and not to the case of the defendant, nor do they tend to support it; wherefore we object to produce the same, and say they are privileged from production." The defendant thereupon applied that the plaintiffs might be ordered to make a further and better affidavit of documents.

The Divisional Court (Mathew and Wright, JJ.), considering itself bound by the decision of another Divisional Court in the case of *McLean* v. *Jones*, 66 L. T. N. S. 653, 40 W. R. Dig. 182, held that the affidavit of the plaintiffs in the form in which it was made was not sufficient, on the ground that privilege could only be claimed for documents of title as distinguished

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

from case, and ordered a further and better affidavit to be made by the plaintiffs.

The plaintiffs appealed.

At the hearing of the appeal the attention of the court was not called to the fact that, by reason of the defendant's counter-claim, the question of the plaintiffs' possession of the *locus in quo* was one of the issues in the action; the case was argued, and was dealt with by the court as if the plaintiffs' possession of the *locus in quo* was not in dispute, and as if the only question in issue was whether the defendant had a right of way over the *locus in quo*.

C. Montague Lush, for the appellants.—The plaintiffs are entitled to claim privilege from production, not alone for the documents which the plaintiffs swear relate solely to the plaintiffs' title, but also for documents which they swear relate solely to the plaintiffs' case, and do not tend to support the defendant's case: *Bewicke* v. *Graham*, 29 W. R. 436, 7 Q. B. D. 400; *Peile* v. *Stoddard*, 1 Mac. & G. 192; *Greenwood* v. *Greenwood*, 6 W. R. 119; *Attorney-General* v. *Thompson*, 8 Hare, 106; *Bulman* v. *Young*, 31 W. R. 766; *Jenkins* v. *Bushby*, 14 W. R. 531, 35 L. J. Ch. 400, *per* Kindersley, V.C., at p. 401; Wigram on Discovery, 2nd ed., pp. 243, 244; and if the documents are privileged, then the affidavit, in the form in which it has been made by the plaintiffs, is sufficient, as the documents for which protection is claimed are therein sufficiently identified, and the plaintiffs were not bound in their affidavit to state what documents relate to title and what to case as distinguished from title: *Taylor* v. *Batten*, 27 W. R. 106, 4 Q. B. D. 85. [LINDLEY, L.J.—*Mansell* v. *Feeney*, 9 W. R. 610, 2 J. & H. 320, is rather against you.] That case was criticized in and is inconsistent with *Bewicke* v. *Graham* and *Bulman* v. *Young*; and *McLean* v. *Jones* is also really inconsistent with *Bewicke* v. *Graham*. The omission in the plaintiffs' affidavit of any statement that the documents in question "contain nothing impeaching the case or title of the plaintiffs" does not render the affidavit insufficient, nor is the omission of such a statement fatal to the plaintiffs' claim of privilege from production: *Morris* v. *Edwards*, 37 W. R. 271, 23 Q. B. D. 287, 15 App. Cas. 309, 39 W. R. Dig. 162; *Ind Coope* v. *Emerson*, 36 W. R. 243, 12 App. Cas. 300. The plaintiffs' affidavit is drawn exactly in the form that was used in *Bewicke* v. *Graham*, which the Court of Appeal there held was a sufficient affidavit. The defendant is bound to accept the oath of the plaintiffs as true.

J. E. Bankes, for the defendant, the respondent.—This is not a case of a claim for protection from production on the ground of professional privilege; it is another kind of privilege which is set up by the plaintiffs' affidavit, and to support this particular kind of privilege the plaintiffs' affidavit should give such a description of the nature of the documents as to enable the court to satisfy itself with reasonable certainty that the plaintiffs have not erroneously represented or misconceived the nature of the documents: *Combe* v. *Corporation of London*, 1 Y. & Col. C. C. 631, at p. 651; *Attorney-General* v. *Emerson*, 31 W. R. 191, 10 Q. B. D. 191, at p. 203-4. The plaintiffs' oath is not an oath as to a fact, but an oath as to the effect of documents, and the court is bound not to accept such an oath without some sufficient description of the documents being given. [LINDLEY, L.J.—How do you get over *Bewicke* v. *Graham*?] That was not a decision as to a sufficiency of the description of the documents on a claim for privilege against production; the question there was merely whether the documents were sufficiently identified. Secondly, the plaintiffs' affidavit should have contained a statement that the documents in question "do not contain anything impeaching the plaintiffs' case": *Boyd* v. *Petrie*, 17 W. R. 903, 20 L. T. N. S. 934. The cases of *Morris* v. *Edwards* and *Ind Coope* v. *Emerson* only decide that in an ejectment action those words need not be inserted. [LOPES, L.J.—In *Morris* v. *Edwards* Lord Herschell does not limit his observations to the case of an ejectment action.] *Morris* v. *Edwards* was in fact an ejectment action. Thirdly, *McLean* v. *Jones* is an express decision that such privilege from production as is claimed here can only be claimed as to documents of title as distinguished from documents of case: *Bustros* v. *White*, 24 W. R. 721, 1 Q. B. D. 423; *Gardner* v. *Irvin*, 27 W. R. 442, 4 Ex. D. 49.

Lush, in reply.—The defendant has not asked for production, but has merely applied that the plaintiffs be ordered to make a further and better affidavit; strictly speaking, the only question before the court at present is as to the sufficiency of the plaintiffs' affidavit; but I am willing that the court should now deal with the question as if an application for production of the documents had been made by the defendant. [*Bankes*.—I, too, am willing to have the matter treated as if it were an application for production.]

LINDLEY, L.J.—This is an appeal from an order of the Divisional Court, declaring that a certain affidavit of documents is insufficient. The affidavit runs thus:—"We have also in our possession or power certain documents, numbered 1 to 26 inclusive, which are tied up in a bundle marked A and initialed by the deponent, Budden. The said last-mentioned documents relate solely to the title or to the case of us, the plaintiffs, and not to the case of the defendant, nor do they tend to support it, wherefore we object to produce the same, and say that they are privileged from production."

The action is an action for trespass, and it is met by a plea of right of way, and the question in dispute therefore will be the existence of the right of way over the land. Possession is enough to support the plaintiffs' claim, and I suppose the possession is not in dispute; but the right of way, of course, may raise a question of title, as to which I say nothing.

Now the real point in dispute will be—I do not say it is at this moment, but will be—whether these documents in this bundle are sufficiently protected from production; the case has been argued before us as if that really were the substantial question. But in point of form what we have to consider is the sufficiency of the affidavit. Now, dealing with that, the question which arises is, What is it necessary to set out in the affidavit to make it a sufficient affidavit of documents? Upon that particular point *Taylor* v. *Batten*, 27 W. R. 106, 4 Q. B. D. 89, is conclusive; the principle of that case is enunciated in two or three lines, which I will read:—"The principle of our decision is that the object of the affidavit is to enable the court to make an order for the production of the documents mentioned in it, if the court think fit so to do, and that a description of the documents which enables production, if ordered, to be enforced, is sufficient."

In the present case the affidavit states that there are certain documents which are capable of being identified—tied up in a bundle, marked, and numbered. Nothing more is wanted to identify those documents or to enable the court to order them to be produced, and to enforce the order, if it is right so to do. Taking, therefore, the case of *Taylor* v. *Batten* as our guide—and there is nothing new in it, for the law there laid down is old law, familiar to all of us—the narrow point whether or not the affidavit here is

sufficient, appears to us to be settled in favour of the plaintiff's contention. It is a sufficient affidavit.

That, however, leaves open one or two other points to which I will now allude. It has been argued that the affidavit is not sufficient, because of the expression "certain documents"; but that does not in any way throw any doubt or difficulty as to the identity of the bundle.

Then it was argued that the affidavit is not sufficient, because it does not say that these documents do not tend to impeach the plaintiff's title. This is a point which refers rather to the protection from production, and that is a question which will arise when the point as to production is raised before the court. That particular point—in an action for ejectment at all events—is met by the decision of the House of Lords in *Morris* v. *Edwards*, and I think also by the decision in *Ind Coope* v. *Emerson*, which also went to the House of Lords. The words "and do not tend to impeach the plaintiff's title" may apparently be omitted in the affidavit; but their omission does not affect the efficiency of the affidavit.

Then the affidavit is also quarrelled with by reason of the word "case" being introduced: that, again, is a point which does not arise on the sufficiency of the affidavit; the only point which arises on the sufficiency of the affidavit is that which I have already dealt with.

I might stop there, and say nothing at all about the right to the production of these documents, for which protection is claimed; but we have been invited to say something, and I will say this: that, having looked into the case of *Bewicke* v. *Graham*, I think it will be found—when the question of production is raised—that that case covers this point. I cannot distinguish that case from the present one; and as it was a decision of the Court of Appeal it is binding on us. Whether it went too far or not, I say nothing at all about. The appeal must be allowed.

LOPES, L.J.—I am of the same opinion. The real question, and in fact the only question which we have to consider, is whether this affidavit is sufficient. The case of *Taylor* v. *Batten* appears to be clear on that point. All that is required is that the documents in question should be sufficiently identified to enable the court to make an order for their production. The terms of the affidavit here are quite sufficient to enable the court to make such an order.

It is impossible, however, to disguise from one's mind that the real question sought to be raised—and which ultimately would have to be raised—in this case is whether or not the documents in question are sufficiently protected from production. It is not necessary for me to express any opinion of my own on this subject; there is the case of *Bewicke* v. *Graham*, and it seems to me that that case is directly in point, and it is a case by which we are bound. I am unable to distinguish it from the present case.

LINDLEY, L.J.—I may add that *Bewicke* v. *Graham* appears to us both to be quite inconsistent with the decision of the Divisional Court in *McLean* v. *Jones*.

Solicitor for the plaintiff, *G. W. Barnard*.

Solicitors for the defendant, *Withall & Co.*

From Chan. Div. (Lindley, Lopes, and A. L. Smith, L.JJ.) — June 30; July 3, 4.

MIDGLEY v. MIDGLEY. (a.)

Executor—Statute of Limitations—Statute-barred debt—Administration summons by creditor dismissed—Subsequent payment of the debt by one executor against wish of his co-executor—Res judicata—Devastavit.

An executor who pays a statute-barred debt after a judicial decision that the debt is not recoverable out of the testator's estate by reason of its being statute-barred, commits a devastavit; *and the creditor who receives payment of such debt, with knowledge of the circumstances, is also liable to the testator's estate for its repayment.*

Appeal from Romer, J.

J. Midgley, who died in 1891, appointed his wife Isabella Midgley and his nephew Stephen Midgley executors of his will, and Isabella Midgley was also the residuary legatee.

On the 9th of April, 1892, an originating summons, for the administration of the testator's estate, was taken out in the Palatine Court of Lancaster on behalf of Elizabeth and Jane Sager by a Mr. C. H. Plant, their solicitor, in which the applicants claimed payment of a sum of £135, representing principal and interest, which they alleged to be due to them from the testator's estate in respect of a loan of £150 made by them to the testator in 1880, which by a payment made by the testator in 1885 had been reduced to £100, since which date no payment or acknowledgment of the debt had been made. One of the executors—viz., Stephen Midgley—admitted the claim of the Misses Sager, but the executrix, Isabella Midgley, objected to it. She suggested that there had been an arrangement come to between the testator and the Misses Sager that the latter were not to claim payment of the money, and she set up the Statute of Limitations as a bar to the claim.

On the 29th of April, 1892, the judge of the Palatine Court dismissed the originating summons of the Misses Sager on the ground that the debt was statute barred. Stephen Midgley nevertheless in May, 1892, at the instigation of Plant, who was the solicitor of the Misses Sager, handed Plant a cheque for £135, signed by himself alone, and payable to the Misses Sager or bearer; the cheque was drawn on a bank in which certain moneys, forming part of the testator's estate, had been lodged by the executors. Plant obtained payment of the cheque and lodged the £135 to the credit of an account kept at his own bank as agent for the Misses Sager, but over which Plant had the control.

The present action was thereupon instituted by Isabella Midgley as plaintiff, against Stephen Midgley, Plant, and the Misses Sager as defendants, claiming to have the £135 repaid to the testator's estate by Plant and the Misses Sager, and a declaration that the defendant Stephen Midgley was also liable to repay the £135 with interest thereon. Shortly after the issue of the writ in the action the defendant Plant paid over the moneys over which he had the control, to the Misses Sager.

Romer, J., at the trial of the action made an order that the defendants, the Misses Sager and Plant, "do forthwith repay £135 to the credit" of the executors of the testator, and that the defendant Stephen Midgley was also liable to repay the £135 with interest.

Each of the defendants appealed.

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

Neville, Q.C., and *Maidlow*, for appellant Stephen Midgley.—It is an old established rule that either executor has a right to pay out of the testator's assets a statute-barred debt, notwithstanding the fact that the residuary legatee objects, provided there has been no decree for administration pronounced: *Shewen* v. *Vanderhorst*, 1 Russ. & Myl. 347; *In re Rownson, Field* v. *White*, 33 W. R. 604, 29 Ch. D. 358, at pp. 362, 363. *In re Wenham, Hunt* v. *Wenham*, 40 W. R. 636, [1892] 3 Ch. 59, is distinguishable, because there, although no decree for administration had actually been pronounced, the court had assumed the duty of, and was acting in, the administration of the estate; but in the present case the court did not assume the duty of administering the estate, the creditors' administration summons having been dismissed. [A. L. SMITH, L.J.—Would not your client have been bound to plead *res judicata* if any action by the Misses Sager to recover the £135 had been brought after the dismissal of the originating summons?] The decision on the originating summons was only a decision that the debt was statute barred; it decided nothing as to the existence of the debt itself. To support a plea of *res judicata* it is necessary to show that the question raised in the second suit had been adjudicated upon in the first: *Moss* v. *Anglo-Egyptian Navigation Co.*, 14 W. R. 150, L. R. 1 Ch. App. 108, at p. 114; Bullen & Leake's Precedents, 3rd ed., p. 575; *Houston* v. *Marquis of Sligo*, 29 Ch. D. 448, 33 W. R. Dig. 83.

Swinfen Eady, for the appellants the Misses Sager.—The learned judge below has found that the originating summons taken out on behalf of the Misses Sager was dismissed because the debt was statute barred. As to the plea of *res judicata*, the court would be bound to see what the point directly in issue in the first action was, because it is only to that extent that the judgment is an estoppel; the replication to a plea of *res judicata* would be *nul tiel record*, and then the record in the first action should be looked into and the exact course which the first action took would have to be shown. [A. L. SMITH, L.J.—On the record you would not find the nature of the pleas pleaded at all.] The dismissal of the originating summons left the executors at large as to the administration of the estate. It is going too far to say that because the originating summons was dismissed, that, therefore, the Misses Sager were not creditors at all; the summons might have been dismissed as a matter of discretion, for the judge has a judicial discretion to grant or to refuse administration of an estate.

Hopkinson, Q.C., and *O. L. Clare*, for the appellant C. H. Plant.—Plant ought not to have been made a party to this action, and no decree ought to have been made against him. The money in question is not in his hands. A solicitor is not to be held responsible as a constructive trustee unless the trust property is in his hands: *Barnes* v. *Addy*, 22 W. R. 505, L. R. 9 Ch. App. 244; *In re Spencer*, 30 W. R. 296, 51 L. J. Ch. 271.

Channell, Q.C., and *Upjohn*, for the respondent, Isabella Midgley.—The origin of the doctrine that an executor paying a statute-barred debt does not commit a *devastavit* is that the debt is justly due. But in the present case the respondent alleged that there had been an arrangement between the dead man and the Misses Sager that they were not to receive judgment; but there was a difficulty about proving this arrangement, and therefore the Statute of Limitations was set up honestly, and not as a means of disputing what was acknowledged to be justly due. The judgment on the originating summons was something more than a decision that the debt was statute barred; it settled conclusively not only all matters actually in issue, but which might have been in issue in that proceeding. Stephen Midgley after that, had a plea of *res judicata*, and by paying the debt he abandoned the benefit of that plea, and that he had no right to do. The plea of *res judicata* goes further than mere estoppel, because whereas the latter depends on the particular issue actually raised in the first suit, the plea of *res judicata* applies to what might have been raised in the first suit: *Newington* v. *Levy*, 19 W. R. 473, L. R. 6 C. P. 180; *Greathead* v. *Bromley*, 7 T. R. 455; *Thomas* v. *Griffith*, 9 W. R. 293, 2 De G. F. & J. 555; *Baldwin* v. *Church*, 1 Stra. 20. On the question as to making the Misses Sager and Plant parties to the action, Plant was not acting as solicitor for Stephen Midgley, the executor, but was acting as solicitor for the Misses Sager, who were mere strangers who appropriated this part of the testator's estate. The case of *Attorney-General* v. *Earl Chesterfield*, 2 W. R. 499, 18 Beav. 596, is therefore distinguishable. At the time this action was brought, Plant was the person who had sole control of the account into which the £135 had been paid. He was therefore a necessary party: *Lee* v. *Sankey*, 21 W. R. 286, L. R. 15 Eq. 204, at p. 211. The Misses Sager are liable because they have now got the £135 in their hands.

Maidlow, in reply for S. Midgley, cited *In re Radcliffe, European Assurance Society* v. *Radcliffe*, 26 W. R. 417, 7 Ch. D. 733.

Hopkinson, Q.C., in reply for Plant, cited *Stahlschmidt* v. *Lett*, 1 Sm. & Giff. 415, and *Coombs* v. *Coombs*, 15 W. R. 286, L. R. 1 P. & D. 288, as to the power of one executor to pay a statute-barred debt; and as to estoppel, *General Steam Navigation Co.* v. *Gillow*, 11 M. & W. 877.

Swinfen Eady replied for the Misses Sager.

LINDLEY, L.J.—In this case there are three appeals—an appeal by Stephen Midgley, another by the Misses Sager, and a third by Mr. Plant—from the order of Romer, J., which order was as follows: [The Lord Justice read the order, and proceeded:—] Why the appeals could not have been consolidated and dealt with in a less expensive way, I do not know. The short point which arises is as follows: It appears that the plaintiff, Mrs. Isabella Midgley, and a Mr. Stephen Midgley were co-executors of Mrs. Midgley's husband. It appears that the Misses Sager claimed to be creditors against the testator's estate; it appears that the executors took different views of what ought to be done about paying the Misses Sager; it appears that Stephen Midgley was of opinion that they ought to be paid, but that Mrs. Midgley was of opinion that they ought not to be paid. She was not satisfied that her husband owed the money. Besides which their debt was, she contended, barred, assuming it to have been a just one, by the Statute of Limitations. I will assume, without deciding it, that it was perfectly competent for Mr. Stephen Midgley in that state of things to have paid the Misses Sager. I will assume too, notwithstanding he knew of the dispute about the debt *bonâ fide* raised by his co-executrix and her objection to pay it, he nevertheless could have paid it. I am disposed to think that may be the law, although I do not think there is any case which goes quite to that length. Certainly, in 1826, no less a judge than the late Baron Bayley said it was not the law. In a passage in the case of *M'Culloch* v. *Dawes*, 9 Dow. & Ryl., at p. 43, decided by Abbott, C.J., Bayley, J., (as he then was) and Holroyd, J.; Bayley, J., said this: "They are bound," speaking of executors,

"if possible to resist such a claim"—that is, a claim barred by the statute—"they have no right to waive any legal defence to such an action, and if they did and were to pay a debt, against the recovery of which there was any legal bar, they would render themselves liable over to those who were interested in the testator's property." I do not say that that is the state of the law now. I do not think it is, because that passage was called pointedly to the attention of Wood, V.C., in *Hill* v. *Walker*, 4 K. & J. 166, in 1858, and he dissented from it. The Vice-Chancellor said: "It certainly cannot be considered to be law at the present day that executors, paying a debt against the recovery of which the Statute of Limitations might be pleaded as a legal bar, render themselves liable over to those who are interested in the testator's property. Instances of such payments must very frequently have occurred, and yet I am not aware of any case in which an executor paying such a debt has been held to incur any liability." Speaking now with a very considerable and long experience in these matters, I have no doubt whatever that the view stated by Wood, V.C., in 1858 has always been accepted as good law ever since, and that the passage I read from the judgment of Bayley, J., has not been followed for the last thirty years at least. But how far the doctrine that an executor can pay a statute-barred debt has gone, is another matter. I take it as a general proposition that an executor can pay a statute-barred debt and not be guilty of *devastavit*.

The position of affairs being what I have mentioned, Mr. Stephen Midgley did not think fit to claim the benefit of the statute. His co-executor did, and the consequence was that the Misses Sager brought an action by way of originating summons, in Chancery, for administration of the estate—that is to say, an action for payment of their debt in due course of administration. That was the scope and object of their summons. Their summons was issued in the Palatine Court, and it was met in this way. Stephen Midgley admitted the debt, and said he thought it ought to be paid. His co-executor, the widow, denied the debt, disputed it, and pleaded the statute. What was to be done? Was the learned judge before whom the case came to take the admission of the executor who admitted the debt and give the plaintiff a decree of administration, or was he to attend to the plea of the widow that the statute barred it? Upon that point it appears to me that he did that which, as I understand, is in perfect accordance with the law, as it is laid down in "Williams on Executors" (Vol. II., Part V., Book III., c. 1, at p. 1,953, 8th ed.): "If there are several executors, they may plead different pleas, and that which is most to the testator's advantage shall be received. Therefore, in an action of *assumpsit* against four executors upon a promise made by the testator, if one executor acknowledges the action and the other three plead *non-assumpsit*, their plea shall be received." Acting upon that principle the learned judge, having before him the view of each executor, felt himself bound by law to attend to the plea of the statute. The question whether the debt was barred by the statute was accordingly gone into, and it was decided that the debt was barred, that is to say, there was by the judge at that time and under that state of circumstances an adjudication that that particular debt which was being sued for was not recoverable out of the estate. I do not say he decided it was not due, but there was an adjudication that it was not recoverable. If it had been recoverable, as a matter of course or in his discretion in the matter, he would have granted the usual decree for administration of the estate. That is the position of affairs.

Now what was done after that? We will consider the effect of what was done presently; but what was done was this. Mr. Stephen Midgley, under the advice of his solicitor—and it really was by the contrivance of Mr. Plant—goes and, notwithstanding that adjudication, pays that debt out of the assets, and now seeks to justify that payment. Can that be? Is it in accordance with principle that that can be right? It seems to me upon principle that it is clearly and manifestly wrong. What is the principle? The principle, as a general principle, is that it is the executors' duty to protect the estate against demands which by law cannot be enforced against it. That is his duty. That general principle is a wholesome principle not to be cut away or narrowed, and it was discussed and recognized and enforced in this court in *In re Rownson, Field* v. *White*, where the point was whether the executor could pay a debt to which the Statute of Frauds was pleaded. The court said no. On general principle I take it to be clear and plain that it was distinctly wrong for the executor to pay a debt which had been judicially decided not to be recoverable out of the estate which it is his duty to protect.

But then, it is said, there is an exception as regards the Statute of Limitations. No doubt that is an exception. The question is—what is the extent of the exception? The exception itself I say no more about. I have read the passage as to that, from the decision of Wood, V.C., in *Hill* v. *Walker*, and I do not wish to diminish it to any extent. How far has it gone? Has it ever been decided that an executor can justify the payment out of assets of a debt which has been judicially held to be irrecoverable? There is no such case. No such authority can be found; and we are asked, therefore, to extend this anomalous principle, and cut into a sounder and more general principle. What is the right course to pursue? Are we to extend this anomalous principle, or are we to maintain a wholesome and general principle? My answer is that an anomalous principle is not to be extended, but is to be confined within the limits of its own anomaly. That principle was distinctly enunciated and acted upon in *In re Rownson, Field* v. *White;* and unless there is authority which drives me to say that an executor can pay a debt which has been judicially determined not to be recoverable, I will not be the first to say he can. It seems to me it would be wrong. Technically, I take it, it is manifestly wrong. Technically the executor is in a position, in the circumstances to which I have alluded, to plead to a fresh action, not only the statute, but *res judicata*. On what principle is he to throw over the protection he has got by the judgment of the court? On the contrary, he falls immediately within the general principle to which I have alluded, and he is outside the anomalous principle to which I have also alluded. That was the short ground on which Romer, J., decided this case. He said—I agree an executor can pay a statute-barred debt, but an executor has no business to throw over the protection which the decision of the court has given him. I entirely agree with Romer, J., and on general principle, I repeat the conclusion I have arrived at—that when there has been a judicial decision that the debt is not recoverable, the right of the executor to pay that debt is gone. It is a new point, but I have no doubt about it; and I therefore hold that Stephen Midgley, when he did pay that debt, did that which, in point of law, he had no right to do. It follows, of course, that Stephen Midgley's appeal must be dismissed.

Then, as regards the case against the Misses Sager and Mr. Plant, their position is somewhat different. As to them, the circumstances are peculiar. At the time the writ in this action was issued, the money

which had been improperly got out of a fund out of which it ought not to have been taken was under the control of Plant, and standing to the credit of the two Misses Sager. How was that money to be got back except by some proceeding to which both were parties? It was necessary they should both be parties, and as the Misses Sager had the money, it was right to compel them to restore it. They got it from a fund out of which it ought never to have been paid, and with knowledge of the circumstances. Therefore I am of opinion the appeal of the Misses Sager fails also.

Now, as to Plant; if this was like the case of *Barnes* v. *Addy*, I should think the action ought to be dismissed against Plant, and dismissed with costs. There used to be a notion, a hazy notion, in chancery that you could file a bill against a solicitor or other agent to get costs out of him, even if you could not get relief against him. I never understood it, nor anybody else that I ever heard of. But those cases were reviewed and discussed and examined by Lord Selborne in the case of *Barnes* v. *Addy*. The question, therefore, whether Mr. Plant ought to be saddled with costs depends, in my judgment, on whether there were circumstances which justified the court in giving relief against him. It appears to me there are such circumstances which amply justify it. In the first place, he had the money at the time when the writ in this action was issued. In the next place, that money was got by him by a deliberate scheme to get it paid out of the fund out of which I have already held it was not legally recoverable. He was the *fons et origo* of the whole of this mischief. I do not allude to matters which it is unnecessary to allude to, but we know the facts. We know how the money was got. We know it was his doing; and he having been the instigator and schemer of the whole thing, in my opinion Romer, J., was justified in making a decree against him. His appeal also ought to be dismissed with costs.

LOPES, L.J.—Unless this had been a somewhat novel and interesting point, I should have reposed under the very elaborate and excellent judgment which has been delivered by my learned brother; but, as it is a somewhat novel and important point, I will shortly state what I think about it.

I think the law is clear to this extent, that an executor is not bound to set up the Statute of Limitations to a claim, and that though the debt may be barred he may nevertheless pay it. But this is before decree in an administration suit. After decree in an administration suit, I think it is competent for any person interested in the fund to take advantage of the Statute of Limitations, notwithstanding the refusal of the executor to set it up. I think, so far, the law is perfectly clear. Whether before decree an executor can pay a statute-barred debt against the protest of persons interested in the assets of the testator and against the wishes of his co-executor, as far as I know (and I believe I am correct), has never yet been decided, and I do not propose in this case to express any opinion on the subject. It is unnecessary to decide such a point, and it is a matter which no doubt will arise, and will have to be decided in the future.

Now, I will deal with this case. An originating summons was taken out by the Misses Sager against the two executors under this testator's will—namely, Stephen Midgley and Isabella Midgley; Isabella Midgley being the plaintiff in the present action. This originating summons being taken out, it appears that Stephen Midgley was willing, nay, anxious, to pay the alleged debt, though it was statute-barred. Isabella Midgley, on the other hand, who, it may be observed, was a residuary legatee, was not anxious that the debt should be paid, and for reasons which are obvious; and she set up the Statute of Limitations. The court, having these two executors before it, and these two different courses being taken by the executors, had to determine the matter, and the court determined it in this way: It upheld the plea of the statute as set up by Isabella Midgley, holding that the claim of the Misses Sager was not an enforceable debt. In point of fact, the court adopted the view of the law enunciated in Williams on Executors, and referred to in the case of *Chaffe* v. *Kelland*, 1 Roll. Abr. 929, that that view was to be taken, in a matter such as this, which was most to the advantage of the testator's estate. The court accordingly upheld the plea set up by Isabella Midgley, and solemnly decided that this debt was not an enforceable debt. Stephen Midgley, it will be recollected, was a defendant and a party to this originating summons, and knew well all that transpired. Mr. Plant also knew all that transpired on the dismissal of this originating summons, because he was the solicitor who was acting for the Misses Sager. Therefore, we have both the Misses Sager and Plant knowing what course the originating summons had taken, and what had been decided by the court in that case. Now, what happens afterwards? Stephen Midgley, notwithstanding what had taken place, notwithstanding this solemn decision of the court to the effect that this debt was not an enforceable debt, pays the debt out of the assets of the testator—I need hardly say without consulting Isabella Midgley—and of his own motion.

That being so, the question which arises in this case is this, and this is the first and governing question—was Stephen Midgley justified in doing as he did? I am clearly of opinion he was not. Whatever the position of a disputed debt may be before it has been adjudicated upon and determined to be a debt not enforceable, I have no hesitation in holding that a co-executor, knowing what has taken place in proceedings such as this originating summons, who, after an adjudication upon it, pays the debt, commits a *devastavit*, and is liable to refund the money. It appears to me that to hold otherwise would be an unjustifiable disregard of the decision of the court that had adjudicated upon the debt. To hold otherwise would be against the principle which is admitted to be a good and sound principle—namely, that it is the duty of an executor to protect his testator's assets; and it would be even worse—it would be an extending of this doctrine with regard to the payment of statute-barred debts and so on, which is admitted to be anomalous, and about which it has over and over again been said that it is a doctrine which ought not to be extended. If the Misses Sager had brought an action for this debt they would have been conclusively answered by the plea of *res judicata*. Can it be said, notwithstanding that the plea of *res judicata* would be a conclusive answer, that the other executor may, of his own motion, pay this debt which the court has said is not to be recoverable? Speaking for myself, I decline to adopt such a view. After an adjudication that the debt is irrecoverable, I am clearly of opinion that no executor would be justified in making payment of it. So much for Stephen Midgley.

With regard to the other defendants—the Misses Sager and Plant—I have little to say. It seems to me clear that the Misses Sager must be held liable. They have obtained the benefit of this payment by Stephen Midgley, and they still hold the money. It may be said that they knew very little with regard to what Plant was doing. I think that is very likely. At the same time Plant was their solicitor; and although he says he acted on his own responsibility,

and I believe he did, yet, as their solicitor, they must be taken to have known what he was doing. The money was obtained for them, they got the benefit of it, and it is still under their control.

With regard to Plant, I have no hesitation in saying that he is liable. He seems to me to have been the instigator of the matter from beginning to end. Nobody admires more than I do to see a solicitor active for his client, but I think Mr. Plant passed the bounds of legitimate zeal which are becoming and proper in a solicitor who has his client's interests at heart. He seems to me to have been a deal more active in the matter than he was called on to be. I am of opinion that the learned judge below was right, and that Mr. Plant ought to be held liable to pay the costs in this case.

A. L. SMITH, L.J.—This point, which involves a very small amount of money—viz., £135—has been argued at great length and at enormous cost, wholly disproportionate to the money at stake. That has arisen, in part, by reason of the fact that the Misses Sager have been represented by eminent counsel; the solicitor, Mr. Plant, has been represented by eminent counsel; and Stephen Midgley has been represented by eminent counsel; and for two whole days points have been discussed, of importance, no doubt, but many of which it is not necessary to determine so as to adjudicate safely on the point in issue.

The sole point is, whether or not Stephen Midgley, who is a co-executor with the widow of John Midgley, the testator, was entitled on the 26th of May, 1892, to pay over the sum of £135, which he got out of the assets of the testator, to the Misses Sager. I will go at once to the material parts of the case. The law applicable to what is a *devastavit* or not is clear; and nobody has disputed that. If an executor pays what he ought not to pay he is guilty of a *devastavit*, except in one particular case, and that is this, that if he has the plea of the Statute of Limitations in his pocket he need not plead it. But, with that exception, if the executor pays what he ought not to pay, he is guilty of a *devastavit*. What happened here? On the 9th of April, 1892, Mr. Plant, for the Misses Sager, took out an originating summons for the purpose of administering the estate of the deceased man, Mr. John Midgley, and of obtaining for the Misses Sager this sum of £135. Whether that was a debt justly due at that time or not I do not pause to inquire. As to that, statements have been made at the bar on the one side and the other. Mr. Channell says it was not, that there had been accord and satisfaction, and so on. The other side says, no, there was no accord and satisfaction, and it was justly due. We have not now to decide whether the debt was at that time a good debt or a bad one, or could be proved to have been paid at that time. But when this originating summons was taken out, one of the executors, the executrix, the widow, pleads the Statute of Limitations, and says, "Your debt of £135 accrued six years before the summons was taken out." Mr. Stephen Midgley, apparently through the instrumentality of Mr. Plant, did all he could to defeat that plea which the widow determined to set up; because, as I understand, Stephen Midgley swore an affidavit in which he said the debt was justly due, and that he wanted to pay it out of the assets of his testator. I do not pause to inquire why he wanted to do that. Reasons can be suggested which I can see; but the judge of the Palatine Court who heard the summons came to a conclusion the debt was a debt which could not be recovered in a court of law, and that the statute was a bar to the whole of the proceedings, and therefore gave judgment for the defendant, the executrix, at any rate, if not for both executors, on that summons. Mr. Plant knew this; the Misses Sager knew this, that is, if Mr. Plant ever told them; and Stephen Midgley I expect knew this, because he had sworn an affidavit in the matter. What did they do? Having been defeated on this originating summons, they then found out that there were some moneys standing to the credit of the dead man's estate, which I understand were the proceeds of a policy, and Mr. Plant, together with Stephen Midgley, who had been defeated and told by a court of competent jurisdiction that this debt could not be recovered in any court of law, set to work and got this sum of £135 out of the proceeds of these policy-moneys, and transferred it into the account of Mr. Plant to the credit of his clients, the Misses Sager. Ought Stephen Midgley to have done that? It is said that at the time this was done Stephen Midgley was an executor who had only the defence of the Statute of Limitations, and that, inasmuch as he was not bound to set up the statute, he was entitled to make this payment out of the assets of his testator, which I have already mentioned. Here comes the real point of the case. Was Stephen Midgley at this time in the position of an executor who only had the Statute of Limitations to rely on? It seems to me he clearly was not; and that he was in a far better position than an executor who only had the statute to rely on. Because what had he? He had, first of all, an adjudication by a judge of a court of competent jurisdiction that the debt had accrued more than six years before summons. He had an adjudication of a court that there had been no acknowledgment to take the debt out of the statute; he had the adjudication of the court that there was no payment to take it out of the statute; and he had an adjudication of the court that six years had run and that the defendants had not been beyond the seas; or, in other words, he had an adjudication that the statute was a bar to any action that the Misses Sager could bring. I think it is manifest that this could be pleaded as *res judicata*; and if I wanted to refer to any authority for that I should refer to the case of *Newington* v. *Levy*, and the judgments of Martin, B., Bramwell, B., and Blackburn, J., in that case, all of whom say this, that not only what you do set up in an action, but what you could have set up in an action before judgment, is concluded by the judgment, and cannot be reopened afterwards in litigation between the same parties. So I say here, this executor, Stephen Midgley, had, beyond all doubt, more than the plea of the Statute of Limitations; he had an adjudication which he could set up against any claim which was made by these two ladies, the Misses Sager, for this £135. That being so, if I am right in that, it seems to me that the case of *In re Rownson, Field* v. *White* in the Court of Appeal has concluded the matter, because in that case the court—to use the words of Fry, L.J., in delivering judgment—said that this exception of the Statute of Limitations which an executor need not set up is an anomaly. In that case the question was whether the executor was bound to set up the Statute of Frauds, and the court held that he was. If a man had at his command a plea which would be a plea in bar, as I hold Stephen Midgley had, I cannot distinguish this case from that of *Field* v. *White*. I fully agree with the judgments which fell from the Lords Justices in that case—namely, that the doctrine that the executor was not bound to set up the plea of the Statute of Limitations is an anomaly, and is not to be extended. That is firm ground. That was the view of Romer, J., and I agree with him. That brings me to the point whether Stephen Midgley was guilty of a *devastavit* when he paid the money under the circum-

stances which I have narrated. My answer is, yes. So much for Stephen Midgley.

Then comes the question about the Misses Sager and Mr. Plant. On that I have nothing to add to what has fallen from the Lords Justices who have preceded me. It seems to me that Mr. Plant was the originator of all this, that he had the money under his control, although it was held for the benefit of the Misses Sager, and that, therefore, they were necessary parties. I will only add that all that Lindley, L.J., has said has my full acquiescence.

Appeal dismissed.

Solicitors for the appellants, *Robbins, Billing, & Co.; J. E. & H. Scott; Bower, Cotton, & Bower*, for *Plant, Abbotts, & Plant*, Preston.

Solicitors for the respondent, *Crowders & Vizard*, for *Stanton & Sons*, Chorley.

High Court of Justice.

Chan. Div. } April 18.
Stirling, J. }

HOWITT *v.* EARL OF HARRINGTON. (*a.*)

Quit rent payable in respect of copyhold tenement—Non-payment—Statutes of Limitation (3 *&* 4 *Will.* 4, *c.* 27, *ss.* 2, 3, *and* 37 *&* 38 *Vict. c.* 57, *s.* 1).

A quit rent payable in respect of a copyhold tenement is liable to be barred under the Statutes of Limitation.

Point of law.

This action was, in September, 1892, brought by a copyholder and her tenant against the lord of the manor of Sawley, in Derbyshire, of whom the copyhold tenement was held, for a declaration that a quit rent payable in respect of the copyhold tenement, and which had not been paid for fifteen years, was barred by the Real Property Limitation Acts (3 & 4 Will. 4, c. 27, and 37 & 38 Vict. c. 57), and for an injunction to restrain the defendant from a threatened distress for the arrears of the quit rent.

The point of law as to whether the copyhold quit rent had been extinguished under the above-mentioned Acts was by consent set down in the action under ord. 25, r. 2, of the Rules of the Supreme Court, 1883, and was now heard and determined.

The statute 3 & 4 Will. 4, c. 27, enacts, in section 1: That the words and expressions hereafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; and then it says: "The word 'rent' shall extend to all heriots and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole)." Section 2 provides "that after the 31st day of December, 1833, no person shall make an entry or distress or bring an action to recover any land or rent but within twenty years next after the time at which the the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims; or, if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same." Section 3 contains enactments as to the time when the right is to be deemed to have first accrued: "that is to say, when the person claiming such land or rent, or some person through he claims, shall in respect of the 'estate or interest' claimed have been in possession or in receipt of the profits of such land or in receipt of such rents, and shall while entitled thereto have been dispossessed or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received." Then there are certain instances given. The period of twenty years mentioned in section 2 was reduced to twelve years by section 1 of the Real Property Limitation Act, 1874.

Beale, Q.C., and *L. Jenkins*, for the plaintiffs.—The defendant's right is barred by the Acts. Quit rents are rents of assize, and are chief rents payable in respect either of freeholds or copyholds. These rents were within the statute 32 Hen. 8, c. 2: *Eldridge* v. *Knott*, 1 Cowp. 214. The Acts apply to freehold quit rents: *Owen* v. *De Beauvoir*, 16 M. & W. 547, 5 Ex. 166; *Earl of Chichester* v. *Hall*, 17 L. T. O. S. 121. Copyhold quit rents are also within the Acts. The text-books, both old and modern, have never drawn any distinction between the two kinds of quit rents in this respect: Scriven on Copyholds, 2nd ed., vol. 1, p. 419, 6th ed., p. 209; Cruise's Digest, 4th ed., tit. 31, c. 2, pl. 45; Blackstone's Commentaries, pl. 3, p. 189, note 3; Bacon's Abridgment, Copyhold, M. 238; Elton on Copyholds, 6th ed., pp. 211-214. The report of the commissioners on which the real property statutes passed in 1832-3 were founded shows that the commissioners intended to include copyhold quit rents in the Real Property Limitation Act, for they distinguished between ancient and conventional rents (such as rents under leases or agreements), and recommended that the Act should apply to such ancient rents. Copyhold quit rent is within the very wording of 3 & 4 Will. 4, c. 27, s. 2, for it is rent payable out of land, which, by section 1, includes copyholds. Conventional rents are not within the statute: *Grant* v. *Ellis*, 9 M. & W. 113; neither are heriots: *Lord Zouche* v. *Dalbiac*, 23 W. R. 564, L. R. 10 Ex. 172. Perpetual rents, however, are within the statute: *Irish Land Commission* v. *Grant*, 33 W. R. 357, 10 App. Cas. 14, 27. It is not necessary that there should be disseisin for the Act to apply, and if *Grant* v. *Ellis* has decided that it was necessary, the reasoning in that case does not support that decision. Mere denial, which is not disseisin (Coke upon Littleton, 160 b), is sufficient: *Owen* v. *De Beauvoir; Adnam* v. *The Earl of Sandwich*, 2 Q. B. D. 485, 25 W. R. Dig. 148. There is no analogy between copyhold quit rents and leaseholds, but freehold and copyhold quit rents are alike in many respects. The lord has the same remedies in both cases: Booth on Real Actions, 2nd ed., p. 263; Watkin's Copyholds, 4th ed., vol. 2, p. 140; *North* v. *Earl of Strafford*, 3 P. W. 148. They have the same origin; the lord has an estate at common law in both kinds of quit rents; Gilbert on Tenures, 5th ed., p. 402; Watkins on Copyhold, 4th ed., vol. 2, p. 139. A copyholder may prescribe in fee against his lord: Viner's Abridgment, 2nd ed., Copyhold, p. 224; *In re Lidiard's Contract*, 37 W. R. 793, 42 Ch. D. 254.

Hastings, Q.C., and *Archibald Brown*, for the defendant.—Copyhold quit rents differ from those pay-

(*a.*) Reported by W. A. G. WOODS, Esq., Barrister-at-Law.

able in respect of ancient freeholds, which are separate tenements, although they pass with the manor: Elton, p. 11. They are incident to the lord's reversion, and are therefore similar to leasehold rents: Gilbert on Tenures, p. 308; *Laughter* v. *Humphrey*, Cro. Eliz. 524; *Bennet's case*, 2 Strange, 786. Rolfe, B., in *Grant* v. *Ellis* considered that the word "rent" in section 2 of the Act of 1833 was to be confined to rents existing as an inheritance distinct from the land, and the question is, therefore, whether the lord has an interest in the rent as distinguished from the land out of which it issues. Although a copyholder may possibly prescribe against his lord as regards matter adverse to his tenure, he cannot do so with reference to the incidents of his tenure. The point was not decided in *In re Lidiard's Contract*. The old Act of Limitation (32 Hen. 8, c. 2) applied to copyholds: *Tarrant* v. *Hellier*, 3 T. R. 162, 172-3, but it could only apply to suits in the lord's court: Gilbert on Tenures, p. 309; and did not apply to services: 1 Scriven on Copyholds, 4th ed., p. 481, 2nd ed., p. 419. It is doubtful whether copyholds came within 32 Hen. 8, c. 37, which enabled executors to distrain for arrears of rent: 2 Watkins on Copyholds, pp. 182, 195; *Appleton* v. *Doily*, Yelverton, 135; *Lane* v. *Alexander*, Brownlow, 140; 6 Vin. Abr., p. 168, plac. 2; Gilbert on Tenures, p. 298. There is no case which has decided that a copyholder can acquire the freehold merely by adverse possession: *Turner* v. *Guardians of West Bromwich Union*, 9 W. R. 155. These rents are analogous to tithe payments, which were held not to be affected by the 3 & 4 Will. 4, c. 27, as between the titheowner and the tithepayer, because that Act only applied as between adverse titheowners: *Dean of Ely* v. *Cash*, 15 M. & W. 617; *Dean of Ely* v. *Bliss*, 2 De G. M. & G. 459. Although in *Irish Land Commission* v. *Grant* Lord Selborne seems to have doubted the correctness of those decisions, we submit that they are correct: *Payne* v. *Esdaile*, 37 W. R. 273, 13 App. Cas. 613. The lord's right to the rent is not barred as long as the relation of landlord and tenant exists: *Archbold* v. *Scully*, 9 H. L. Cas. 360, 10 W. R. H. L. Dig. 5; for the lord's estate is in the property, and not in the rent which issues out of it: *Prescott* v. *Boucher*, 3 B. & Ad. 849; *North* v. *Earl of Strafford*; *Shuttleworth* v. *Garnett*, Carth. 90. *Eldridge* v. *Knott* is not an authority that a copyhold rent is liable to be barred, because there the tenement was a freehold tenement.

Beale, Q.C., was not called upon to reply.

STIRLING, J.—This action raises a short question of law, namely, whether where a quit rent payable in respect of a copyhold tenement has not been paid for the last fifteen years—that is roughly the period—the right to it is barred by the Statute of Limitations, 3 & 4 Will. 4, c. 27, as amended by the Real Property Limitation Act, 1874. The earlier Act is an Act "for the limitation of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto." [His lordship then referred to sections 1, 2, and 3 of the Act, and continued:—] Shortly after the passing of that Act questions arose as to what sort of rents the statute applied to. The statute having been passed in 1833, the question arose in the case of *Paget* v. *Foley*, 2 Bing. N. C. 679, although it was not decided, as to whether rents reserved on leases fell within the statute. Tindal, C.J., says this: "If we were bound to decide whether or not the cases fell within 3 & 4 Will. 4, c. 27, I should say there are strong reasons for thinking that it does not include the present case. That statute is entitled, 'An Act for the limitation of actions and suits relating to property and for simplifying the remedies for trying the rights thereto'; which seems more pertinent to rents that are a charge on the land than to mere conventional rents." Then he refers to other considerations that go to that effect. In the case of *The Dean of Ely* v. *Bliss* Lord St. Leonards says, 2 De G. M. & G. 472: 'I think it clear, from repeated consideration of it, that 'rent' in the sense in which it is spoken of in the 2nd section means rent of inheritance, and that it does not mean rent reserved by a lease, for example, a rent in the common and ordinary form, or a render of rent for property." And the decisions have gone to this. In the case of *James* v. *Salter*, 3 Bing. N. C. 544, it was held that an annuity accruing by will fell within the 2nd section of the statute, and that although the 3rd section did not contain any provision as to rent accruing by will. That section says: "And when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him." Then there is a certain provision as to the time at which the right is to be deemed to have accrued. Upon that it was argued that the operation of the 2nd section was limited to the cases which were enumerated in the 3rd section. Tindal, C.J., says this:—"When this case was originally before the court upon a motion for a new trial after the rule had been made absolute upon a ground perfectly distinct from that which is now before us, an opinion was expressed by the judge then in court that the present case was excluded from the operation of the 2nd section by reason of its not being comprehended within the 3rd; which 3rd section appeared to us, upon a more hasty view, to contain an enumeration of instances to which only the 2nd section could be held to be applicable. For myself, however, I am ready to admit, and I am authorized at the same time to say the same for my three brethren who were then in court, that the further argument which we have heard on this point, when brought directly before us for judgment upon the record, and the further opportunity for consideration which has been afforded us, has induced us to alter the opinion we then formed, and that we think (in which my brother Vaughan entirely concurs with us) that this case is governed by the 2nd section of the statute, which, under the facts found in the special verdict, affords a bar to all claim and title to the annuity. That the case must have been governed by the 2nd section, if that section had stood alone, cannot be doubted; and upon a more close examination of the 3rd section the object and intent of it seem to us to be no more than this: to explain and give a construction to the enactment contained in the 2nd clause as to 'the time at which the right to make a distress for any rent shall be deemed to have first accrued,' in those cases only in which doubt or difficulty might occur; leaving every case which plainly falls within the general words of the 2nd section but is not included amongst the instances given by the 3rd to be governed by the operation of the 2nd."

Then in the case of *Owen* v. *De Beauvoir* it was held that a quit rent payable in respect of a freehold tenement was liable to be barred by the operation of section 2 of this statute. Now there is no decision precisely in point as regards a quit rent payable in respect of a copyhold tenement; but if, as was decided in *Owen* v. *De Beauvoir*, a quit rent payable in respect of a freehold tenement falls under section 2 of the Statute of Limitations, to which I have referred, and is liable to be barred by non-payment, it is extremely difficult to see why a quit rent payable in respect of a copyhold tenement should not be equally barred; and the burden appears to me to lie upon those who assert that it is not. Now the ground really on which it is said that this rent payable in respect of a copy-

hold tenement is not barred by the statute is based on some language used by the Court of Exchequer in *Grant* v. *Ellis*, which decided that the statute did not apply to rent reserved on a lease. In dealing with the case and in arriving at the same conclusion as suggested by Tindal, C.J., in the first case I mentioned of *Paget* v. *Foley*, 2 Bing. N. C. 679, the court dealt first of all with the 2nd section, and they said: "In order to come to a just conclusion as to the meaning of the word 'rent' as used in the two sections to which we have referred, it is important first to consider what is the meaning of the word 'recover' as used in the 2nd section. The enactment is that no person shall make an entry or distress, or bring an action to 'recover' any land or rent, but within twenty years, &c. Now so far as relates to land the word 'recover' in this passage clearly means the same thing as 'obtain possession or seisin of.' The clause assumes one party to be in wrongful seisin or possession of land to which another has the right, and then limits the time within which the right must be asserted. If such be the meaning of the word 'recover' when used with reference to one of its objects, 'land,' it is very reasonable to suppose that the Legislature intended it to have the same meaning in respect of the other object, 'rent.' It is true, indeed, that with respect to an incorporeal hereditament like rent there cannot be strictly any wrongful adverse seisin or possession by another. If A. claims and receives the rent due to B., B. has still the same right against the terre-tenant as if no payment had been made to A. The receipt of rent by A. is not inconsistent with possession of the same land by B. But still, before the passing of this Act a party seised of rents, whether rents service, rent-charges, or rents seck, might, in case the rent was paid to another or withheld from him, consider himself, if he thought fit, as being disseised of such rent. And a party electing to consider himself so disseised might have the same remedy by an assize to recover seisin of his rent as a party disseised of land might have to recover seisin of his land. The judgment in each case was the same, '*quod recuperet seisinam*'; and in each case the party was entitled to a writ of *habere facias seisinam*," and so on. Then the court goes on:—"Now we are of opinion that it is to this sort of recovery only that the 2nd section of the statute has reference, for such is clearly the meaning of the word 'recover' when used with reference to land; and the plain grammatical construction requires us to give it the same meaning when applied to rent, unless, which is not the case here, some manifest absurdity or inconvenience should result from our so doing. It follows from hence as a matter of course that the word 'rent' in the 2nd section must necessarily be confined to rent, which might in its nature have been the object of such a recovery, and this certainly does not include the rent reserved on common leases for years. According to our view of this case, therefore, even if the 2nd section stood alone, we should have been of opinion that the pleas in bar afforded no answer to the defendant's cognizance, and consequently that he was entitled to judgment in his favour." I stop there to remark that that passage has been commented upon by Lord Selborne in the House of Lords in the case of the *Irish Land Commission* v. *Grant*, 10 App. Cas. 14. His lordship, at p. 26, says this:—"The points decided in *Grant* v. *Ellis* was that the word 'rent' in the statute did not mean a conventional rent reserved by a lease, which is undoubted law. Among other reasons for that conclusion one was founded upon the use of the word 'recover' in the 2nd section, which the court considered to refer to 'that sort of recovery which, before the passing of the Act, was open to a party seised of rents, whether rents service, rent-charges, or rents seck,' who might 'in case the rent was paid to another or withheld from him, consider himself, if he thought fit, as being disseised of such rent,' and who 'electing to consider himself so disseised might have the same remedy by an assize to recover seisin of his rent as a party disseised of land might have to recover seisin of his land; the judgment in each case being the same, *quod recuperet seisinam*.' I am far from understanding this (as Smith, M.R., appears to have understood it: see 10 Ir. Eq. Rep. 418) as meant to imply that the application of the statute, in cases of rent, as between the owner of the rent and the person 'withholding' it 'from him' could after the abolition of real and mixed actions by section 36 of the same statute, depend in any way upon the form of proceeding for the assertion or recovery of the right." Therefore, having regard to that, I think the passage from *Grant* v. *Ellis* that I have just read is not to be treated as indicating that in order to bring the case within the statute you must have the same mode of proceeding for the assertion or recovery of the right as existed prior to the passing of the statute; but the rents to which such forms of procedure were applicable give a general indication of the nature or sort of rents in respect of which the statute is to apply. Then Lord Selborne continues:—"If it had been said in *Grant* v. *Ellis* as to rents of inheritance generally that the 2nd section of the statute did not apply to any case of mere non-payment of rent or to any action by the owner of a rent against the person liable to pay it, it would be necessary to determine whether this or the contrary law laid down in the prior case of *James* v. *Salter* and the subsequent case of *Owen* v. *De Beauvoir* was correct. There can be no doubt, I think, of the correctness of the decisions in *James* v. *Salter* and *Owen* v. *De Beauvoir*" (so that the correctness of those decisions is recognized in the House of Lords), "which determined that the right to distrain or bring an action for a quit rent or other perpetual rent is within the 2nd and 3rd sections of the statute, and may be barred by non-payment for twenty years before distress or action. Rolfe, B., who delivered the judgment in *Grant* v. *Ellis*, concurred in the decision of *Owen* v. *De Beauvoir*, which was affirmed in the Exchequer Chamber. The mere use of the word 'distress' (as well as 'entry' and 'action') in the 2nd section would have appeared to me to show that this must have been the intention of the Legislature."

Now, then, let us consider for one moment whether the quit rent payable in respect of a copyhold tenement is more analogous to a quit rent payable in respect of a freehold tenement, or to a rent reserved on a demise. To propound such a question seems to be almost to answer it. A quit rent payable in respect of a copyhold is perpetual; it is not limited for a period of time such as is the rent reserved by a lease for a term of years. It is a rent (as is put in the cases of *Paget* v. *Foley* and *Dean of Ely* v. *Bliss*) of inheritance. The origin of a quit rent in respect of freeholds and in respect of copyholds is exactly similar. If authority be wanted for that it is enough to mention the passage from Gilbert on Tenures, which has been referred to in the course of the argument: "A lord of a manor may avow for the rent or service of his copyholder in any court at Westminster; for he has an estate at common law in the rent, and not a customary estate; and it is due to him upon the same grounds and reasons in law as the rent of freehold lands is." Lastly—and this is not immaterial—it is not a rent which, as between the person to whom it is due and the person by whom it is payable, can be made the subject of agreement like the rent in a lease. In that respect it is similar to a quit rent pay-

able in respect of freehold land. The Statute of *Quia Emptores* has prevented the owners of freehold lands from granting out their lands in consideration of perpetual rents, or rather from reserving to themselves perpetual rents because they may be granted in respect of a rent-charge, which is a different thing. The Statute of *Quia Emptores* does not apply to copyholds; and it is true that when copyhold land comes back to the hands of the lord he may grant it out afresh, but he is bound to do so in the same way as it had been granted before. I will read a few words on that point from Mr. Elton's Law of Copyholds and Customary Tenures of Land. He says (2nd ed., at p. 211): "When the copyhold comes into the hands of the lord it has been shown that he may regrant it as copyhold, provided that he has created no common law interest in the land higher than a tenancy at will. Upon a grant of this kind he may alienate the tenement by parcels, and apportion the rent and services, but he must not alter them in any other way, as he is 'custom's instrument,' and is not permitted to create what would in effect be a new copyhold. He can neither add to nor diminish the ancient rent, nor make the minutest variation in other respects." Now it seems to me that these are most material matters in considering whether the quit rent payable in respect of copyholds is more analogous to a quit rent payable in respect of freeholds than to rent reserved upon a demise for a term of years of land. There is no doubt one difference between quit rents payable in respect of freeholds and quit rents payable in respect of copyholds. The freehold in the case of copyholds remains in the lord, the immediate freeholder, just as in the case of demises for years it remains in the grantor. Great stress has been laid upon that, and I have been referred to a subsequent passage in the judgment in *Grant* v. *Ellis* as justifying the distinction between quit rents payable in respect of copyholds and those payable in respect of freeholds. It is to be observed that that passage occurs when the court proceed to deal with the 3rd section, and not when they are dealing with the 2nd section.

I have already referred to *Paget* v. *Foley* as showing that the limitations which are introduced in the 3rd section, being introduced *alio intuitu*, are not to be treated as limiting the effect of section 2. But, further, Rolfe, B., proceeds to say, in *Grant* v. *Ellis*: "In the 3rd and some other sections the Act proceeds to define the time in most, though (as is noticed by Tindal, C.J., in the case of *James* v. *Salter*) not in all possible, cases, at which the right to make a distress for the purpose of recovering any rents, shall be deemed to have first accrued to the party making the same. The first case put is that of a party who has himself, in respect of the estate or interest claimed, been in possession of the rent, and who afterwards has been dispossessed, or has discontinued the receipt of the rent. The estate or interest claimed must, according to the context, mean the estate or interest claimed in the rent, and not in the lands out of which the rent issues. Now a person entitled to the rent reserved on a common lease for years has no estate in the rent at all: *Prescott* v. *Boucher*; he is entitled to the rent when it from time to time becomes due, as being an incident to his reversion, and not because he has any estate in the rent itself. He is himself the freeholder of the land, and can, therefore, have no estate in rent issuing out of the land." This is the passage relied on largely by the learned counsel for the defendant in this case, but one must not omit to read the passage that follows:—"The word 'interest,' indeed," (for the words in the statute are 'estate' or 'interest,' and not 'estate' only) "is of so large and comprehensive a nature as perhaps to embrace the right which the reversioner has in the rent as incident to his reversion; still that interest can in no fair sense be described as the interest claimed. What is claimed by a landlord distraining for rent on a common lease for years is the amount of the arrears, wholly irrespective of the extent of his estate or interest in the reversion, as an incident to which the right to those arrears has accrued; what he 'recovers' by his distress is the amount due for arrears of rent, and will be the same whether he is tenant in fee simple, tenant for life, or tenant for years. The statute in this branch of section 3 clearly looks to the party recovering the same estate or interest of which he was previously possessed and of which he had been dispossessed, and this is altogether inapplicable to a distress for rent incident to a reversion expectant on a common lease for years."

Now, it is said that here the rent is incident to what is termed the reversion or the legal freehold, which is vested in the lord. The question is, Is that so? Has the lord got an estate in his rent? On that Gilbert, C.B., in the passage I have already cited, distinctly says he has an estate at common law in the rent. That, it would seem to me, is enough for me to act upon and to justify me in holding that the first of the two passages I have read from *Grant* v. *Ellis* does not apply, but, at all events, it appears to me it does show this—that the lord has such an "interest" if he has not an estate in the rent as brings him within the words "estate or interest." If it be not an estate it is so near it that one of the most learned judges, a distinguished writer on English law, has failed to observe the distinction between them. It seems to me that, in this case, what is here claimed is the interest or rent which the defendants had before the plaintiff or his predecessor in title ceased to pay, and that the words in section 3, "estate or interest," are applicable to a distress for such a rent, although they are "altogether inapplicable to a distress for rent incident to a reversion expectant on a common lease for years."

I think, under these circumstances, the interpretation of the statute, which is a modern statute, has been fixed for me with reasonable clearness; and I therefore hold that these quit rents are much more analogous in their nature and properties to a quit rent payable in respect of freehold land than to a rent reserved on a demise, which is the only exception that is to prevail from the operation of section 2 of the statute. In my judgment, therefore, the plaintiffs are right, and the point of law must be decided in their favour.

Solicitors for the plaintiffs, *Peacock & Goddard*, for *Rothera & Sons*, Nottingham.

Solicitors for the defendant, *Walfords*.

Chan. Div.
Kekewich, J. } July 1.

In re ANTHONY.
ANTHONY *v.* ANTHONY. (*a.*)

Administration—Lands of tenant in tail delivered in execution under writ of elegit—*Devise—Exoneration* —1 *&* 2 *Vict. c.* 110, *s.* 13.

Lands to which a testator was believed to be entitled in fee simple, but of which he was in fact tenant in tail under a settlement, were in his lifetime delivered in execution, under a writ of elegit, *to judgment creditors. The testator devised these lands to W. H. A., who sur-*

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

vived the testator and died intestate, leaving H. W. A. his heir-at-law. H. W. A. was tenant in tail in possession of these lands under the limitations of the settlement.

Held, that the charge created by the judgment, though enforceable against the estate tail of H. W. A., was not so enforceable in exoneration of the testator's personal estate.

Adjourned summons.

On the 16th of December, 1884, judgment was recovered against the testator, John Hollis Anthony, for £1,550 and costs. On the 22nd of January, 1885, a writ of *elegit* was duly issued, by virtue of which the sheriff delivered to the judgment creditors certain lands in Essex belonging to the testator.

By his will, dated the 7th of February, 1886, the testator specifically devised these lands to William Hollis Anthony.

The testator died on the 13th of February, 1890. William Hollis Anthony survived the testator and died intestate, leaving Henry William Anthony his heir-at-law.

On a former summons in the action (reported 40 W. R. 316, [1892] 1 Ch. 450) his lordship held that the case came within Locke King's Acts, and that the devisee was not entitled to have the judgment satisfied out of the testator's personal estate. Subsequently to the decision of the above summons it was discovered that the testator was not entitled in fee to the lands devised to William Hollis Anthony, but was tenant in tail of them under a settlement. It also appeared that on the testator's death the lands devolved, under the limitations of the settlement, upon William Hollis Anthony during his life, and on his death upon Henry William Anthony as his issue in tail.

The judgment creditors having been paid out of the personal estate of the testator, the plaintiff, the executor, and one of the residuary legatees sought to succeed to their rights against the land, and took out this summons asking for an order upon Henry William Anthony to execute a disentailing assurance of the lands.

Vernon Smith, for the plaintiff.—The writ of *elegit* is binding against these lands by virtue of section 13 of 1 & 2 Vict. c. 110, and the decision on the former summons remains good: *Jenkinson* v. *Harcourt*, 2 W. R. 688, Kay, 688. Henry William Anthony should execute a disentailing assurance: *Lewis* v. *Duncombe*, 20 Beav. 398, 4 W. R. Ch. Dig. 42.

C. E. E. Jenkins, for another residuary legatee.

Warrington, for Henry William Anthony.—Locke King's Acts do not apply to the present facts at all. The former decision cannot stand.

Cur. adv. vult.

KEKEWICH, J.—The discovery since this case was last before me that, as regards part of the property, Henry William Anthony succeeded thereto, not as heir of his father, but as tenant in tail under an old settlement, does not effect my decision, but renders it inoperative as regards this particular item. Even as regards that, the decision stands to this extent, that the judgment debt is charged thereon. The language of the statute (1 & 2 Vict. c. 110, s. 13) expressly extends to land of which the judgment debtor is tenant in tail, and the charge is enforceable against successors in title not claiming through him but under a prior settlement. There is no longer any room for the application of Locke King's Acts, which operate only between the persons taking through the debtor his real and personal estate, but the question arises whether, apart from these Acts, the charge is enforceable as against the estate tail to the exoneration of the testator's personalty. The argument in support of the claim that it is so enforceable was based on *Jenkinson* v. *Harcourt*, it being contended that as, according to the words of the statute, the judgment debtor must be taken to have agreed to charge this property with the judgment debt, the inference is that he intended to do so in exoneration of his personal estate. It must, so the argument runs, have been to his benefit to make the charge on that which would pass from him on his death rather than on that which would remain subject to his testamentary dispositions, and the court must give effect to his presumed intention to do that which was best for his own estate. It would, I think, be straining the doctrine of *Jenkinson* v. *Harcourt* too far to extend it to a charge effected, not by any act of the debtor postulating an exercise of his will, but by a statutory provision attributing to the intervention of a stranger an agreement by the debtor, into which he never in fact entered. The summons asks that the tenant in tail may be directed to execute a proper disentailing assurance of the property in question. There is authority, *Lewis* v. *Duncombe*, for this being done, and had the applicant's case been established I should, of course, have followed that authority, notwithstanding a doubt (on which I will not enlarge) whether a disentailing assurance is necessary. For the reasons above given it ought not, in my opinion, to be directed here. On the hearing of the summons some further points were partially argued, but I upheld Mr. Warrington in saying that they were not properly before me, and could not conveniently be disposed of on the available materials. The summons is refused with costs.

Solicitors, *Patersons, Snow, Bloxam, & Kinder*, for *Gayton & Hare*, Much Hadham; *Shaen, Roscoe, & Co.*; *Torr, Janeways, & Co.*, for *Anthony & Imlach*, Liverpool.

Q. B. Div. (Charles and Vaughan Williams, JJ.) — May 15, 16; June 17.

REG. v. JUSTICES OF LONDON AND THE LONDON COUNTY COUNCIL. (*a*.)

Metropolis — Valuations — Valuation list — Appeals — Time for hearing appeals — Whether assessment sessions has jurisdiction to hear appeals after the 31st of March in each year — Valuation of Property (Metropolis) Act, 1869 (32 & 33 *Vict.* c. 67), *s.* 42, *sub-section* 13.

Section 42 *of the Valuation of Property (Metropolis) Act*, 1869, *provides:—"With respect to the times within which proceedings under this Act and the Acts incorporated herewith are to be done, the following provisions shall have effect—that is to say:* (13) *The justices may hold the assessment sessions at any time after the 1st of February in the same year, which will enable them to determine all appeals (except where a valuation list or valuation is ordered) before the ensuing 31st of March."*

Held, that the provisions in this sub-section as to the time of hearing of appeals are imperative, and not directory; so that the court has no jurisdiction to hear the year's appeals after the 31st of March in each year.

Rule calling on the justices of the peace for the county of London (sitting as the court substituted by the Local Government Act, 1888, for the General Assessment Sessions under the Valuation Metropolis

(*a*.) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

Act, 1869) and the London County Council to show cause why a writ of prohibition should not issue directed to said justices to prohibit them from proceeding further in the matter of a certain appeal by the London County Council against the valuation list of the parish of St. George, Hanover-square.

The above rule for a prohibition was obtained at the instance of the Assessment Committee of the St. George's Union, in the county of London.

The facts, arguments, and sections of the Act fully appear in the written judgment of the court.

Meadows White, Q.C., and *H. Avory*, for the London County Council, showed cause against the rule.

Sir E. Clarke, Q.C., Poland, Q.C., and *Danckwerts*, in support of the rule.

Cur. adv. vult.

June 17.—The judgment of the COURT (CHARLES and VAUGHAN WILLIAMS, JJ.) was read by

CHARLES, J.—In this case the Assessment Committee of the St. George's Union sought to prohibit the County of London Sessions from further proceedings in the matter of an appeal by the London County Council against the valuation list of the parish of St. George, Hanover-square, made and deposited in accordance with the Metropolis Valuation Act, 1869, by the overseers of that parish on or about the 31st of May, 1890, and finally settled by the assessment committee on or about the 29th of October, 1890. The respondents in the appeal were the assessment committee and the surveyor of taxes of the district comprising the parish, but he did not appear. Notice of appeal was given by the London County Council on the 14th of January, 1891, against the valuation list, on the ground that the totals of the rateable and gross values in the parish were too low. Cases were lodged by the county council and the assessment committee in accordance with the practice of the quarter sessions on or before the 1st of February, 1891, but the appeal, owing to the pressure of business in the court, did not come on to be heard before the 31st of March, 1891. The main contention of the applicants was that on that day the jurisdiction of the court to hear appeals came to an end by effluxion of time, and whether this contention be well founded or not depends entirely on the construction which ought to be placed on the Valuation of Property (Metropolis) Act, 1869 (32 & 33 Vict. c. 67). The jurisdiction formerly exercised under that statute by the assessment sessions has, it is true, been transferred by the Local Government Act, 1888, to the County of London Sessions; but they exercise it under the same conditions as those under which it was formerly exercised by the Assessment Sessions.

By section 32 of the Act of 1869 an appeal against the valuation lists of the various parishes is given to a court of general assessment sessions to (amongst other persons) any ratepayer in the metropolis and any body of persons authorized by law to levy rates or require contributions payable out of rates if they or he feel aggrieved, by reason (1) of the total of the gross value of any parish being too high or too low; (2) of the total of the rateable value of any parish being too high or too low; or (3) of there being no approved valuation list for some parish. Section 24 enacts that the court shall consist of three justices for Middlesex and two each for Surrey, Kent, and the City of London, and that "the said justices shall be appointed in the month of October in every year or at such other time as may be from time to time fixed by the appointing body. They shall hold office for twelve months beginning on the 1st of November, and any casual vacancy may be filled up by the appointing body." By section 26 the court is given power to adjourn from time to time as may be necessary for the performance of their duties under the Act, and it is provided that they should conduct their proceedings, be convened, and be in the same position as near as might be as if they were a court of quarter sessions. The justices in assessment sessions had by section 35 power to appoint a person to make a valuation list where none has been made by the parish authorities and approved. By section 36 they could on an appeal direct a valuation to be made of any particular hereditament, and by section 37 it was enacted that "where the court appoint a person to make a valuation list or a valuation they may fix some subsequent day either before or after the day before which all appeals are required by this Act to be heard for receiving such valuation list or valuation, and may adjourn the hearing to that day." By section 40 an appeal on questions of law is given to the superior court. Section 42 enacts: "With respect to the times within which proceedings under this Act and the Acts incorporated herewith are to be done the following provisions shall have effect—that is to say, (13) the justices may hold the assessment sessions at any time after the 1st of February, which will enable them to determine all appeals (except where a valuation list or valuation is ordered) before the ensuing 31st of March." Other sub-sections appoint dates for the making and deposit of the valuation list, for its transmission to the assessment committee, and final approval by them. These last-mentioned provisions were held in *Reg.* v. *Ingall*, 25 W. R. 57, 2 Q. B. D. 199, to be directory only, but there is nothing in the judgment delivered by Mellor and Lush, JJ., to indicate that they considered all the other sub-sections directory also. On the contrary, we gather from the language used, especially by Lush, J., that the court was of opinion that whilst the particular dates mentioned in the Act for the deposit, transmission, and final approval of the list need not be absolutely adhered to, the whole of the year's appeals must be disposed of before the 31st of March in each year. There is certainly nothing in this decision to compel us to hold that sub-section (13) is directory as well as sub-sections (1), (2), and (8), with which the court was there dealing; and, although we find in the introductory words of the section a general statement applicable to all the sections to the effect that the proceedings "are to be done" within the times prescribed, it appears to us by no means to follow that in each sub-section the words used must necessarily be construed in the same manner.

We must inquire whether in each particular case the words are directory or imperative, and in order to determine the question must have regard to the general scheme and other sections of the statute. Now the scheme of the statute seems to us clearly to point to the valuation list being finally fixed before the commencement of each financial year (*i.e.*, before the 6th of April), except in the two cases where a new valuation is ordered or where a case has been stated for the opinion of the superior court. Section 43 enacts that "the valuation list as approved by the assessment committee, and if altered on any appeal under this Act to any sessions or a superior court as so altered, shall come into force at the beginning of the year (commencing on the 6th of April) succeeding that in which it is made, and shall last for five years, subject to any alterations that may be made by any supplemental or provisional list as hereinafter mentioned." A supplemental list is to be made in each of the first four years of the quinquennial period, the first of such periods beginning on the 6th of April, 1871, showing the alterations which have taken place in the previous

twelve months, and in each of the last four years the valuation list is to be the original list, together with the new supplemental list (section 46). A provisional list is provided for by section 47 to meet the cases of hereditaments reduced or increased in value during the course of any year, and when made is to be deemed to form part of the valuation list then in force. By section 45 the valuation list is made conclusive evidence of the gross and rateable value of the hereditaments included therein for a large number of rates besides the poor rate, and also for taxes levied under the House Tax and Income Tax Acts. It would be highly inconvenient, in our opinion, having regard to these enactments, to read sub-section 13 of section 42 otherwise than as imperative. Unless the 31st of March in each year is regarded as an absolute limit, an appeal such as that now in question might be heard at any time during the quinquennial period, and even after its expiration, with the possible result of inflicting grave injustice by imposing on the general body of ratepayers of one year the burden of another, a result in direct contravention to the general principle of rating law, that the burdens of each year should be borne by the ratepayers in that year, a principle which forbids a retrospective rate unless specially provided for. And the hearing might, in such a case, for example, as the present, be almost indefinitely protracted; for the county council, in support of their contention that the parish total is too low, have challenged upwards of 3,000 individual assessments, all of which the parish propose to defend. The duration of such an inquiry it is impossible to predict, but it is certain that it would be of great length, and the valuation list of the parish would thus remain for months, if not years, in an indeterminate condition. Other sections of the Act, as well as the terms of sub-section 13 of section 42 itself, lead to the same conclusion. Thus the power to adjourn the hearing of an appeal given by section 34 is expressly limited "to any day not later than the day before which all appeals to them are required by this Act to be heard." The same phrase is used in section 37 above referred to, whereby the court is set free from the time restriction with regard to receiving a specially prepared valuation list. Section 44, indeed, contemplates the possibility of an appeal being pending at the commencement of a financial year, and provides that, notwithstanding the pendency of such an appeal, the valuation list shall come into force unaltered. But though the words are general, they are satisfied by reference to the cases mentioned in sections 37 and 40, where there has been a revaluation ordered, or where an appeal has been made to a superior court. We may add that the exception introduced into sub-section 13 of section 42 is meaningless unless the other words of the sub-section are held to be imperative. It was strongly urged upon us that to adopt this construction will deprive the parties aggrieved of the right of appeal given to them by the Act, and it cannot be denied that our decision will lead to that result. But we must consider the balance of convenience, and weigh against the detriment which may or must arise to individuals the serious inconvenience and injustice to the ratepayers which a contrary holding would entail.

The question whether the Legislature intends a provision to be imperative or directory must depend in each case on the scope and object of the enactment, and, having regard to the general scheme of the statute and to its express provisions, we have no doubt the Legislature intended, and has sufficiently expressed its intention, that no appeal (with the specified exceptions) should be heard after the 31st of March in each year. Many decisions on other Acts were referred to, but they furnish us with little, if any, assistance, and do not affect the conclusion at which we have arrived. Two other points were raised by the applicants. They contended that the county council, in their capacity of a "body of persons authorized by law to levy rates or require contributions payable out of rates in the metropolis," had sustained no appealable grievance by reason of the total of the gross and rateable value of a particular parish being too high or too low. In any case their precept for contribution would be satisfied. On the other hand, it was argued that the grievance might be appealable though not pecuniary, and that undue inequality of assessment was in itself a statutory grievance of which the county council could complain. Further, it was contended by the applicants that on an appeal against totals the individual assessment cannot be challenged, but that matters of principle only can be raised, such, for example, as a deduction from gross value in excess of the maximum allowed by the Act. (See section 52 and schedule 3.) To this it was replied that there is nothing in section 32 to limit the appeal, and that the most effective way of challenging a total is to challenge the constituents of which it is composed. Both these matters are of wide importance, but in the view we take of the question of time it is unnecessary to pronounce any opinion upon them.

For the reasons we have given we think that the jurisdiction of the court to hear this appeal came to an end on the 31st of March, 1891, and therefore make this rule absolute, with costs.

Avory objected that the court had no power to give costs when the rule was made absolute.

The question of costs was then reserved for further argument.

June 20.—CHARLES, J..—We have carefully considered the question of costs, and we consider, on the authority of *Wallace* v. *Allen*, 23 W. R. 708, L. R. 10 C. P. 607, that we have power to give costs, and we give costs accordingly.

The point as to the costs was not then further argued, as it was understood that the whole question would come before the Court of Appeal.

Rule absolute, with costs.

Solicitor for the London County Council, W. A. *Blaxland.*

Solicitors for the assessment committee, *Caprons, Dalton, Hitchins, & Brabant.*

Q. B. Div.
(Grantham and Vaughan Williams, JJ.) May

LONDON AND WESTMINSTER LOAN CO. v. LONDON AND NORTH-WESTERN RAILWAY CO. (a.)

Landlord and tenant—Rent payable in advance if required—Reasonable notice of demand.

The effect of the words "rent payable quarterly, always, if required, a quarter in advance," in an agreement of tenancy is to make the rent payable a quarter in advance throughout, and the landlord is entitled to payment, or, in default, to distrain for the rent of the current quarter at any time during the currency of the quarter on giving reasonable notice of his demand. The question of the reasonableness of the notice is one of

(a.) Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

and must depend upon the particular circumstances of the case.

This was an appeal by the defendants from a decision of Judge Bacon at the Bloomsbury County Court.

The plaintiffs were the holders of a bill of sale over certain furniture belonging to a tenant of the defendants, and being in the house which they had let to him in Euston-square. By the agreement of tenancy between the defendants and their tenant, dated July 24, 1891, rent was reserved at the rate of £90 a year for the first year, and afterwards at the rate of £85 a year, payable quarterly on certain specified days, and "always, if required, a quarter in advance." The agreement also contained a provision for re-entry in the event of any one quarter's rent, or any part thereof, being in arrear and unpaid for one week after it should have become due and payable by virtue of the agreement without the necessity for any previous demand.

On the 8th of December one quarter's rent was already in arrear and another was nearly due, and on that day the furniture was about to be sold by an auctioneer on behalf of the plaintiffs when the defendants demanded their rent up to the end of the current quarter, threatening a distress. The amount was paid by the plaintiffs under protest that the sale might proceed, and the present action was brought in the county court to recover back the sum so paid.

The county court judge decided in favour of the plaintiffs, and the present appeal was brought.

Leigh Clare, for the appellants.—This rent being due in advance the defendants were entitled to demand it, or, in default, to distrain for it: *Witty* v. *Williams*, 12 W. R. 755; *Williams* v. *Holmes*, 1 W. R. 391.

Ernest Pollock, for the respondents.—*Witty* v. *Williams* and *Williams* v. *Holmes* were decided upon words very different from those used in the present case. Under any circumstances a reasonable notice of the demand ought to have been given.

He also cited *Mallam* v. *Arden and Others*, 10 Bing. 99; *Brighty* v. *Norton*, 11 W. R. 167, 3 B. & S. 305; *Toms* v. *Wilson*, 11 W. R. 117, 4 B. & S. 455; *Ex parte Trevor, In re Burghardt*, 24 W. R. 301, 1 Ch. D. 297.

Leigh Clare, in reply.—From the first this rent was reserved a quarter in advance. The reasonableness of the notice must have reference to the circumstances of the case, and a notice must not be required which would enable the tenant to remove his property and defeat the object of the provision.

GRANTHAM, J.—I am of opinion that the county court judge was wrong in his view of the law. Where the terms are as clear as they are in this case the rent is throughout payable a quarter in advance, all that is necessary is to give notice to the tenant. Here the rent for the current quarter was due on September 29 instead of December 25, in accordance with a clause which is often put into agreements of this kind, though it is not often enforced. But the landlord must give notice that he requires the payment in advance. What notice? It must be a reasonable notice. What is a reasonable notice? That must depend on the particular facts of each case, and on the evidence here I think the notice was reasonable in view of the fact that the goods were being, or about to be, removed, and were actually in the hands of someone who was authorized to take them away.

WRIGHTMAN WILLIAMS, J.—This is a matter between landlord and tenant which will probably arise again, and there should be no doubt as to the basis of our decision. Mr. Clare must succeed in showing that the rent was throughout due in advance; if he had to say that the landlord had a right to alter the day, so as to make rent due in advance which was originally due at the end of the quarter, he would be in a great difficulty; but it seems to me that we ought to hold that these words do mean that the rent was reserved due a quarter in advance. But it is only to become payable on notice, which it is plain must be a reasonable notice. The reasonableness is a question of fact which I should not have decided at all but that I suppose we have the power to take upon ourselves the function of jurymen that we may put an end to this case.

Appeal allowed.

Solicitor for the plaintiffs, *Jackman*.

Solicitor for the defendants, *Mason*.

Prob. Div. & Adm. Div. Admiralty. } March 14.

"THE GLENLIVET." (*a.*)

Insurance—Marine insurance—Meaning of "burnt" in memorandum of policy.

Where a ship has sustained damage by reason of fire, she is not "burnt" within the meaning of the memorandum in a marine insurance policy unless the injury resulting from the fire is sufficient to cause some interruption of the voyage so that the ship is thereby temporarily unnavigable, that is, for the time incapable of being properly used for the purposes of her voyage.

This was an action on a marine insurance policy on the steamship *Glenlivet*, instituted on behalf of the Glenlivet Steamship Co. (Limited) against John Henry Titcombe, to recover amounts of particular average admittedly caused by the perils insured against, but by reason of the operation of the memorandum in the policy not chargeable against the defendant unless the ship had been "burnt or stranded" within the meaning of the terms of such memorandum.

The action now came on for hearing on the point of law whether, on the admitted facts, the warranty in the memorandum precluded the plaintiffs from recovering judgment in the action.

It was admitted that the warranty in the memorandum debarred the plaintiff from recovering unless the court should be of opinion that *The Glenlivet* had been "burnt" within the meaning of such memorandum by reason of the following facts: that on one of the voyages on which she was insured under the policy sued on, certain coals on board her had taken fire, and the fire had been extinguished without any damage to *The Glenlivet;* and that on two occasions on other of the voyages on which she had been so insured, a fire had occurred on board her, which had done some damage to the structure of the ship, but the voyage of the ship had not been interrupted, and the amount of the damage done by fire had been within the percentage referred to in the memorandum.

Aspinall, Q.C., for the plaintiffs.

Joseph Walton, Q.C., for the defendants.

BARNES, J.—This is the second case in which the procedure adopted, first in the case of *The Alps*, [1893] P. 109, recently decided by me, has been followed. I need add nothing to what I said in that case as to the advantages of this procedure, except

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

to point out that the present case has been heard within a fortnight of its commencement, and that the materials placed before me from which the facts are gathered consist only of a memorandum as to the points raised, and the policies, log-books, and surveys of *The Glenlivet*—in fact, such documents as an average stater would require for the purposes of an average adjustment.

The case raises a difficult question of construction of the memorandum commonly used in a Lloyd's policy. The question is as to the meaning of the term "burnt" in the memorandum. The claim on the first voyage is for a small average loss, under three per cent., from perils other than fire, and on the second and fourth voyages for small average losses to the vessel herself, under three per cent., partly from fire and partly from other perils insured against. First, I have, therefore, to determine whether the "ship" was "burnt" on any of the said voyages within the meaning of that term in the memorandum. Secondly, it is agreed that if the ship was burnt on any of the voyages the plaintiffs are entitled to recover for the loss occurring on the voyage or voyages on which the burning occurred, and that if she was not burnt they are not so entitled. As the memorandum originally stood when it was introduced into policies, about the year 1749, it did not contain the words "sunk or burnt." I am informed that they have been in use for over thirty years, and I find them in the policy in the case of the *Great India and Peninsular Railway Co.* v. *Saunders*, 1 B. & S. 41, 9 W. R. C. L. Dig. 43, decided in 1861. The memorandum was framed to protect the underwriters from frivolous demands in respect for small losses which are most likely to have arisen from natural deterioration or wear and tear, and the original exception of stranding tends to show that this was the scope of the memorandum. The framers had probably in view a casualty of so serious a nature as to be akin to wreck—that is, such a loss that makes it probable that the damage, though under the given percentage, might reasonably be attributed thereto, and not to the perishable nature of the subject-matter of the insurance. Several cases were decided upon the memorandum after its introduction, and for a time there was a difference of opinion upon its true construction; Lord Mansfield and Buller, J., holding that the words "unless general or the ship be stranded" constituted one exception, and that the claim should be read "free from average, except general average, and average occasioned by the ship having been stranded"; Ryder, C.J., and Lord Kenyon holding, on the other hand, that the words "or the ship be stranded" constituted a condition, so that if the ship be stranded in the course of the voyage the underwriters are liable for an average loss by perils insured against, though no part of the loss arise from the stranding. And so it was finally held, after full argument, in *Burnett* v. *Kensington*, 7 T. R. 210. If, therefore, the ship be stranded, the warranty against average or against average under five or three per cent. is destroyed, and in order to recover for damage, which but for the stranding would not have been recoverable, it is then not necessary to prove that the damage was occasioned by the stranding. The inquiry is to be, What condition of the ship constitutes a stranding? So also the inquiry in cases where it is said that the ship was "sunk or burnt" is, What condition of the ship satisfies the term "sunk" or "burnt"? There have been a large number of decisions upon the word "stranding," and in these, various definitions of the word may be found, but in my opinion there runs through them all, in a greater or less degree, the idea which was probably present to the minds of the framers of the memorandum, of a serious casualty to the ship affecting her safety and navigation, even though, as a matter of fact, the amount of damage sustained is unimportant. This idea is tersely expressed by Lord Ellenborough in the case of *M'Dougle* v. *Royal Exchange Assurance Co.*, 4 M. & S. 503, there he says: "I take it that stranding, in its fair legal sense, implies a settling of the ship, some resting, or interruption of the voyage, so that the ship may *pro tempore* be considered as wrecked; from which misfortune a vast deal of damage does frequently arise." That is to say, the vessel becomes for a time in a condition in which she cannot be properly used for the purposes of her voyage, or is unnavigable. From the collocation of the words "sunk or burnt" with the word "stranded," and from the primary expression produced by reading these words "sunk or burnt," it is natural and reasonable to construe them upon the principle applied and with the idea prevailing in arriving at the proper meaning of the word "stranded."

The contention of the plaintiffs is that the ship is burnt within the true meaning of the clause if any injury whatever is done by fire to any part of the vessel or any part of her fittings or stores; in other words, if anything included in the term "ship" is on fire, for however short a time, or damaged by fire, however slightly. Mr. Aspinall illustrated his argument by quoting the saying, "A burnt child dreads the fire"; and argued that the meaning of the word in the policy was similar in effect to that, in that saying. Mr. Walton, not to be outdone on illustration, quoted the lines—

"This air of France, methinks, becomes us well;
Let's burn our boats, for here we mean to dwell."

He did not, however, contend that the word "burnt" was to be construed in its primary meaning as given in dictionaries—viz., consumed by fire—so as to require a total consumption of the vessel by fire—but that the word would not be satisfied unless the burning was such as to render the vessel temporarily useless or unnavigable. There have been no cases on the word "sunk" except *Bryant & May* v. *The London Assurance Corporation*, 2 Times L. R. 591, the report in which only refers to certain observations by Grove, J., as to "stranding"; but my impression, from having been engaged in the case, is that the plaintiffs contended that the vessel had become so deep in the water that she could sink no more, and should be considered to have sunk. If I recollect aright, the vessel never for a moment ceased to be navigable, nor was the voyage interrupted; and I think that the suggestion that she was "sunk" was not, therefore, accepted. There are no decisions upon the word "burnt" in the memorandum in the policy, and it is a remarkable fact if, as Mr. Aspinall contended, the momentary setting fire to any part of a vessel—such, for instance, as cabin curtains or fittings—is enough to cause the vessel to be a "burnt" ship, and thereby to destroy the warranty, that the present contention has never been brought before the courts since the introduction of the words "sunk or burnt," though one would think that slight damage by fire was not infrequent on vessels, especially on large passenger vessels. Cases on the word "burning" in the Statute of frauds, 29 Car. 2, c. 3, s. 6, were cited to me in support of the plaintiffs' contention. They are not of much assistance in construing a mercantile document, but I may notice that Coleridge, J., in the case of *Doe d. Reed* v. *Harris*, 6 A. & E. 209, says, at p. 217, "the question is put whether the ship must be destroyed wholly, or to what extent? It is hardly necessary to say; but there must be such a

injury with intent to revoke as destroys the entirety of the will, because it may then be said that the instrument no longer exists as it was"; and Lord Denman in the same case observed that doubt might be entertained whether the proof given in the case of *Bibb dem Mole* v. *Thomas*, 2 Wm. Bl. 1,043, where the will was slightly torn and slightly burnt, would now be deemed sufficient to establish the burning of the will.

It was argued for the plaintiffs that the defendants' construction of the word "burnt" in a policy on ship would make the memorandum practically useless, because a fire which reduced the vessel to such a state that she could not be properly used would always exceed three per cent., and the damage caused by such a fire would be recoverable whether the memorandum was inserted or not. But this argument omits the consideration that if the ship be "burnt" all damage under three per cent. would be recoverable, and also that these words, "sunk or burnt," being commonly found now, as I understand, in policies on all kinds of goods, if the ship is burnt average losses on goods which might otherwise be excluded would be recoverable under the policy. Again, this argument would permit of the recovery of all losses by fire under a policy on a ship, although there is a warranty against losses under three per cent., and would thus place the peril of fire in a different position from any of the other perils assured against. I cannot bring myself to think that it would be a reasonable or business-like construction of the word "burnt" to hold that the ship is burnt, if any part of her or her stores or fittings is slightly injured by fire, whether that fire is one which exhausts itself without danger to the vessel, or, as also was suggested, is one which unless promptly extinguished would cause danger to the vessel. In my opinion the more reasonable and business-like construction is that the ship is "burnt" whenever the injury by fire is sufficient to cause some interruption of the voyage, so that the vessel is *pro tempore* incapable of being properly used for the purposes of her voyage. This may be expressed by the term "temporarily unnavigable."

In the present case, on the first voyage the coals heated slightly, and water being poured on them, whatever fire existed was extinguished. Even assuming that coals are to be treated as included in the word "ship," which the plaintiffs alleged and the defendants did not deny, there was no interruption of the voyage, nor any interference in any way with the safety or navigation of the vessel. On the second and fourth voyages the heating of the coal caused some damage to the structure of the vessel, but again, there was no interruption of the voyage or any interference with the vessel's safety or navigation. I am of opinion that in none of the voyages was the ship burnt within the meaning of the policy, and that the defendant is entitled to judgment, with costs.

Solicitors for the plaintiffs, *Botterell & Roche.*

Solicitors for the defendant, *Waltons, Johnson, Ashb, & Wharton.*

Court of Appeal.

From Q. B. Div. (Bowen and Kay, L.JJ.) — July 6.

DUKE *v.* DAVIS. (*a.*)

Practice—Change of parties—Death of one of several defendants—Action remitted to county court—Application by administrator of deceased defendant to High Court—Summons to proceed or dismiss—Jurisdiction of High Court — Validity of order of remitter—R. S. C., 1883, *ord.* 17, *r.* 8—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 65.

An action was brought in the High Court against several defendants, whom it was sought to make severally liable on a contract. One of the defendants having died, the plaintiffs obtained an order remitting the action to the county court under section 65 of the County Courts Act, 1888. *The action was tried in the county court against the other defendants, and judgment was given in their favour. The administrator of the deceased defendant applied to the High Court, under ord.* 17, *r.* 8, *for an order that the plaintiffs might be compelled to proceed with the action against him, or that, in default, the action might be dismissed against him.*

Held (*affirming the decision of the* Divisional Court), *that, the action having been remitted to the county court, the High Court had no jurisdiction to make an order.*

The order remitting the action was not void; semble, *it was not irregular.*

Appeal from a judgment of a divisional court.

The action was commenced in the High Court against five defendants, who were alleged to be severally liable on a contract. On the 21st of July, 1891, one of the defendants, named Lowry, delivered his defence, and on the 24th of July he died intestate. On the 15th of January, 1892, the plaintiffs obtained an order under section 65 of the County Courts Act, 1888, remitting the action to the county court. The action was tried in the county court as against the other defendants, and judgment was given in their favour. On the 23rd of August, 1892, letters of administration to the estate of Lowry were granted to one Nicholson, who, on the 3rd of May, 1893, applied to the High Court for an order that the plaintiffs might be directed to proceed with the action as against him, or that in default the action might be dismissed as against him. It appeared that at the time when the action was remitted the solicitors for the plaintiffs had written a letter to the solicitors who had acted for Lowry, in which they said: "This action is remitted to the county court as against all the defendants except your client." Wills, J., before whom the application came at chambers, referred the matter to the court. The Divisional Court (Grantham and Bruce, JJ.) dismissed the application, on the ground that, the action having been remitted to the county court, the High Court had no jurisdiction to make any order.

The administrator of the deceased defendant appealed.

Cababé, for the administrator.—Ord. 17, r. 8, says: "When the plaintiff or defendant in a cause or matter dies, and the cause of action survives, but the person entitled to proceed fails to proceed, the defendant (or the person against whom the cause or matter may be continued) may apply by summons to compel the plaintiff (or the person entitled to proceed) to proceed

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

within such time as may be ordered; and in default of such proceeding judgment may be entered for the defendant, or, as the case may be, for the person against whom the cause or matter might have been continued." The administrator rightly applied under this rule. The marginal note to the rule given in the Annual Practice, "Death of sole plaintiff or defendant," is not part of the rule, and it is incorrect. The administrator could only apply to the High Court. As far as he was concerned the action still remained in the High Court. The order remitting the action to the county court was, as regards him, null and void. On the death of the deceased defendant the action as against him was abated or suspended, and no step could rightly be taken in the action until his legal personal representative had been made a party to the action: *Eldridge* v. *Burgess*, 26 W. R. 435, 7 Ch. D. 411. Any order made in the action after the death of the deceased, and in the absence of any person to represent his estate, was ineffectual: *In re Shephard, Atkins* v. *Shephard*, 38 W. R. 133, 43 Ch. D. 131; see also *Lloyd* v. *Dimmack*, 26 W. R. 458, 7 Ch. D. 398. If the order remitting the action was good as against the other defendants, it could not affect the deceased or his estate. The letter of the plaintiffs' solicitors shows that it was not intended to do so.

He also cited *Reg.* v. *Holroyd*, 32 W. R. 370.

F. J. Lowe, for the plaintiffs.

BOWEN, L.J.—I am of opinion in this case that the judgment ought to be affirmed. The action was brought against several defendants on a contract on which they were alleged to be jointly and severally liable. One of the defendants died intestate a few days after he had delivered his defence. The action thereupon as against him ceased to have any existence until proper steps should be taken to bring in his personal representative as a party to the action. Without any such step having been taken, an order was made on the application of the plaintiffs remitting the action to the county court. The action then was an action against the other defendants solely, and it was tried in the county court as against those defendants, and judgment was given in their favour. The present appellant, who was subsequently appointed administrator of the deceased defendant, was unwilling to let the matter remain where it was, and he decided to do this—he treated the order of remitter as being void against himself, and applied to the High Court for an order that the action might be dismissed as against him, or else that the plaintiff might be compelled to take some further steps in the action. The plaintiff objected that the High Court had no jurisdiction to make any such order, the action having been remitted to the county court.

The argument presented to the Divisional Court on behalf of the administrator was that, inasmuch as the order remitting the action had been made after the death of the intestate and while his estate was unrepresented, such order should be treated as null and void as against him, and the court ought, on his, the administrator's, appearance, to treat the action for his benefit as if it were still in the High Court. The Divisional Court refused the application, and the administrator has appealed to this court. Is it true to say that he is entitled to treat what took place when the intestate was unrepresented as null and void? Assuming that on the death of the deceased defendant the action continued solely against the other defendants, and that, though his representative had a right to become a party to the action, until that was done the others alone were parties to the action, it seems to follow that the administrator is not in a position to take any objection to the making of the order; and that I take to be the true state of the case. But even if it were not so, it seems to me that the most the administrator could say now would be that as against him the order was irregular; he cannot say that it is void. It was open to him when he appeared, to be content with the order of remitter which had been made. If he was dissatisfied with it, the utmost he could have done was to ask to have it set aside, but he cannot ask the court to treat it as void. The argument which has been used rests on a picturesque illusion, that when a defendant dies the action is something more than an action against his co-defendants, that it continues to have an unsubstantial shadowy existence against the deceased man or with regard to his rights. The truth is that the action is abated as against him, and nothing remains except an action against the other defendants, though it may, on the application of his administrator, be revived against him. I think that in making the order remitting the action the court did what it had the power to do; but if the order was irregular, all the administrator could do would be to ask to have it set aside. I therefore think that the appeal must be dismissed.

KAY, L.J.—I am of the same opinion. The application is based on a misapprehension. When this defendant died, the action survived against the other defendants in respect of either the whole or part of the cause of action, but it was altogether dead as against the deceased. The only application which his personal representative could then make with regard to the action was such an application as the administrator is now making. As matters stood he was no party to the action; he was only entitled to apply that the plaintiff should make him a party. But he cannot now make such application in the High Court; for the action has been transferred to the county court, and every application in the action must be made in the county court. He treats the case as if there were a shadowy apparition of an action still existing in the High Court. But what was remitted was the whole action, and nothing of the action was left remaining in the High Court. If the order remitting the action was wrong, no doubt there must be some means of setting it right. But he does not say it was wrong, he says it was void. His argument must involve this, that, whenever a co-defendant in an action to enforce a joint and several liability dies, no order can be made in the action as regards the other co-defendants until the action has been revived against the personal representative of the deceased defendant. This appears to me to be untenable, and I am of opinion that if the administrator wished to have the action revived against him it was for him to make an application for that purpose, and he ought to have applied to the county court. Any step which the administrator could take in the action should have been taken by him in the county court. It has never been suggested that the action was not a fit one to be transferred to the county court; and it seems to me to be impossible to treat an action as divided—*i.e.*, as being partly in the High Court and partly in the county court. I therefore agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *Crowders & Vizard*, for *F. Cecil Lane*, Plymouth.

Solicitors for the administrator, *Swepstone & Stone.*

From Q. B. Div. (Lord Esher, M.R., and Bowen and Kay, L.JJ.) June 1.

ZIERENBERG AND WIFE v. LABOUCHERE. (a.)

Defamation—Libel—Plea of justification—Particulars—Insufficiency of—Validity of plea.

A general plea of justification in an action of libel, where the libel complained of consists of a general charge against the plaintiff, is bad, unless the defendant, in his particulars, states specifically the facts upon which he relies in support of the charge.

Appeal from an order of the Queen's Bench Division directing the defendant to deliver further and better particulars.

The action was for libel. The alleged libel appeared in a newspaper called *Truth*, and referred to a Home for Female Inebriates kept by the plaintiffs, and stated, so far as material to this report, that the plaintiffs were "charity swindlers" and "impostors," and that the home was a "monstrous swindle." There were many other statements charged as libellous.

The defendant pleaded a general plea of justification to the whole. The defendant was ordered to give particulars of how and in what way the plaintiffs were "charity swindlers" and "impostors" and the home was a "monstrous swindle"; and in his particulars he stated that the plaintiffs, by the annual reports, prospectuses, and appeals issued by them, represented the home to be a Home for Female Inebriates, and invited subscriptions and donations on that representation, whereas in fact the home was conducted as a commercial undertaking for the benefit of the plaintiffs; and the facts and matters relied on were "that no proper system of books or accounts showing the receipts and expenditure of the home was kept, and that no proper vouchers were submitted to the auditors for the purpose of preparing the annual balance-sheets, and that the said balance-sheets do not show the real or entire receipts or expenditure of the home, and that the plaintiffs, by means of the home, were enabled to live free of expense to themselves, and that they appropriated for their own purposes moneys received for or earned by the home, and the time when the aforesaid facts and matters occurred was the whole time the home has been open since its institution in 1876." The master made an order that the defendant should deliver further and better particulars, setting out the receipt of moneys appropriated by the plaintiffs for their own purposes and not accounted for, and of the persons from whom and the dates when such moneys were received, and in what way the said expenditure of the home was not shown by the balance-sheets; and that unless the defendant delivered such particulars he should be precluded from giving any evidence in support of his justification of the statements in respect of which he did not supply the particulars ordered. The judge at chambers and the Divisional Court affirmed this order.

The defendant appealed.

Reid, Q.C., and *J. E. Bankes*, for the defendant, contended (1) that the particulars were sufficient; (2) that the defendant ought not to be ordered to give further particulars until after he had obtained discovery; and (3) that the particulars asked for would disclose the names of the defendant's witnesses.

They referred to *I'Anson* v. *Stuart*, 1 T. R. 748; *Hickinbotham* v. *Leach*, 10 M. & W. 361; *Gourley* v. *Plimsoll*, 21 W. R. 683, L. R. 8 C. P. 362; *Leitch* v. *Abbott*, 34 W. R. 506, 31 Ch. D. 374.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Sir Edward Clarke, Q.C., and *C. C. Scott*, for the plaintiffs.

Cur. adv. vult.

June 1.—Lord ESHER, M.R.—The plaintiffs brought an action of libel against the defendant, and they set out in their statement of claim the alleged libellous matter, which contained a great many separate statements. The defendant pleaded to the whole generally a justification. The plaintiffs thereupon took out a summons for particulars, and instead of asking for particulars generally, they adopted what seems to be a good practice—namely, asking in the summons for particulars of the special allegations in the libel of which they want particulars. The defendant thereupon gave certain particulars, and the plaintiffs are satisfied as to some, but as to others they complain that they are insufficient, being in reality no particulars at all. Now the defendant has pleaded justification to the whole. Strictly speaking, perhaps, he would be bound to prove justification of the whole, and if he failed to justify every part the plea would fail, and the plaintiffs would recover as if there were no plea of justification. That would, perhaps, in these days, be dealing with the matter too strictly, because the defendant is charged with several libellous statements, and he might separate those statements and plead a separate justification to each. If, therefore, we treat these separate statements as separate libels, and divide the plea of justification and apply it to each separate statement, we must then see the result of ordering the defendant to give further particulars.

That a general plea of justification without particulars is a bad plea has been settled law for many years. In *I'Anson* v. *Stuart* the headnote says that to print of any person that he is a swindler is a libel and actionable; and a justification of such a charge must state the particular instances of fraud by which the defendant means to support it. That is to say, if a person calls another a swindler, he cannot plead justification without setting out the particular instances of fraud, else the plea is demurrable. Ashurst, J., said: "When the defendant took upon himself to justify generally the charge of swindling, he must be prepared with the facts which constitute the charge in order to maintain his plea. Then he ought to state those facts specifically to give the plaintiff an opportunity of denying them, for the plaintiff cannot come to the court prepared to justify his whole life." That is a leading case upon the point. In those days it was necessary to insert the particulars in the plea. In later times the plea was left general, but before going to trial the defendant was bound to state in his particulars what had formerly been inserted in the plea—namely, the facts upon which he relied in support of his general statement. In *Hickinbotham* v. *Leach* Parke, B., said: "It is a perfectly well-established rule in cases of libel and slander that, where the charge is general in its nature, the defendant, in a plea of justification, must state some specific instances of the misconduct imputed to the plaintiff." Alderson, B., also said in the course of the argument that "the plea ought to state the charge with the same precision as in an indictment."

Now treating the statements complained of here as separable, we must see whether the order for further and better particulars is right. The defendant states that the plaintiffs are charity swindlers. He is asked for specific instances. Are his particulars sufficient? No doubt they state the mode in which the defendant is going to support his plea of justification, but they do not give specific instances, the occasions upon which the things happened, nor the names of the persons who were swindled. They are

not sufficient. Under the old system the plea would be bad for want of specific instances inserted in the plea. Under the present system the plea is bad for want of sufficient particulars. We therefore agree with the Divisional Court that the defendant must give further and better particulars as to that part of the alleged libel, and if he does not give sufficient particulars the plea of justification as to that part goes, and he cannot give evidence in support of his justification as regards that part of the libel. It was then said that the particulars asked for were too minute, and therefore embarrassing, as the result would be to disclose the names of the defendant's witnesses. But if it is right that the particulars should be given, it is no answer to say that they will disclose the names of the witnesses. We only say that better particulars must be given, and the defendant must give the best he can. If by affidavit he says that he cannot give the names as he does not know them, that may perhaps excuse him. What is required of him is not too minute so as to embarrass him.

Then comes the last contention—namely, that the defendant ought not to be ordered to give the particulars until after he has had discovery. This is not a case in which there is a relation between the plaintiffs and defendant, such as the relation of principal and agent, or of partners, or of trustee and *cestui que trust*. There is no relation at all between them. I do not think that the defendant is entitled to discovery before he has fixed the issues in the pleadings. The general rule is that no court, whether of common law or equity, would allow discovery merely to enable the person asking for discovery to find out whether he has a case or not. Interrogatorries of that kind have been called fishing interrogatories, and this discovery may also be called fishing. I have said that there is no relation here between the parties, nor are there any special circumstances, such as when one party is keeping back what the other party ought to know. A bad plea is no plea at all; and therefore the general rule come to this, that discovery will not be granted until a good plea is on the record, or if the application is made by the plaintiff until a good cause of action is on the record. Here the general plea of justification is bad, there being no sufficient particulars, and until a good plea is on the record the defendant cannot get discovery either by interrogatories or otherwise. There being no relation between the parties here, nor any special circumstances to take the case out of the general rule, the obligation to give particulars cannot be held back until discovery is given. The defendant has, indeed, candidly admitted that he wants discovery in order to enable him to place a good plea on the record.

The case of *Leitch* v. *Abbott* was relied upon by the defendant; but there the relation of principal and agent existed between the parties, and so that case comes within the exception to the general rule. The appeal must therefore be dismissed. I desire to add this as regards a general plea of justification, that the plaintiff must ask for particulars, otherwise the plea would stand, just as under the old law if the plea were not demurred to, it would be treated as good.

BOWEN, L.J.—I am of the same opinion.

KAY, L.J., read the following judgment: The argument in this case, in our view of it, seems to involve the question whether mere suspicion can justify a libel. It is urged that the so-called particulars, which are in terms as general as the libel complained of, ought not to be made more definite at present, because, until the defendant has obtained discovery from the plaintiffs, he may not be able to give particulars in any better form. The defendant in a libel action may plead a justification; but it is no justification to plead simply that his alleged libel is true. That, as has been pointedly said, is not justification, but is merely repeating the libel: *I'Anson* v. *Stuart*. Accordingly, the practice required that the plea should state facts which justified the defendant in publishing the language complained of. This is clear from the decision in *Hickinbotham* v. *Leach*, and the authorities referred to in that case, viz.: *Jones* v. *Stevens*, 11 Price, 235; *Newman* v. *Bailey*, 2 Chit. Rep. 665; *I'Anson* v. *Stuart*; *Holmes* v. *Catesby*, 1 Taunt. 543.

It is said that the modern practice is not to state the facts relied on as a justification in the pleading, but to add them in particulars. I presume this is done under ord. 19, rr. 6, 7. But then the particulars should be as explicit as the plea was required to be before. If the defendant says that he is unable to state any such facts without discovery, the answer is simple and conclusive. He ought not to have published the libel, and cannot plead any justification for having done so. The case of a charge of fraud against an agent, or of breach of trust against a trustee, by pleading only, where no libel has been published otherwise, is essentially different. There the fiduciary relation, and the circumstance that the facts are generally known only to the defendant, or at least that he has means of knowledge not in the first instance equally accessible to the plaintiff, may justify the court in requiring the defendant to make discovery before the plaintiff is called on to give particulars, because the fiduciary relation of the defendant to the plaintiff entitles the plaintiff to all the knowledge which the defendant may have; and it is not uncommon, when a conflict arises between the right of the plaintiff to discovery and the right of the defendant to particulars, in such cases to postpone the giving of particulars until the discovery has been made: *Leitch* v. *Abbott*; *Sachs* v. *Spielman*, 36 W. R. 498, 37 Ch. D. 295. But to apply this practice to the case of libel would be to sanction the publication of a libel when the libeller knew no facts justifying the libellous statement, because he believed he could, by the process of discovery, elicit such facts.

It is urged, then, if the facts are stated before discovery is given, that the discovery will be limited to the particular facts so alleged. I am not satisfied that this will necessarily be so. I can conceive a case in which a libel in general terms may be justified by certain facts stated in the particulars, and that there may be power to obtain discovery of other analogous facts which may support the justification. But even if it were so limited, that is no reason why the particulars should not be as definite or explicit as the defendant can make them. It seems to me a much less evil, if it be an evil, to confine the discovery to the particular facts adduced as a justification than to give the smallest sanction to a libel unsupported by facts which justify the publication.

There is another obvious reason for requiring precise particulars, namely, that the plaintiff may know the case he has to meet and what acts it is alleged have been committed which justify the general charge against him. But this is a consideration not peculiar to libel cases.

I am of opinion that the particulars complained of are too general; that they are not particulars at all, but a mere repetition of part of the libel, and that further and better particulars ought to be given.

There remains the question whether the penalty, if better particulars are not given, is not, as it now stands, too large. A libellous statement as to which no particulars are given ought not to be allowed to be justified at all. But where some facts are stated in the particulars by way of justification, which may or

may not be sufficient, it is argued that the defendant should not be prevented from relying on them at the trial simply because he has added a general statement which in itself is not sufficient. However, I am not satisfied that this argument applies in the present case. I do not think that any facts are stated as a justification in this case in the particulars complained of, and therefore the penalty imposed is not too large.

Appeal dismissed.

Solicitors for the plaintiffs, *Pritchard, Englefield, & Co.*

Solicitors for the defendant, *Lewis & Lewis.*

From Chan. Div. (Lindley, Lopes, and A. L. Smith, L.JJ.) June 14, 15; July 3.

WHEATON *v.* MAPLE & CO. (*a.*)

Easement — Light — Prescription — Enjoyment against lessee of the Crown—Surrender of lease—New lease—Presumption of lost grant—Inference of enjoyment from time immemorial—Limited easement for residue of term—"Absolute and indefeasible"—Prescription Act (2 & 3 *Will.* 4, *c.* 71), *ss.* 2, 3.

Section 2 *of the Prescription Act does not apply to easements of light, which are governed by section* 3 *and the subsequent sections, which have to be read with it.*

The Crown, not being named in section 3, *is not bound by it.*

Limited and qualified easements are not within the scope of the Prescription Act; accordingly, an easement of light cannot arise under section 3 *as against a lessee of the Crown, to exist only during the continuance of the lease.*

M., being assignee of a lease of Crown land for a term of ninety-nine years from 1815, *surrendered it in* 1892 *and agreed to take a new lease, under which agreement he proceeded to erect a building so as to interfere with the access of light which W. had enjoyed to a house on contiguous land without interruption ever since* 1852, *when such house was built. In* 1893 *W. commenced an action to restrain M. from so building.*

Held, that there was no ground for presuming a lost grant, or for inferring immemorial prescription, in favour of W.; that no easement of light had arisen under the Prescription Act, and that W.'s claim therefore failed.

Decision of Kekewich, J., *reversed.*

Principle of Bright *v.* Walker, 1 *C. M. & R.* 211, *followed.*

Perry *v.* Eames, 39 *W. R.* 602, [1891] 1 *Ch.* 658, *approved.*

Appeal from a decision of Kekewich, J.

The defendants were lessees of Crown property. In 1826 a lease of it was granted by the Crown for ninety-nine years from 1815, to expire, therefore, if not previously determined, in 1914. In 1891 this lease became vested in the defendants. On the 5th of September, 1892, they surrended it to the Crown, and the Crown agreed to grant them a new lease of the same land on certain terms; and the defendants agreed to erect a new building on the land. By this agreement the defendants were to be responsible and to make compensation for, all damage which might be done with respect to (*inter alia*) all rights of air and light which any person might have over the land. Under that agreement the defendants were erecting the building of which the plaintiff complained. The plaintiff was the owner in fee of land adjoining the defendants' land. The plaintiff acquired his title in July, 1852, and he then built a house which he now sought to protect. He and his tenants had enjoyed access of light to that house for more than forty years—*i.e.*, since 1852—without interruption. The light so enjoyed would be interfered with by the defendants' new building. The plaintiff issued his writ in this action in March, 1893—*i.e.*, more than forty years after the commencement of his enjoyment, but within three years after the termination of the Crown lease of 1826 by the surrender above mentioned—for an injunction to restrain the defendants from erecting any building so as to obstruct his ancient lights. Kekewich, J., held that the plaintiff had not acquired an easement in fee against the Crown, but that he had acquired an easement against the lessees of the Crown for the residue of the term of ninety-nine years granted by the lease of 1826, and that the easement so acquired must be treated as subsisting as against the defendants until the year 1914, when the lease would have expired by effluxion of time if the defendants had not surrendered it. From that judgment the defendants appealed.

Section 2 of the Prescription Act provides: "No claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said lord the king, his heirs or successors . . . when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

Section 3 provides: "When the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

Warmington, Q.C., and *Ingle Joyce*, appeared for the appellants.

Marten, Q.C., and *Boome*, were for the respondent.

The nature of the arguments is sufficiently indicated in the judgments.

The following cases were referred to: *Bright* v. *Walker*, 1 C. M. & R. 211; *Perry* v. *Eames*, 39 W. R. 602, [1891] 1 Ch. 658; *Piggott* v. *Stratton*, 7 W. R. 486, Johns. 341; s. c. on appeal, 8 W. R. 13, 1 De G. F. & J. 33; *Frewen* v. *Philipps*, 9 W. R. 786, 11 C. B. N. S. 449; *Beggan* v. *Macdonald*, 2 L. R. Ir. 560; *Fahey* v. *Dwyer*, 4 L. R. Ir. 271, 27 W. R. Dig. 230; *Harris* v. *De Pinna*, 33 Ch. D. 238, 251, 252, 34 W. R. Dig. 63; *Mitchell* v. *Cantrill*, 36 W. R. 229, 37 Ch. D. 56; *Robson* v. *Edwards*, *ante*, p. 569,

(*a.*) Reported by ARTHUR LAWRENCE, Esq., Barrister-at-Law.

[1893] 2 Ch. 146; *Russell* v. *Watts*, 34 W. R. 277, 10 App. Cas. 602; *Angus* v. *Dalton*, 30 W. R. 191, 6 App. Cas. 740, 798; *Bass* v. *Gregory*, 25 Q. B. D. 481, 39 W. R. Dig. 79; *Webb* v. *Bird*, 9 W. R. 899, 10 C. B. N. S. 282; *Tickle* v. *Brown*, 4 Ad. & Ell. 369; also Bullen and Leake's Precedents of Pleadings, 4th ed., pt. 1, p. 448.

Cur. adv. vult.

July 3.—LINDLEY, L.J.—The question raised by this appeal is whether the plaintiff is entitled to an easement of light over the land of the defendants. [His lordship stated the material facts set forth above and proceeded:—] The plaintiff's contention is (1) that section 3 of the Prescription Act applies to the Crown; (2) that, if not, it applies to the Crown's lessees, who have allowed access of light to be enjoyed over their property for twenty years without interruption; (3) that, if the plaintiff has not acquired a title by section 3, he has acquired such title by forty years' enjoyment under section 2 of the Act; (4) that at all events a lost grant ought to be presumed in his favour or immemorial enjoyment ought to be inferred.

Before considering the effect of the statute 2 & 3 Will. 4, c. 71 it is desirable to dispose of the points relied on by the plaintiff apart from that Act. A grant from the Crown as distinguished from its tenant cannot be presumed, for there has been no enjoyment against the Crown itself; and without it there is no foundation for such a presumption. A title by immemorial prescription is excluded by the known history of the plaintiff's house, which was built in 1852, during the pendency of the Crown lease. The Crown lessee might no doubt have granted to the plaintiff, his executors, administrators, and assigns, an easement over the land held under the Crown for the residue of the term created in 1826; such an easement, if so created, would bind the lessee, his executors, administrators, and assigns, for the residue of the term thereby created; nor could the lessee, or any one claiming under him, defeat the easement so created by surrendering the term. The lessee could only surrender such interest as he had at the time of the surrender, and the surrenderee could only acquire the same interest. See *Doe* v. *Pyke*, 5 M. & S. 146; *Piggott* v. *Stratton*. Moreover, in this respect the Crown would be in no better position than any other surrenderee. If, therefore, the plaintiff had acquired by a grant from the Crown's lessee an easement for the residue of the term granted by the lease of 1826 the surrender of that lease would not have destroyed such easement; and, notwithstanding the surrender, the easement would have continued, even as against the Crown, until 1914, when the lease would have expired by effluxion of time. But in this case there is no evidence of any grant of any easement by any lessee of the Crown; nor can I infer as a fact such a grant by any of the Crown's lessees.

But then it is contended that such a grant ought to be presumed as a matter of law. But this is not so. No such grant is required to account for the state of things which exists, nor is any fiction or presumption necessary to render legal, conduct of the plaintiff which would have been illegal without it. The plaintiff has simply been enjoying his own property, as he was perfectly entitled to do; and no presumption of any grant entitling him to that enjoyment in the past, or to similar enjoyment in future, can properly be made. It is true that it has been said that, after an uninterrupted enjoyment of light for twenty years, a covenant not to interrupt will be presumed (see *Cross* v. *Lewis*, 2 B. & C. 689, and *Moore* v. *Rawson*, 3 B. & C. 340). But I am not aware of any authority for presuming as a matter of law a lost grant by a lessee for years in the case of ordinary easements, or a lost covenant by such a person not to interrupt in the case of light, and I am certainly not prepared to introduce another fiction to support a claim to a novel prescriptive right. The whole theory of prescription at common law is against presuming any grant or covenant not to interrupt by or with anyone, except an owner in fee. A right claimed by prescription must be claimed as appendant or appurtenant to land, and not as annexed to it for a term of years. Although, therefore, a grant by a lessee of the Crown, commensurate with his lease, might be inferred as a fact, if there was evidence to justify the inference, there is no legal presumption, as distinguished from an inference in fact, in favour of such a grant. This view of the common law is in entire accordance with *Bright* v. *Walker*, where this doctrine of presumption is carefully examined.

The plaintiff's right to the easement claimed is thus reduced to the statute 2 & 3 Will. 4, c. 71. The section specially applicable to light is section 3, which excludes all fictions and presumptions of law and is a clear and simple enactment. Two questions arise upon this section in the present case, viz.:—(1) Does it bind the Crown? (2) Does it confer a temporary right against a lessee of the Crown, although not as against the Crown itself as reversioner? In *Perry* v. *Eames* it was decided that, although parts of the statute—viz., sections 1 and 2—bind the Crown, yet section 3 does not; the reason being that the Crown is expressly mentioned in sections 1 and 2, and is not mentioned in section 3. Upon reflection I am of opinion that this decision is correct. Considering the difference between enjoying light in one's own property and enjoying other easements in other people's property, and considering the great alteration made by section 3 in the law applicable to light, I cannot regard section 3 as a mere addition or proviso to or qualification of section 2. It is what it purports to be—viz., a fresh and independent enactment relating to a different kind of easement. The Legislature may well have thought right to bind the Crown when persons had been for many years actively asserting rights over its property, and may yet have purposely omitted to impose upon the Crown the obligation of not interfering with persons who never, in fact, interfered with it. The Crown is never bound by a statutory enactment, unless the intention of the Legislature to bind the Crown is clear and unmistakable, and this is by no means the case in dealing with the question of lights.

I come now to the last question—viz., whether section 3 has conferred an easement as against the Crown's lessee. So far as mere language is concerned, and apart from the nature of the subject-matter with which the section is dealing, I should see no difficulty in applying section 3 to all English subjects, whether lessees of the Crown or other people; I should see no difficulty in reading "absolute and indefeasible" as meaning absolute and indefeasible as against all persons to whom the section is applicable. But, if the section is so read, the consequence will necessarily be to create, by mere occupation and enjoyment, a class of easements which at common law could never have been acquired by prescription, but only by express agreement or grant. An easement for a term of years may, of course, be created by grant, but such an easement cannot be gained by prescription, and, not being capable of being so acquired, it does not fall within the scope of the statute 2 & 3 Will. 4, c. 71. The expression "absolute and indefeasible," as applied to easements of all kinds, coupled with the declared object of the Act, which is to shorten the time for prescription, shows that the easements dealt with were easements appendant or appurtenant to land, and which, when acquired, imposed a burden for ever

on the servient tenement. This view of the statute was clearly expressed soon after it passed in *Bright* v. *Walker*, and, although some passages in the judgment of Parke, B., in that case have been criticized, and even dissented from, the broad view which underlies the judgment has never been disapproved. That view, as I understand it, is that the Act has not created a class of easements which could not be gained by prescription at common law, or, in other words, has not created an easement for a limited time only, or available only against particular owners or occupiers of the servient tenement. Such easements can only be created since the Act as before the Act—viz., by grant or by an agreement enforceable in equity, which for most purposes is as efficacious as a deed under seal. Such a grant or agreement must, moreover, be proved as a fact, and not be purely fictitious. It was contended that *Bright* v. *Walker* is inconsistent with *Frewen* v. *Philipps*, but this is a mistake attributable to the wording of the head-note. In that case the plaintiff had acquired the easement he claimed, not only against the defendant, the adjoining tenant, but also against his lessor, although the plaintiff and the defendant both held under the same landlord. Similar observations apply to *Mitchell* v. *Cantrill* and to *Robson* v. *Edwards*.

Although the expression "other easement" occurs in section 2, I concur in the view generally hitherto adopted, and judicially held to be correct, in *Perry* v. *Eames*—viz., that light is not included in section 2, but is governed entirely by section 3 and the subsequent sections which have to be read with it. I may, however, observe that if section 2 were applicable to this case section 8 would be also applicable, and that, as the three years there mentioned had not expired before the writ was issued, the plaintiff's right would not have been absolute and indefeasible even under section 2.

It only remains to add that there are no circumstances in this case giving the plaintiff any equitable, as distinguished from legal, rights against the defendants. For the reasons I have given I am of opinion that the plaintiff has acquired no right to light under the statute or otherwise, and that the appeal must be allowed and judgment be entered for the defendants, with costs here and below.

LOPES, L.J.—The plaintiff contends that independently of the Prescription Act he can maintain his case on the ground that a lost grant ought to be presumed, and if not, at any rate, that enjoyment from time immemorial ought to be inferred. Both these contentions can be easily disposed of. For convenience sake the fiction of a lost grant is very often pressed into the service, but to presume a lost grant made by the Crown, or the lessees of the Crown, since 1852, and lost, would be overtaxing the credulity of the most credulous, and would be making a demand too extravagant even for the elasticity of this patient and accommodating fiction. As for enjoyment from time immemorial, how can that be presumed when it is an admitted fact that the house now claiming the right, only came into existence in 1852? The head of the prescription is cut off, and this contention of the plaintiff fails.

I will now deal with the Prescription Act, 2 & 3 Will. 4, c. 71. The plaintiff says he has acquired an absolute and indefeasible right by his enjoyment as of right without interruption for forty years of the access of light to his house. It is to be observed that the Crown is mentioned in the second section, and would be bound. If the plaintiff can bring his case within it he will succeed. But there are two answers to his contention, 1st, that section 2 does not apply to an easement of light; and, 2nd, if it did, the plaintiff would be met by the 8th section of the Prescription Act, which gives the reversioner three years next after the end of the term within which to resist the claim. Three years had not elapsed after the determination of the lease by surrender previously to the issue of the writ. Is the easement of light within section 2? It is true the expression "other easement" occurs in section 2. But it was held by Chitty, J., in *Perry* v. *Eames*, in his lucid judgment delivered in that case, that the words "other easement" did not apply to an easement of light which is governed exclusively by section 3, and subsequent ancillary sections. I entirely concur with that judgment and with the reasons for holding the easement of light not within the terms of section 2, but exclusively regulated by section 3 and subsequent sections. This disposes of the plaintiff's case so far as section 2 is concerned.

The plaintiff further contends that he has obtained an absolute and indefeasible right by forty years' actual enjoyment without interruption, under section 3. If the Crown was named in this section it would be bound, and the plaintiff's case would be established, but the Crown is not named, and is not bound. "Absolute and indefeasible" means absolute and indefeasible against the whole world. Unless the enjoyment gives a title against all persons having any interest in the *locus in quo* it gives no title at all. See *Bright* v. *Walker*. *Frewen* v. *Philipps* in no way conflicts with *Bright* v. *Walker*, for the title there acquired was absolute and indefeasible, being good against the reversioner and every person having any interest in the *locus in quo*. In the present case, however, the Crown, not being named in section 3, is not bound, and no absolute and indefeasible title is acquired good as it must be against every person interested: *Perry* v. *Eames*.

But the plaintiff says, if the Crown is not bound, at any rate the lessees of the Crown are bound, against whom the plaintiff had enjoyed access of light to his house for more than forty years. Undoubtedly this would be so if, as in *Frewen* v. *Philipps*, there was a reversioner who could be bound. But the easement suggested is a qualified and terminable easement. Such an easement could not have been claimed by immemorial prescription, and was not contemplated by the Prescription Act. An easement contemplated by the Act must be such as absolutely binds the fee in the land. The statute nowhere contains any intimation that there may be different classes of rights, qualified and absolute, valid as to some persons, invalid as to others. I cannot, therefore, agree with Kekewich, J., who has held that though the plaintiff has not acquired a title against the Crown, he has acquired a title against the lessees of the Crown for the residue of the term created by the lease of 1826, which easement would have existed until the expiration of the term by effluxion of time if there had been no surrender. Such an easement might have been created by a grant from the lessee of the Crown to the plaintiff. Such a grant would have bound the defendants and their successors in title for the residue of the term. If such a grant had been made before surrender it would not have been defeated by surrender, but would have stood good even against the Crown until 1914. The surrenderee, whether the Crown or a subject, would have taken subject to existing rights. It is not, and cannot be, pretended that any such grant was in fact made.

I am clearly of opinion that no title at all is conferred on the plaintiff. The appeal must be allowed and judgment entered for the defendants with costs here and below.

A. L. SMITH, L.J.—Kekewich, J., held upon the

facts that the plaintiff could not maintain any action founded either upon prescription at common law or upon an assumed lost grant, in both of which findings I agree, for, as said by Bramwell, L.J., in *Duke of Norfolk* v. *Arbuthnot*, 5 C. P. D. 392, 29 W. R. Dig. 76, as regards the prescription at common law, we know the whole truth, and prescription at common law is consequently not maintainable; and I also decline, as Kekewich, J., has done, in the circumstances of this case, to presume a lost grant either from the Crown or its lessee, for there are no facts from which I should infer a covenant not to obstruct the plaintiff's lights to have been granted by anyone. Lindley, L.J., has so fully dealt with this point that I have nothing to add.

The plaintiff can therefore only maintain his cause of action under section 3 of Lord Tenterden's Act of 1832 (2 & 3 Will. 4, c. 71), and it becomes necessary to ascertain what is the true construction of that section. That and the two preceding sections have been the subject of many decisions, and it appears to me to have been settled, firstly, that the words "or other easement" in section 2 do not include the claim to the use of light specially provided for by section 3. The suggestion that Lord Selborne thought otherwise in *Dalton* v. *Angus*, 30 W. R. 208, 6 App Cas. 798, is ill-founded. What he there stated was: "The expressed policy of the Act is large and general; it is to prevent claims of prescription from being defeated by showing a commencement within legal memory. Why should not this extend to other easements besides ways and water rights and lights, which (by section 3) are specially provided for and exceptionally favoured?" This is by no means a statement that section 2 embraced lights, but, on the contrary, that such are specially provided for and exceptionally favoured in section 3. Coleridge, J., in *Truscott* v. *Merchant Taylors' Co.*, 4 W. R. 295, 11 Ex. 863, has stated that section 3 seemed to him to almost new found the mode of acquiring the right to access to light; and Lord Westbury, in *Tapling* v. *Jones*, 13 W. R. 617, at p. 618, 11 H. L. Cas. 290, at p. 304, said: "The right to what is called an ancient light now depends upon positive enactment"—*i.e.*, section 3. Moreover, it has for many years been thought in the profession that section 3 was the section, and the only one, which dealt with lights. The point now argued, that section 3 is to be read as a proviso upon section 2, is in my judgment wholly untenable, as Chitty, J., has held to be the case in *Perry* v. *Eames*, in which I agree. It has been held, to use the words of Parke, B., "that section 3 converts into a right such an enjoyment only of access of light over contiguous land as has been had for the whole period of twenty years in the character of an easement distinct from the enjoyment of the land itself, and that the statute puts this species of negative easement, as it has been termed, on the same footing in this respect as those positive easements provided for by the other sections, all of which, after long enjoyment as easements, are invested with the quality of rights," *Harbidge* v. *Warwick*, 3 Ex. 552, at p. 556. In my judgment it is too late now to argue either of the above-mentioned propositions, and, what is more, I think that they have been rightly decided.

The question which arises, therefore, is, Has the plaintiff for the whole period of twenty years enjoyed in the character of an easement the access of light without interruption over land contiguous to his dwelling-house so as to have acquired a right within section 3.

If this contiguous land had belonged to a subject the answer would have been yes, but the contiguous land is the land of the Crown and not the land of a subject, and that raises what, to my mind, is the real point in this case—viz., Does section 3 apply at all to a case where the land over which the enjoyment has taken place is the land of the Crown, even though it has been for years in the occupation of a subject who is lessee of the Crown. As I have before said, section 3 in this Act has to stand alone; it is not to be read, as suggested by Mr. Marten for the plaintiff, as a proviso upon section 2, in which section the Crown is named; and, applying the well-known rule, the Crown not being named in section 3, neither it nor its lands are bound thereby. Chitty, J., in the case of *Perry* v. *Eames* had to decide whether the Crown was bound by section 3. I have fully considered the judgment. He came to the conclusion that the Crown was not bound, and with his reasons and conclusions I entirely agree. If, then, the enjoyment of the access and use of light over land contiguous to the plaintiff's dwelling-house for a period of twenty years is only converted into a right which the plaintiff can enforce by reason of the provisions of section 3, and that section does not apply to an enjoyment in the nature of an easement over lands of the Crown, how can it be said that the section gives any right to the plaintiff, for it is only over Crown lands that he is now seeking to enforce such right?

It is argued that though this may be so as regards the Crown if the lease had run out and the Crown was obstructing the plaintiff's light, yet it is said that the section applies to and binds the lessee of the Crown so long as the lease remains, because he and his predecessors as lessees have permitted the uninterrupted enjoyment of the access and use of the light to the plaintiff's dwelling-house, and he is the person who is now raising the obstruction to the lights. This position Kekewich, J., has held to be well founded, and decided that the defendant, the lessee, was bound by the section so long as the lease existed. I own that at first sight this appears plausible, but when examined it seems to me to be unsound and to be concluded by authority. I have pointed out that to constitute the right claimed by the plaintiff under the section the access and use of the light must have been enjoyed in the character of an easement. The case of *Bright* v. *Walker* over fifty ago decided that the section nowhere contains any intimation that there might be different classes of rights qualified, and absolute, valid as to some persons and invalid as to others, and held that when the enjoyment is of the character of an easement, and it cannot give a valid title against all persons having estates in the *locus in quo*, the statute gives no right at all even against a lessee during the continuance of the term. Parke, B., in delivering the judgment of the court distinctly lays this down; he says, at pp. 220, 221: "The important question is whether this enjoyment, as it cannot give a title against all persons having estates in the *locus in quo*, gives a title as against the lessee and the defendants claiming under him or not at all"; and he answers this question by saying, "No title at all is gained by a user which does not give a valid title against all" and permanently affect the fee—which in this case would be in the Crown. In other words, a person cannot obtain an absolute and indefeasible right within the meaning of the statute unless by the user he can get a right against all. If he does not, he gets no absolute and indefeasible rights within the section. The present case falls directly within this decision, which, as regards this point of the statute, has never been impugned. The case of *Frewen* v. *Philipps* and the two Irish cases cited by Mr. Marten in no way affect the construction of the statute as regards this point, and, inasmuch as the plaintiff cannot make out a title

against all, he cannot make out a title against any, and consequently he cannot avail himself of the section; and in my judgment this action fails against the defendant, who is lessee of the Crown. The appeal must be allowed.

Appeal allowed.

Solicitors, *Peake, Bird, Collins, & Peake; Wakeford, May, & Woulfe.*

From Chan. Div. (Lindley, Bowen, and Kay, L.JJ.) — May 31; June 12.

In re WASHINGTON DIAMOND MINING CO. (*a.*)

Company — Winding up — Fraudulent preference — Amount unpaid on shares—Arrears of directors' fees —Set-off—Mutual credits—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 164—*Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *ss.* 38, 48.

Section 164 *of the Companies Act,* 1862, *which enacts that that shall be a fraudulent preference in the case of a company which would be a fraudulent preference in the case of an individual trader, cannot be construed as having imported into it section* 38 *of the Bankruptcy Act,* 1883, *so as to prevent, by allowing mutual credits, any transaction from being a fraudulent preference which would otherwise be so.*

Decision of Vaughan Williams, J. (*that no fraudulent preference was established*), *reversed.*

The following statement of facts is taken from the judgment of Lindley, L.J.

This is an appeal by the liquidator of this company against an order of Vaughan Williams, J., dismissing an application made by the liquidator against Colonel Underwood and Mr. M'Keand, two of the directors of the company. The application was for an order to compel them to repay to the company two sums of £70 each. These sums were paid by the two gentlemen in question to the company in respect of the amounts unpaid on the shares held by them, and were immediately repaid by the company to them in respect of arrears of fees due to them as directors. The repayments are alleged by the liquidator to have been invalid under section 164 of the Companies Act, 1862, which relates to fraudulent preferences. Vaughan Williams, J., held that no fraudulent preference was established. Hence the appeal. The appeal raises some questions of fact, and also an important question of law. The questions of fact are —(1) whether the directors paid themselves their fees at a time when the company was unable to pay its debts as they became due; and (2) whether they paid themselves with a view to give themselves a preference over other creditors of the company (section 48 of the Bankruptcy Act, 1883). The question of law is whether the mutual credit clause, section 38, in the Bankruptcy Act, 1883, is to be applied to cross claims between a limited company and its members in respect of calls, so as to render valid a payment by the company, which, but for that clause, would be a fraudulent preference. The facts are as follows. The company was formed in June, 1889, to buy and work some mines in South Africa. Its nominal capital was £100,000, divided into 100,000 shares of £1 each. Of these 65,000 were offered to the public, and, according to the prospectus, the shares taken by the public ought to have been paid for by instalments, the last of which became payable on the 31st of March, 1890. I will assume that in July, 1891, Colonel Underwood and Mr. M'Keand owed the company £70 each in respect of their shares, though no calls were ever, in fact, made pursuant to the articles of association. The vendors of the mines were paid partly in shares of the company and partly by three bills of £1,000 each. Two of these bills were due before the 21st of July, 1891, and were then unpaid. The other bill fell due on the 4th of September, 1891, and was then dishonoured. As collateral security for those bills, the vendors held sixty debentures of the company for £50 each, bearing interest at 5 per cent. from the 1st of March, 1890, but no interest was ever paid in respect of them. Whether the debentures were themselves due and payable on the 21st of July, 1891, I do not know. The interest in arrear certainly was. Part of the capital had been underwritten by various persons; but as early as March, 1890, it became apparent that they would pay nothing unless compelled, and in April, 1890, writs were issued against them. A test case to determine their liability was proposed, but nothing was got, or in truth could be got, from them before the winding up commenced. Out of about 20,800 shares allotted to the public only about £1,220 was ever received by the company. The company never did any business in the way of mining. The Government royalties were not kept down, and on July 21, 1891, £1,820 was due in respect of them. The cash standing to the credit of the company at its bankers from June, 1890, to September, 1891, was ludicrously small; in June, 1890, it was as low as £2 1s. 5d., and there was not enough to pay the most pressing demands made against the company, small as some of them were. Messrs. Lord & Co., the auditors, could not get their fees, amounting to £15 15s; Caldicott & Bell, the company's agents in South Africa, could not get paid a sum of £18 15s. 7d. due to them; Barnett, a creditor for about £90, pressed in vain for payment of the amount due to him; and Farmer, the company's solicitor, could get nothing in respect of costs due to him and which he wanted to be paid. Petitions to wind up were threatened in the autumn of 1890, and on October 31, 1890, notices were issued convening a meeting to consider the expediency of winding up and reconstructing the company. The sum standing to the credit of the company at its bankers was then reported to be £2 1s. 5d. The reconstruction scheme came to nothing. In June, 1891, Barnett presented a petition to wind up the company; the directors, however, put the company in funds to pay him off, and he was got rid of; they had previously found the money to pay off Lord & Co. On the 21st of July, 1891, the balance at the company's credit was reported to be £2 0s. 11d. At that time Farmer had resigned his appointment as solicitor; his bill amounted to £215; he offered to take £100 in satisfaction of his claim, and the secretary informed him on the 22nd of July that the company was not in a position to make any payment at present. The company's own money, in fact, consisted of what it could get from its shareholders and those who had underwritten its capital; and they would not pay. One of them, however, a Mr. Counsel, afterwards paid £900 into court in the winding up of the company, and this may be regarded as a good asset, though not available in July, 1891. It is true that the vendors and some of the other creditors were not pressing for payment, but Farmer was, and the Government claims for royalties required immediate attention, as the mines were in danger of being forfeited. Such being the financial position of the company, Mr. M'Keand, one of the directors, on the 21st of July, 1891, paid £70 to the company, being the amount due on his shares, and on the same day the

(a.) Reported by ARTHUR LAWRENCE, Esq., Barrister-at-Law.

company paid him a cheque for £70 on account of his fees. At or about the same time similar payments were made by and to Colonel Underwood, another director These payments by the company were made by cheques signed by Colonel Underwood and Mr. M'Keand. On the 5th of September a petition to wind up the company was presented by Counsel, a shareholder, and the company is being wound up under an order made on this petition.

Buckley, Q.C., and *Kenyon Parker*, for the appellant.

Farwell, Q.C., and *J. G. Wood*, for Colonel Underwood.—This payment to the directors by the company would not be a fraudulent preference in the case of an individual trader, for there might be set-off under section 38 of the Bankruptcy Act, 1883, and that section is, in effect, incorporated in section 164 of the Companies Act, 1862, and the benefit of it applies as well to a company in a winding up as to an individual trader in a bankruptcy.

F. Dodd, for Mr. M'Keand, used similar arguments.

Kenyon Parker, in reply.—Every case which would be a fraudulent preference within section 48 of the Bankruptcy Act, 1883, without taking into account the mutual credit section (38), and as if that section did not exist, is a fraudulent preference within section 164 of the Companies Act. [He referred to *Kent's case*, 36 W. R. 818, 39 Ch. D. 259.] [LINDLEY, L.J.—The substance of what Cotton, L.J., says on the point is that section 164 of the Companies Act incorporates section 48, but not section 38, of the Bankruptcy Act.]

Cur. adv. vult.

June 12.—LINDLEY, L.J. [after stating the facts as above set forth; and holding that the proof that the company at the time of the transactions complained of was unable to pay its debts as they became due out of its own money was overwhelming; that it had no means whatever of paying Colonel Underwood and Mr. M'Keand their fees unless they first furnished the funds by paying up their shares; that each of the transactions which were impeached was an attempt by these directors to pay up their shares without really parting with any money, and that the circumstances compelled the conclusion that the payments by the company to them were made deliberately to give them a preference over the other creditors; proceeded:—] Now comes the question of law. If the company were an ordinary bankrupt trader to whom the mutual credit clause (section 38) of the Bankruptcy Act, 1883, was applicable, the preferential payments to Mr. M'Keand and Colonel Underwood could not be avoided by the trustee in bankruptcy, because they would have injured no one. The two debts could have been set one against the other after the bankruptcy just as effectually as before, and whether the debts were both paid or were set off against each other before the bankruptcy or after would be perfectly immaterial. This being unquestionably true of ordinary traders, it is contended that section 164 of the Companies Act, 1862, is so worded as to involve the same consequence on the winding up of a company, which must for this purpose be treated as a bankrupt trader. This argument is certainly ingenious, but to give effect to it would be to defeat those sections of the Companies Act, 1862, which prevent all set-off against calls on the winding up of a limited company so long as any of its creditors are unpaid. See section 38 (7) and section 101; *Grissell's case*, 14 W. R. 1015, L. R. 1 Ch. App. 528. Section 164 is a general section applicable to all the creditors of all companies governed by the Act, whether they are limited or not, and whether the creditors are members or not; its language is, therefore, wide enough to include all creditors of all companies governed by the Act. But, in applying the section to limited companies, and to the members of such companies, the special legislation applicable to them must be regarded and must not be defeated. The first part of section 164 must be construed as referring to the class of acts described in section 48 of the present Bankruptcy Act, 1883; and the words "any trader" in section 164 must be held to include traders to whom the mutual credit clause in the Bankruptcy Act, 1883 (section 38), is inapplicable, as well as to include those traders to which the clause is applicable. This construction does no violence to the language used, and is obviously required by those sections of the Act which expressly prevent a member of a limited company in arrear for calls from obtaining payment in full of debts due to him in preference to other creditors. The disallowance of a set-off against calls between a limited company and its members on a winding up is to prevent any such preference, and its prohibition removes the only reason why a preferential payment in bankruptcy, where a set-off is allowable, is not fraudulent and void. The maxim *Cessante ratione cessat lex* is properly applicable in such a case. This construction of section 164 is not new; it was seen to be right and was distinctly adopted by Cotton, L.J., in *Kent's case*, and it is the only construction which does not defeat the obvious intention of the Legislature. It must be borne in mind that it has been already decided that section 10 of the Judicature Act, 1875, has not repealed or affected the enactments in the Companies Act, 1862, prohibiting set-off against calls in the winding up of limited companies: See *Gill's case*, 27 W. R. 934, 12 Ch. D. 755.

In considering this case I have assumed that the sums paid by Mr. M'Keand and Colonel Underwood were really due and payable by them to the company, although no calls had been made as contemplated by the articles of association. I am by no means sure that this is not taking too favourable a view of the position of these gentlemen. If the moneys were not due the case is much stronger against them: See *Sykes's case*, L. R. 13 Eq. 255, 20 W. R. Ch. Dig. 49.

For these reasons I am compelled to differ from the view taken by the learned judge who decided the case. The appeal must be allowed, with costs, both here and below. The void payments having been made by cheques signed by both the directors, they are jointly and severally liable to repay both and sought to be recovered by the liquidator, with interest at 4 per cent. [LINDLEY, L.J., added that Bowen L.J., had read his judgment, and concurred in it.]

KAY, L.J.—The first question is as to the meaning and effect of the 164th section of the Companies Act, 1862. It is argued that this section only means that a fraudulent preference, which would be so if the company were an individual who had since become bankrupt; and that in the case of such an individual any of his debtors who had a counter-claim against him which might be set off in an action, may be relieved of such debt by a voluntary set-off by the bankrupt before bankruptcy. If this be so it is by reason of the mutual credit clause, section 38, of the Bankruptcy Act, 1883. The effect of that clause is to give the debtor after the bankruptcy the advantage of set-off, and therefore to set off the debt before the bankruptcy cannot be in any sense fraudulent. But after a winding up there is no such right as set-off, and therefore to allow a set-off before winding up does not confer on the debtor an advan

tage which may be deemed fraudulent under section 164. I am unable to read the section as this argument requires us to do. Its object is to prevent a fraudulent preference. If it has the meaning suggested the case of voluntary set-off must be an unintentional omission in the statute. But I do not think there is any such omission. [His lordship then dealt with the questions of fact, and having arrived at the conclusion that the transactions complained of were in contemplation of a possible or even probable winding up, and with the intention of giving a preference over other creditors, and at a time when the company was unable to pay the debts which it then owed, continued:—] I think that all the directors who concurred in making these payments were guilty of a misfeasance, and that the order should direct them jointly and severally to repay the amounts, and also the costs of this application here and below.

Appeal allowed.

Solicitors, *John M. Mitchell; Wrensted & Sharpe; J. B. D. Lewis.*

From Chan. Div. (Lindley, Bowen, and A. L. Smith, L.JJ.) Feb. 8.

In re WHITE.
WHITE *v.* WHITE. (*a.*)

Charity—Will—Bequest to "religious societies."

Testator bequeathed his residuary estate "to the following religious societies—viz."—then followed a blank—"to be divided in equal shares among them."

Held, (1) *that this bequest was to be treated as a bequest for "religious purposes"; (2) that, being for "religious purposes," it was* primâ facie *a bequest for "charitable purposes"; and* (3) *that, as no religious society was particularly mentioned, there was nothing from which anything to the contrary of this* primâ facie *presumption could be shown; and, consequently, that a scheme for the application* cy-près *of the charitable gift should be directed.*

Decision of Kekewich, J., *reversed.*

Appeal from Kekewich, J.

The testator, Ebenezer White, by his will gave his residuary estate to trustees on trust for sale, and subject to successive life interests to his widow and a niece he made the following bequest of such residue: "I do give and bequeath the whole of my property to the following religious societies—viz. (*) to be divided in equal shares among them." The will was written on one half side of a sheet of note paper, and on the blank sheet opposite the above clause the testator after the execution of the will had written the following words:—"(*) viz., the Tract Society, the Home Missionary Society, the London Missionary Society, the Colonial Missionary Society." On the death of the testator probate of these latter words was refused, and these latter accordingly did not appear in the probate granted.

Kekewich, J., held that there was no general intention which the court could execute or recognize shown by the testator to devote the residue to charity; and, accordingly, that there was an intestacy, and that the next of kin took the residue, subject to the life interest therein of the widow and the niece.

The Crown appealed.

Sir John Rigby, S.G., and *Ingle Joyce,* for the appellant.—A society which exists for "religious purposes" is *primâ facie* a charity: *Baker* v. *Sutton,* 1 Keen, 224; *Townsend* v. *Carus,* 3 Ha. 257; *Thornton* v. *Howe,* 10 W. R. 642, 31 Beav. 14; *Wilkinson* v. *Lindgren,* 18 W. R. 961, L. R. 5 Ch. App. 570; a general charitable intention is therefore shown: *Pieschel* v. *Paris,* 2 Sim. & St. 384. In the case of *Cocks* v. *Manners,* 19 W. R. 1055, L. R. 12 Eq. 574, the *ratio decidendi* was that the gift was one to private individuals.

Warmington, Q.C., and *Edward Ford,* for the next of kin.—A general charitable intention must be indicated. The words in the gift in this will are incomplete, and it is idle to look for a general intent in an incomplete gift. It would be going beyond any of the decided cases to hold that a gift "to the following religious societies"—none being named—is a gift to charities generally for the purposes of charity. The will says nothing as to purposes for which the gift is made.

They cited *Cocks* v. *Manners*; *Budget* v. *Hulford,* W. N., 1873, p. 175; *Mills* v. *Farmer,* 1 Mer. 55; *Ewen* v. *Bannerman,* 2 Dow. & Cl. 74; *Aston* v. *Wood,* L. R. 6 Eq. 419, 17 W. R. Ch. Dig. 190; *Mayor of Gloucester* v. *Wood,* 3 Ha. 131, 1 H. L. Cas. 272; *Moggridge* v. *Thackwell,* 7 Ves. 70. [BOWEN, L.J., referred to *Pocock* v. *Attorney-General,* 25 W. R. 277, 3 Ch. D. 342.]

Sir J. Rigby, S.G., in reply.—*Attorney-General* v. *Syderfin,* reported 1 Mer. 59, 1 Vern. 224, and also in a note to the report in 7 Ves., p. 43, of *Moggridge* v. *Thackwell,* was approved of by Lord Eldon in *Moggridge* v. *Thackwell.* In *Fisk* v. *Attorney-General,* 15 W. R. 1200, L. R. 4 Eq. 521, Wood, V.C., followed *Clark* v. *Taylor,* 1 W. R. 476, 1 Drew. 642, and *Russell* v. *Kellett,* 3 Sm. & Giff. 264, 4 W. R. Dig. 131, both of which were only decisions of courts of first instance; and if the two latter cases decided what they have been assumed to decide, they cannot be supported: see *In re Slevin,* 39 W. R. 578, [1891] 2 Ch. 236. There is a long series of authorities which show that if you do not need to look outside the gift itself for the purpose of getting at a general charitable intent, then, though the particular charity fail, the gift will be applied *cy-près: Isaac* v. *De Friez,* 17 Ves. 373n; *Attorney-General* v. *Ironmongers' Co.,* 2 My. & K. 576; *Loscombe* v. *Wintringham,* 13 Beav. 87; *Mills* v. *Farmer.* [BOWEN, L.J., referred to *Clephane* v. *Provost of Edinburgh,* L. R. 1 H. L. Sc. 417, 17 W. R. H. L. Dig. 3.] The gift in the present case is to "religious societies." It is not a reasonable interpretation of that to say that the testator meant a mere personal benefit amongst any number of religious people; the reasonable interpretation is that the gift was for religious purposes. A gift to "religious societies" is *primâ facie,* at all events, a charitable gift: *Wilkinson* v. *Lindgren.* He also referred to *Liley* v. *Hey,* 1 Ha. 580. [*Ingle-Joyce* mentioned that he had found in Lincoln's-inn Library a manuscript report by Serjeant Hill of the case of *Jones* v. *Attorney-General,* which was mentioned by Lord Eldon in his judgment in *Mills* v. *Farmer,* 1 Mer. 101, as "not now to be found."]

Cur. adv. vult.

Feb. 8.—The judgment of the COURT (LINDLEY, BOWEN, and A. L. SMITH, L.JJ.) was delivered by

LINDLEY, L.J.—[His lordship stated the facts, and continued:—] Under these circumstances Kekewich, J., held that there was an intestacy. From this decision the Attorney-General, on behalf of the Crown, has appealed, upon the ground that the testator has bequeathed his property for charitable

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Reported by M. J. BLAKE, Esq., Barrister-at-Law.

purposes, and that a scheme for its application ought to be directed.

If the bequest in question amounts to, and ought to be construed as, a dedication by the testator of his property to charitable purposes, then there can be no doubt the Attorney-General is right. But the will says nothing in terms about charity, nor about the purposes for which the property is bequeathed. And it was urged by counsel for the next of kin that it was not possible to discover those purposes except by guessing.

A "religious" society may or may not be a "charitable" society, in the sense in which that expression is used. A society for the promotion of private prayer and devotion by its own members, and which has no wider scope, no public element, no purposes of general utility, would be a "religious" society, but not a "charitable" one: see *Cocks* v. *Manners*. In that case it was held that a gift by will to a Dominican convent was not a charitable gift. Wickens, V.C., said: "A voluntary association of women for the purpose of working out their own salvation by religious exercises and self-denial seems to me to have none of the requisites of a charitable institution, whether the word 'charitable' is used in its popular sense or in its legal sense."

In the present case the words of the testator's will are insufficient to show what kind of religious societies he meant. They may or may not have been "charitable" as well as "religious"; and as all religious societies are not charitable, we should, in the absence of authority, be unable to come to the conclusion that "charity" was intended, and we should, therefore, be of opinion that the result was an intestacy.

It is, however, impossible, we think, seriously to deny that the testator intended his property to be given to some religious societies for religious purposes. His property was to be divided amongst certain societies; but what for? The only rational answer to this question must, we think, be "for the purposes of those societies"; and, the societies being themselves described as "religious societies," the purposes for which the testator gave his property must be treated as religious purposes. It is true that these are not necessarily "charitable" purposes, and in a particular case a "religious" society may be shown not to be a "charitable" society. This was the case in *Cocks* v. *Manners*. But the authorities show that a bequest to a religious institution, or for a religious purpose, is *primâ facie* a bequest for a "charitable" purpose, and that the law applicable to "charitable" bequests, as distinguished from the law applicable to ordinary bequests, ought to be applied to a bequest to a religious institution or for a religious purpose. The leading cases on this head are as follows:—*Baker* v. *Sutton* (1836), where the bequest was to such religious and charitable institutions and purposes as in the opinion of the trustees might be fit and proper. Lord Langdale, M.R., in that case said: "All the cases, with one exception, go to support the proposition that a religious purpose is a charitable purpose." *Townsend* v. *Carus* (1843) is to the same effect. Wigram, V.C., there said: "If this is a bequest for religious purposes I think I am bound to hold it a charity within the decided cases." The promotion of the spiritual welfare of mankind was the object of the testator in that case, and the Vice-Chancellor dealt with the argument that some modes of promoting such welfare might not be "charitable." Having come to the conclusion that the object of the testator was "charitable," because it was "religious," he says that no mode of carrying out his intention could be proper if that mode was not itself charitable. In *Wilkinson* v. *Lindgren* (1870), where the bequest was to certain charitable institutions previously named, "or any other religious institution or purposes," as the trustees might think proper, religious purposes were treated as clearly "charitable." We can find no authority which really conflicts with these, or which is opposed to the principle on which they proceed.

We come, therefore, to the conclusion, first, that the gift is for religious purposes; and, secondly, that, being for religious purposes, it must be treated as a gift for "charitable" purposes unless the contrary can be shown. If once this conclusion is arrived at, the rest is plain. A charitable bequest never fails for uncertainty. *Mills* v. *Farmer* settles that point. Lord Eldon was clearly of opinion that the nomination of particular objects is only the mode and not the substance of a gift to "charity." We may add that, having looked at the registrar's book for the bill in *Attorney-General* v. *Syderfin*, we find that it is correctly set out in the note in 7 Vesey 43.

The decision appealed from must therefore be reversed, and it must be declared that in the events which have happened the testator's personal estate is subject to a trust for "charitable" purposes, and a scheme must be directed as to such part of it as was pure personalty at the testator's death. But having regard to the blunder made by the testator and the real difficulty occasioned by him, the costs of all parties, both here and below, ought to come out of his estate, subject to the life interest of the tenants for life.

Appeal allowed.

Solicitors, *Barfield & Child*; *Hare & Co.*

High Court of Justice.

Chan. Div. North, J. } March 23, 25.

In re WILSON.
WILSON *v.* HOLLOWAY. (*a.*)

Partnership—Real estate—Conversion.

Land was held by two persons under an agreement made between them for a common object. One of the parties having died,

Held, that the deceased's interest in the land devolved as real estate.

The effect of the existence of a partnership between the parties on the question of conversion considered.

Adjourned summons.

An estate called the Chobham Manor Estate was purchased by William Settles; and, with the view of developing it with the aid of Andrew Wilson as surveyor, an agreement dated the 11th of January 1867, was made between William Settles and Andrew Wilson by which Settles agreed to sell to Wilson the sum of £9,231 12s. one undivided moiety of the estate, the purchase-money to be paid within six months, Wilson to bear one moiety of all sums which Settles might have to pay on account of the purchase and one moiety of all expenses connected with the estate since the 16th of February then last, and to be entitled to one moiety of the profits thereof from that day. On payment by Wilson of the balance of the purchase-money Settles was, at the expense of himself and Wilson, to convey to Wilson, his heirs and assigns, one moiety of the estate, and, until such conveyance, would, after payment of all the purchase

(*a.*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

oney and interest, stand seised of such moiety on ust for Wilson and his heirs.

After acknowledgment by Settles of the receipt om Wilson of £3,862 2s. 8d. on account of the urchase-money, the agreement provided as follows: And it is expressly agreed that if Wilson shall ake default in payment of the balance of the purase-money and interest within the time before entioned, Settles shall be at liberty, if he shall ink fit, to return to Wilson all moneys paid by him account of such purchase-money without any terest, and by notice in writing to declare this reement void, and the same shall be void accordgly, and Settles shall thenceforth hold the estate r his own use solely, and Wilson shall have no im to anything for interest, services, or otherwise, Settles may enforce such agreement. Wilson all give all his services as a surveyor in the manageent and disposal of the estate, and use his best ertions to make the most profit for the same witht any remuneration, but the work done by his rks may be charged. Settles shall not be obliged give any attention to the management or disposal the estate further than he shall think fit. Wilson ll not, except by his will, dispose of his undivided iety of the estate, or any part thereof, without the itten consent of Settles, and no agreement shall be ered into for the disposal of the entirety of any t of the estate, either in fee or for any less interest, hout the concurrence of both parties."

Wilson, who died in 1871, by his will devised and queathed all his real and personal estate to his exeors upon the trusts therein set out in favour of his e and three children. All the purchase-money l been paid by Wilson except the last instalment, ich was paid by his executors. No conveyance ever executed to Wilson, and at the date of his th none of the estate had been disposed of. In 4 his moiety was sold to Settles under the proons of the Settled Land Act. The testator's ow was now dead, and one of his sons had died state in her lifetime. This was an originating mons by the brother and heir of the deceased son have it determined, *inter alia*, whether Wilson's sty of the estate was converted into personalty at time of his death.

wens-Hardy, Q.C., and *J. M. Stone*, for the plain-

Hall, Q.C., and *Ingle Joyce*, for the defendant, a or of Wilson, cited *Darby* v. *Darby*, 4 W. R. 413, . 495, and *In re Hulton*, 62 L. T. N. S. 200, . R. Dig. 144. This estate is partnership pro-, and therefore converted into personalty.

RTH, J.—The question here is whether Andrew n's moiety of the Chobham Manor Estate is realty rsonalty as between his real and personal repreives. It was suggested that a conversion into lty was effected by his will, but that is clearly case. The question is, therefore, was it con- by anything else antecedent to his will and nothing except the agreement of 1867. It that Settles and Wilson were partners, and is, being partnership property, was therefore lty. I do not think the question of partnerdirectly in point. The question is, is there any contract by virtue of which conversion was . Whether or not they were partners is not case directly material, though no doubt if it own that they were partners we should get a ay, as their property would of course be perd not real in the absence of any circumstances it realty. But even supposing they were and land formed part of the partnership property, yet there might be a definite agreement that at the end of the partnership the land should be conveyed as land, when I take it it would be real estate; on the other hand, if they were not partners there might be an agreement that the property should be converted, and such an agreement might operate as a conversion; therefore the question of partnership is only material for the purpose of construing this agreement. I have the agreement before me, and the question of conversion turns solely on that document. His lordship then held on the construction of the agreement that no conversion had taken place and that Wilson's moiety of the estate was realty at his death.

Solicitors for the plaintiff, *Stones, Morris, & Stone.*

Solicitors for the defendant, *Currie, Williams, & Williams.*

Chan. Div. Kekewich, J. — June 23, 24, 27; July 1.

In re SHEWARD.
SHEWARD *v.* BROWN. (*a.*)

Will—Life interest—Forfeiture clause—Assigning or attempting to assign.

Under a will the tenant for life's interest was to be forfeited if he assigned, charged, or incumbered his interest, or attempted to do so. The tenant for life borrowed money, and gave the lender a document which was in form an equitable assignment of part of his interest. No notice of the document was given to the trustees, and it was subsequently cancelled. Evidence was given to show that, as between the parties, the document was not intended as a charge or assignment, and that it would have been a fraud on the bargain to have so used it.

Held, that evidence to show the real meaning of the document could be received, and that there had been no forfeiture of the life interest.

Originating summons.

This was an application by the trustees of a will for the determination of the questions (1) whether a direction or authority dated the 6th of July, 1892, addressed to them and signed by Mr. and Mrs. Brown, to pay the income arising from the investments representing the sum of £30,000 to which Mr. Brown would be entitled in the months of January and July, 1893, was an assignment, or attempted assignment, by Mr. Brown of the said income, so as to determine the trusts declared by the will of the said income in favour of Mr. Brown, and to give rise to the discretionary trust vested in the trustees under the will to apply the said income; (2) whether the trusts in favour of Mr. Brown under the will expectant on the decease of E. E. Sheward of the sum of £20,000 were affected by the said direction or authority.

The testator by his will gave £30,000 to trustees in trust to invest and pay the income thereof to Mr. Brown for life or until he should be outlawed, or become a bankrupt, or enter into any composition with his creditors, or should assign, charge, or incumber, or attempt or affect to assign, charge, or incumber the same, or should do or suffer something whereby the same or some part thereof would, through his act or default, or by operation or process of law or otherwise, if belonging absolutely to him, become vested in or payable to some other person or persons, and

(*a.*) Reported by FRANCIS T. DUKA, Esq., Barrister-at-Law.

after the failure or determination of the trust thereinbefore declared in the lifetime of Mr. Brown, to apply the same for the benefit of his wife and family. A further sum of £20,000 was to be held by his trustees in trust for the testator's wife for life, with remainder on similar trusts to those declared of the said sum of £30,000.

On the 6th of July, 1892, Mr. and Mrs. Brown signed a document addressed to the trustees requesting them to pay the income arising from the £30,000 to which Mr. Brown was entitled under the will of the testator due in January and July, 1893, to H. V. Long, whose receipt, together with that authority, should be the trustees' discharge for the same. The authority was not served on the trustees, but they became aware of its existence in March, 1893. Long subsequently cancelled it. It was never acted on, and had not been out of his possession. Evidence was given that it was never intended to operate as a charge or alienation of Brown's life interest, and that it would have been a fraud on the bargain between the parties to it so to use it.

Ingpen, for the trustees.

Warmington, Q.C., and *Ingle Joyce*, for Mr. and Brown.—The document does not cause a forfeiture.

Renshaw, Q.C., and *F. A. Milne*, for the child of Mr. and Mrs. Brown.—It was an equitable assignment: *Gorringe* v. *Irwell India Rubber and Gutta Percha Works*, 35 W. R. 86, 34 Ch. D. 128; *Oldham* v. *Oldham*, 15 W. R. 300, L. R. 3 Eq. 404; *Wilkinson* v. *Wilkinson*, 3 Swans. 515; *Re Porter, Coulson* v. *Capper*, *ante*, p. 38 [1892] 3 Ch. 481; *Hurst* v. *Hurst*, 21 Ch. D. 278, 30 W. R. Dig. 225.

Warmington, Q.C., replied.

KEKEWICH, J.—The document of the 6th of July, 1892, is certainly an assignment, or an attempt to assign, within the meaning of the will. An inquiry whether it may more properly be described as one or the other would be merely academical, and may be dismissed. Nor will I pause to examine or compare the language of Fry, J., in *Hurst* v. *Hurst*, and North, J., in *In re Porter, Coulson* v. *Capper*. Suffice it to refer to the passage in Lindley, L.J.'s judgment in *Hurst* v. *Hurst*, where he says: "A proviso prohibiting the charging a life estate means in fact to prohibit anything purporting to charge it." The document really operates as an equitable assignment. This is conformable to the doctrine of *Wilkinson* v. *Wilkinson* and of many other cases, for instance, *Burn* v. *Carvalho*, 4 My. & Cr. 690, before Lord Cottenham, and *Rodick* v. *Gandell*, 1 De G. M. & G. 763, before Lord Truro. The authority of *Gorringe* v. *Irwell India Rubber and Gutta Percha Works* was not required to establish that notice to the trustees of the will is not necessary to complete the assignment, and that point was not contested. But it is argued that an equitable assignment can only operate according to the intention of the parties, and that to give it any other effect would be to permit a fraud. The intention here pointed at is, of course, external to the instrument itself, an intention beyond, and possibly in contravention of, that deducible from the instrument properly construed, and such a position must, therefore, be approached with exceeding caution, especially as the question falling for decision is not capable here of being tried between the parties to the contract—that is, between him who gave the charge and him to whom it was given. No authority was cited in support of this position, nor am I aware of any so directly bearing on it as to be useful for reference. There is some objection to deciding the question on principle, because, as already remarked, it does not arise between the contracting parties, and, moreover, the method of proceeding—summons by the trustees of the will—is not well adapted to the purpose. On the other hand, the document has been cancelled by Mr. Long himself, so that if he were here he could not argue in maintenance of its validity, and no injustice can be done to him by pronouncing it invalid. All other parties concerned are before me, and I have had the advantage of that thorough argument on behalf of the infant without which decision would have been impossible. There is another observation to be made in this connection. The accident of the pending litigation in *Brown* v. *Long* has supplied all the evidence that could reasonably be expected to be forthcoming on the point now under consideration, and no advantage in the way of additional or more satisfactory evidence could be anticipated if it were thought right to insist on the point being raised and decided in other proceedings. It may, therefore, be properly decided now. What I have to consider is, not whether the document means what its language imports, but whether operation can in conscience be given to that meaning. In other words, if Mr. Brown had been plaintiff in an action to set aside the document, on the ground of mistake or fraud, could Mr. Long have successfully resisted judgment?

My conclusion from the evidence is that Mr. Brown did not intend to charge his life interest, and cannot be taken to have consented to sign a document of that purport—that is, that he cannot be taken to have given his deliberate assent thereto. He had been warned on the occasion of a first loan that he could not mortgage his interest under the will, and though possibly, and indeed probably, he did not attribute any definite legal meaning to the term "mortgage," and certainly had not fathomed the mysteries of equitable assignment, yet the warning given was present to his mind on the occasion of the second loan, as is obvious from the inquiry made respecting the nature and effect of this particular document when called upon to sign it. That he was imprudent, and under the pressure of the moment accepted an unsatisfactory explanation, is abundantly clear, but I cannot hold him to have intended to do what he had been told was, and he believed to be, impossible. The reasonable inference from the evidence is that he would have declined to sign this document if the true nature thereof had been explained to him. The Mr. Long did not intend the document to be what it is, is not so clear. He also knew that Mr. Brown could not mortgage his interest. He also must be credited with something short of full acquaintance with the equitable doctrines affecting the matter in hand, but he may have thought that the document, even equivalent to a mortgage, and from that point of view futile, would be useful for some purpose, not of course that avowed, which is obviously incorrect, but some other purpose not definitely present to his mind. But I cannot credit Mr. Long with such folly as would be implied in the intention that the document should operate as a charge which would cut off Mr. Brown's income, and with it his means of making a payment to Mr. Long. Here comes in an observation made by Mr. Warmington in reply which is entitled to considerable weight. He almost used the language of Lord Truro in *Rodick* v. *Gandell*, which is worth quoting in this connection. Lord Truro says (p. 78): "Although it is not necessary to the validity of an assignment of a debt, as between the assignor and assignee, that notice should be given to the person from whom the debt is due, yet it is most usual and very expedient for the safety of the assignee that it should be done, and the omission to give any such notice may operate as strong moral evidence of the intention and understanding of the parties." I have

come to the conclusion that as between Mr. Brown and Mr. Long the document of the 6th of July, 1892, was not intended as a charge on Mr. Brown's interest under the will, that it would have been a fraud on the bargain so to have used it, and that any attempt by Mr. Long to use it in that manner would, on the evidence now before me, have been restrained by injunction. It seems to me legitimate thus to go behind the document, and to hold that the literal meaning is not according to truth and honesty, and must not be regarded as expressing any real contract between the parties. The result is that the first and second questions asked by the summons must be answered in the negative, and the costs must be paid by the trustees out of the income of the trust fund.

Solicitors, *Kingsford, Dorman, & Co.; Rowcliffes, Rawle, & Co.; Simmey & Simmey.*

Chan. Div. } Kekewich, J. } Feb. 17.

EVANS *v.* DAVIES. (*a.*)

Practice—Shares in company—Order for sale—Rules of Supreme Court, 1883, *ord.* 50, *r.* 2.

The expression "goods" in the Rules of the Supreme Court, 1883, *ord.* 50, *r.* 2, *includes shares in a limited company, and if, for "any just and sufficient reason," it is desirable to have them sold at once, they may be sold under the rule in a pending action.*

Under an agreement between the plaintiff and the defendant the plaintiff agreed to sell and the defendant to purchase certain shares in a brewery company, the defendant paying a deposit and giving a bill for a further portion of the purchase-money, and the balance to be paid at a future date, whereupon the plaintiff was to execute a transfer of the shares. On the completion of the purchase the plaintiff was to pay the defendant a sum of money by way of commission, and in reduction of the balance of the purchase-money. The certificate was in the interval to remain in the custody of a third party as trustee for the plaintiff and defendant, and the plaintiff was to receive the interest. Until payment the shares were to stand charged with the payment to the plaintiff of the unpaid purchase-money. In default of completion the plaintiff was to be at liberty to sell the shares and retain thereout the unpaid balance of purchase-money. The deposit was paid, but the bill was dishonoured at maturity, whereupon the plaintiff sued upon it in the Queen's Bench Division.

The defendant alleged in his defence that the transaction was not a sale and purchase, but that he was merely the agent of the plaintiff for the sale of the shares on commission. The defendant advertised the shares for sale by auction, and thereupon the plaintiff issued a writ in the Chancery Division claiming a declaration of lien on the shares for the balance of the purchase-money and an order for sale, and then served the defendant with notice of motion to restrain the intended sale; the defendant gave a cross notice of motion for an order directing the sale by auction and payment of the proceeds into court, on the ground that the shares had risen in value, and would, if sold, realize more than sufficient to meet any claims the plaintiff might have.

D. Villiers Meager, for the defendant.—The defendant is agent for the plaintiff to find a purchaser, and asks for an immediate sale. Shares are goods within ord. 50, r. 2. Goods include bonds: *Coddington* v. *Jacksonville Railway Co.*, 39 L. T. N. S. 12, 26 W. R. Dig. 180.

H. Terrell, for the plaintiff.—The rule does not give the court jurisdiction to order a sale in this case. If defendant was agent he has no right to deal with them. If he is purchaser the plaintiff is entitled to judgment.

KEKEWICH, J.—On the agreement of the 19th of November, 1891, the question arises whether the shares referred to were really purchased by the defendant, or whether the defendant was in reality constituted the agent of the plaintiff for the sale of the shares. The defendant says he was only the plaintiff's agent, and held the shares only for the plaintiff, but the plaintiff claims the purchase-money only. He sues for the money in the Queen's Bench Division, and in the meantime the plaintiff is entitled to protection against his property being made away with. The defendant has paid £300, and he is entitled to a lien on the shares in any event for what he has paid, and he is not bound to wait until the trial to have his lien enforced if the court has in the meantime power to do it for him. Has the court that power? Under ord. 50, r. 2, the court has power to sell, that is to direct a sale, of "any goods, wares, or merchandise which may be of a perishable nature or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once. The object of that rule is to enable the court while an action is pending to sell the goods or merchandise in dispute, and to keep the proceeds in court to abide the result of the litigation. Upon that rule I have myself constantly acted. Are shares "goods" within the rule? In *Bartholomew* v. *Freeman*, 26 W. R. 743, 3 C. P. D. 316, "goods" included a horse, and in *Reg.* v. *Slade*, 37 W. R. 141, 21 Q. B. D. 433, under the same word in 2 & 3 Vict. c. 71, s. 40, it was held a dog was included. In *Coddington* v. *Jacksonville Railway Co.* the Court of Appeal held that certain foreign bonds came within the rule and an immediate sale was ordered. I have no hesitation in holding that the word "goods" does include shares. Then can the shares now in question properly be ordered to be sold in this case? In my opinion they come within the words "which for any other just and sufficient reason it may be desirable to have sold at once." It is common knowledge that shares in a limited company, however flourishing, are of a fluctuating character, and any person holding a number of such shares would sell them as soon as they had attained a good market price. Here they have risen in value, and will, if sold, realize sufficient to answer the plaintiff's claim. The defendant has, therefore, sufficient reason for saying that the shares should be sold at once supposing an opportunity arises. The defendant says they ought to be sold under an order of the court. I am of the same opinion. I therefore make an order on both motions for the sale of the shares under the direction of the court, and the court will decide who is entitled to the proceeds.

Solicitors, *Crowders & Vizard; Evans, Richards, & Marriott*, for *J. R. Richards*, Swansea.

(*a.*) Reported by FRANCIS T. DUKA, Esq., Barrister-at-Law.

Q. B. Div.
(Mathew, Wright, and Collins, JJ.) June 19.

LONDON COUNTY COUNCIL, *Appellants.*
LAWRANCE & SONS, *Respondents.* (a.)

Building—Height—"Erected on the side of any new street"—Metropolis Local Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 85.

Section 85 *of the Metropolis Local Management Amendment Act,* 1862, *provides that no building shall be erected on the side of any new street which shall exceed the height specified in the section.*

A building was erected at the corner of two streets, one being a new street within the Act, the other not such a street. The main entrance to the building was from the old street, but there was a small tradesmen's entrance from the area at the side of the building in the new street.

Held, that the building was erected on the side of the new street within the meaning of the section.

Case stated by a metropolitan police magistrate in which the following facts appeared:—

A summons was issued on behalf of the appellants, the London County Council, charging the respondents that they had unlawfully erected a building on the south side of Kensington-court, being a new street of a less width than fifty feet, exceeding in height the distance from the external wall or front of such building to the opposite side of such street without the written consent of the appellants, contrary to section 85 of the Metropolis Management Amendment Act, 1862.

On the hearing of the summons it was proved that the street Kensington-court was a new street within the meaning of the Metropolis Local Management Amendment Act, 1862, and was of a less width than fifty feet, and that the height of the building erected by the respondents as measured from the level of the centre of the said street immediately opposite the building to the parapet or eaves of the building was 74 feet 10 inches, and that the distance from the external wall of the building to the opposite side of the street Kensington-court was 45 feet.

The appellants had not consented in writing to the erection of the building. The entrance to the building was from Kensington-road, which was not a new street within the meaning of the Act. There was a small tradesmen's entrance from the area at the side of the building in Kensington-court, but with that exception there was no entrance to the building except from Kensington-road. The front of the building was in Kensington-road, which was of the width of 55 feet, and which abutted on the gardens of Kensington Palace.

It was contended for the respondents that the building was in fact situated in Kensington-road, and was not situated in the street called Kensington-court, and that it was not a building erected on the side of the street called Kensington-court, and did not constitute an offence against section 85 of the Metropolis Local Management Amendment Act, 1862.

The magistrate found as a fact that the building fronted on and was situate in Kensington-road, and he held that, although the side of the building abutted on Kensington-court, the building was not "erected on the side of Kensington-court," within the meaning of, and so as to be subject to, the provisions of the section, and he therefore dismissed the summons. The question for the opinion of the court was whether the magistrate was right in his decision.

Section 85 of the Metropolis Local Management Amendment Act is as follows:—No building except a church or chapel shall be erected on the side of any new street of a less width than fifty feet which shall exceed in height the distance from the external wall or front of such building to the opposite side of such street without the consent in writing of the Metropolitan Board of Works; nor shall the height of any building so erected be at any time subsequently increased so as to exceed such distance without such consent; and in determining the height of such building the measurement shall be taken from the level of the centre of the street immediately opposite the building up to the parapet or eaves of such building; and every person committing any offence under this enactment shall be liable to a penalty of £5, and in case of a continuing offence to a further penalty of 40s. for every day during which such offence shall continue after notice from the said board, to be recovered by summary proceeding.

(The case was originally argued before Day and Bruce, JJ., and was ordered to be reargued before a full divisional court.)

Avory (*Finlay, Q.C.,* with him), for the appellants.—The magistrate has found that the external wall of this building abuts on Kensington-court; that is a finding that the building comes within the terms of the section, and the respondents have, therefore, rendered themselves liable to a penalty.

He relied on *Barlow* v. *Kensington Vestry,* 34 W. R. 521, 11 App. Cas, 257; *Gilbart* v. *Wandsworth Local Board,* 60 L. T. 149, 37 W. R. Dig. 120.

Dickens, Q.C. (*T. Willes Chitty* with him), for the respondents.—The words in section 85 are: "No building shall be erected on the side of any new street." We admit that it is possible for the same house to be erected on the sides of two streets, but whether it is so or not must be a question of fact for the magistrate in each case. In this case the magistrate has found as a fact that the building is not erected on the side of Kensington-court, although it abuts on that street. The court is bound by that finding of facts, and the appeal ought to be dismissed.

He referred to *Attorney-General* v. *Edwardes,* [1891] 1 Ch. 194, 39 W. R. Dig. 115; *Warren* v. *Mustard,* 61 L. J. M. C. 18, 40 W. R. Dig. 128.

MATHEW, J.—This building is a corner house fronting the Kensington-road, with an external wall in Kensington-court. The building has been erected beyond the height permitted by section 85 of the Metropolis Local Management Amendment Act, 1862, and this has been done without the consent of the London County Council. If the words of the section had been "situate in a new street" there might have been something in the respondent's contention that the building did not come within the terms of the section. But the words are "erected on the side of any new street," and it is quite clear that this building is erected on the side of a new street. The decision of the magistrate was wrong, and the case must be remitted for him to convict.

WRIGHT and COLLINS, JJ., concurred.

Appeal allowed.

Solicitor for the appellants, *W. A. Blaxland.*

Solicitors for the respondents, *Poole & Robinson.*

[THE END.]

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

THE

WEEKLY REPORTER DIGEST

OF ALL THE

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE;

WITH

APPEALS TO THE HOUSE OF LORDS AND PRIVY COUNCIL;

ALSO OF

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE AND COURT OF BANKRUPTCY IN IRELAND;

FROM THE 24TH OF OCTOBER, 1892, TO THE 12TH OF AUGUST, 1893.

VOL. XLI.

LONDON: 27, CHANCERY LANE, W.C.

1893.

A DIGEST

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THE 24TH OF OCTOBER, 1892, TO THE 12TH OF AUGUST, 1893,

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VOL. XLI. OF THE WEEKLY REPORTER, 1892-93;

AND IN

OTHER LEGAL REPORTS DURING THE SAME PERIOD,

TOGETHER ALSO WITH CERTAIN OTHER CASES REPORTED THEREIN DURING THE SAME PERIOD, BUT DECIDED PREVIOUSLY THERETO.

*** In the following Digest the letters H.L. after a case indicate the HOUSE OF LORDS; P.C., the PRIVY COUNCIL; C.A., the COURT OF APPEAL; LUN., LUNACY; CH.D., the CHANCERY DIVISION; CHI., J., Mr. Justice CHITTY; NOR., J., Mr. Justice NORTH; STI., J., Mr. Justice STIRLING; KEK., J., Mr. Justice KEKEWICH; ROM., J., Mr. Justice ROMER; WILL., J., Mr. Justice WILLIAMS; WRI., J., Mr. Justice WRIGHT; Q.B.D., the QUEEN'S BENCH DIVISION; Q.B.D., BKCY., the QUEEN'S BENCH DIVISION sitting in BANKRUPTCY; P.D. & A.D., the PROBATE, DIVORCE, AND ADMIRALTY DIVISION; C.C.R., the COURT FOR CROWN CASES RESERVED; ARCH. CT., COURT OF ARCHES; CONSIST. CT., CONSISTORY COURT OF LONDON; C.A. (Ir.), the COURT OF APPEAL IN IRELAND; M.R. (Ir.), the MASTER OF THE ROLLS IN IRELAND; V.C. (Ir.), the VICE-CHANCELLOR OF IRELAND; L.J. (Ir.), the LAND JUDGE, IRELAND; Q.B.D. (Ir.), the QUEEN'S BENCH DIVISION, IRELAND; EX.D. (Ir.), the EXCHEQUER DIVISION, IRELAND; P. & M.D. (Ir.), the PROBATE AND MATRIMONIAL DIVISION, IRELAND; C.C.R. (Ir.), the COURT FOR CROWN CASES RESERVED, IRELAND; BKCY. (Ir.), the COURT OF BANKRUPTCY, IRELAND; LAND COM. (Ir.), LAND COMMISSION, IRELAND.

*** THIS DIGEST CONTAINS THE NAMES OF ALL CASES REPORTED UP TO THE END OF AUGUST, 1893.

ACCIDENT INSURANCE.—See INSURANCE (ACCIDENT).

ADMINISTRATION:—

1. *Costs—Insolvent estate—Mortgage of realty—Valuation of security—Sale of realty—Proceeds less than valuation—Costs of sale.*—In a creditor's suit for the administration of an insolvent estate mortgagees of realty, being required to do so, valued their security. An order was subsequently made for sale of the realty, the mortgagees not objecting, and the sale was carried out, the plaintiff having carriage. The amount realized was less than the sum at which the mortgagees had valued their security.

Held, that the plaintiff was not entitled to be paid his costs of the sale out of the amount realized. —*Ross* v. *Ross*, V.C. (Ir.)—29 L. R. Ir. 318.

1a. *Lands of tenant in tail delivered in execution under writ of* elegit—*Devise—Exoneration*—1 & 2 *Vict. c.* 110, *s.* 13.—Lands to which a testator was believed to be entitled in fee simple, but of which he was in fact tenant in tail under a settlement, were in his lifetime delivered in execution, under a writ of *elegit*, to judgment creditors. The testator devised these lands to W. H. A., who survived the testator and died intestate, leaving H. W. A. his heir-at-law. H. W. A. was tenant in tail in possession of these lands under the limitations of the settlement.

Held, that the charge created by the judgment, though enforceable against the estate tail of H. W. A., was not so enforceable in exoneration of the testator's personal estate.—*In re Anthony, Anthony* v. *Anthony*, CH.D. KEK., J. 667.

2. *Marshalling assets—Pecuniary legacies—Real estate charged with debts.*—A testatrix, after directing her debts and funeral and testamentary expenses to be paid by her executors as soon as conveniently might be, and making a certain specific bequest, gave a legacy of £500 to L. M. She then made other specific bequests, and devised and bequeathed the residue of her personal estate and all her real estate to her trustees upon trust for sale and conversion, and to hold the proceeds of sale upon trust for certain beneficiaries therein mentioned, and she appointed her trustees executors of her will. The

personal estate not specifically bequeathed was insufficient to pay the legacies in full after satisfying the debts and funeral and testamentary expenses.

Held, that L. M. was entitled to have the assets marshalled so that her legacy of £500 might be considered a charge on the real estate to the extent to which the personal estate had been applied in the payment of the debts and funeral and testamentary expenses.

In re Bate, Bate v. *Bate*, 43 Ch. D. 600, 62 L. T. N. S. 559, discussed.—*In re Stokes, Parsons* v. *Miller*, CH.D. STI., J.—67 L. T. 223.

3. *Receiver—Creditor's action—Mortgagee in possession—Right to back rents—Dividends* in custodiâ legis.—Moneys in the hands of a receiver appointed by the court in a creditor's administration action are not necessarily *in custodiâ legis* in the same way as they would be in the hands of a sequestrator. The receiver, so far as the receipt of the assets is concerned, stands in the place of the executor, and the creditors cannot be in a worse position than if the assets had been received by the executor.

Delany v. *Mansfield*, 1 Hogan, 234, discussed and disapproved.—*In re Hoare, Hoare* v. *Owen*, CH.D. STI., J. 105—[1892] 3 Ch. 94; 61 L. J. Ch. 541; 67 L. T. 45.

See also COUNTY COURT, 1.

ADMIRALTY:—

1. *Practice—Costs—Taxation—Allowance to country solicitor attending hearing—Discretion.*—It is a general rule, for the guidance of the Admiralty registrar in taxing costs between party and party, that, where a solicitor in the country retained for one of the parties employs a London agent, a charge for the attendance of the country solicitor at the hearing will not be allowed; but this rule is not inflexible, and will be relaxed if it appears that the attendance of the country solicitor at the hearing was necessary for the proper prosecution of the suit. —*The Soto*, P.D. & A.D. 479—[1893] P. 73; 62 L. J. P. D. & A. 17.

2. *Practice—Costs—Collision—Amount recovered under* £300—*County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 3, *sub-section* 3; *s.* 9.—In an action of damage by collision the hearing lasted five hours, and the decision mainly turned on the inability of the defendants to exonerate their steamship from the charge of not keeping out of the way of the plaintiffs' steamer, a large vessel in tow of tugs, and which the defendants' steamer was overtaking in the River Thames. In the result the defendants' vessel was held alone to blame, and the damages were referred in the usual way to the registrar and merchants.

The plaintiffs filed their particulars of claim amounting to £339 15s. 7d., but the reference was not proceeded with, as the parties agreed the damages at £226 5s.

On motion on behalf of the plaintiffs to condemn the defendants and their bail in that amount, with interest, and in the costs of the action, the defendants contended that the plaintiffs were not entitled to their costs, as the amount recovered was under the statutory county court limit of £300, and therefore the action ought to have been brought in a county court.

Held, that the plaintiffs were entitled to their costs, for the discretion of the court in allowing or refusing costs now depends upon whether, considering the facts and the circumstances of the particular case, the plaintiffs have acted properly and reasonably in bringing their action in the High Court; and, considering the size of the vessels, the nature of the collision, the length of time the hearing lasted, and the judgment pronounced, this case was a proper one to be tried in the High Court. —*The Saltburn*, P.D. & A.D.—[1892] P. 333.

3. *Practice—Service of writ out of jurisdiction—Contract made by foreigners for salvage of foreign ship in English waters—Place of payment—Lien on ship and cargo—Ord.* 11, *r.* 1 (*e*).—A foreign ship owned by the defendants, a German company, carrying on the business of shipowners in Germany, stranded on the English coast. Her master, a German, entered into a contract in the German language with the plaintiffs, a Swedish salvage company, and also with a German salvage company, by which the two salvage companies jointly undertook to do their best to salve the ship and her cargo, and convey them to an English port "against a salvage reward or compensation of fifty per cent." of the value of the property in the salved condition. In case of disagreement the value was to be determined by arbitration, and the salvage money was to be paid within ten days after the salvage had been effected, to the German salvage company, who were to have a lien on ship and cargo until payment, but no place of payment was specified.

The ship was floated and, together with a great part of her cargo, conveyed to the named English port. The parties disagreed as to the valuation of the ship, and the amount was determined by arbitration. The plaintiffs obtained leave, *ex parte*, to serve the defendants out of the jurisdiction with notice of a writ of summons claiming fifty per cent. of the value.

Held, affirming the decision of the President of the Admiralty Division, that the order must be discharged and the writ of summons set aside, as there was no obligation to pay the salvage money within the jurisdiction, and therefore no breach within the jurisdiction within the meaning of ord. 11, r. 1 (*e*).—*The Eider*, C.A.—[1893] P. 119.

4. *Salvage—Action* in rem—*Appearance of owners of* res—*Award in excess of undertaking to put in bail—Personal liability of owners of* res.—In an action *in rem* for salvage services the writ was directed in the usual form "to the owners and parties interested" in the *res*, and indorsed with a claim for £5,000.

As the owners of the salved ship, her cargo, and freight appeared as defendants, and through their solicitor gave an undertaking to put in bail for the above amount, the plaintiffs did not arrest the vessel or interfere with the discharge of the cargo.

The value of the salved ship, her cargo, and freight was £179,200, and at the hearing the court made an award of £7,500.

The plaintiffs subsequently obtained leave to amend the indorsement on the writ by altering the sum therein to £8,500: *The Dictator*, [1892] P. 64.

The amount of the award was affirmed on appeal, and the defendants paid the costs, but denied their liability in respect of the amount awarded beyond the amount of the undertaking to put in bail, viz., £5,000.

The plaintiffs thereupon moved for leave to proceed personally for the full amount awarded.

Held, that the remedy was not limited by the amount of the undertaking to put in bail, and that the plaintiffs were entitled in the present action to sue out writs of *fieri facias* in order to enforce payment from the defendants personally of the full amount of the decree.—*The Dictator*, P.D. & A.D.—[1892] P. 304; 61 L. J. P. D. & A. 73.

5. *Wrongful arrest of ship*—Crassa negligentia—

Mala fides—*Damages.*—Proof of actual damage is not necessary to sustain an action in a court of admiralty for wrongful arrest if the seizure of the vessel was the result of *mala fides*, or *crassa negligentia* implying malice.

Semble, an action lies at common law for malicious arrest of a ship by admiralty process.—*The Walter D. Wallet*, P.D. & A.D.—[1893] P. 202.

ADULTERATION :—

Sale of Food and Drugs Acts, 1875 *and* 1879 (38 & 39 *Vict. c.* 63, *s.* 6; 42 & 43 *Vict. c.* 30, *s.* 10)—*Summons—Particulars of offence.*—A summons under section 6 of the Food and Drugs Act, 1875, following the words of the section, charged a milkman with selling to the prejudice of the purchaser a pint of milk not of the nature, substance, and quality demanded, and gave no further particulars.

Held, that the summons was defective for want of particulars, the defendant being entitled under section 10 of the Sale of Food and Drugs Act Amendment Act, 1879, to information as to the defect in the milk—*e.g.*, whether he was accused of having added water or of having abstracted cream. —*Barnes* v. *Ryder*, Q.B.D.—62 L. J. M. C. 25; 68 L. T. 447.

APOTHECARY :—

Unqualified person—"Act or practise"—"Every such offence" whether more than one—Penalty—Apothecaries Act, 1815 (55 *Geo.* 3, *c.* 194), *s.* 20.—The words "act or practise" in the 20th section of the Apothecaries Act, 1815, which provides that, if any person "shall act or practise as an apothecary" without having obtained the certificate required by a previous section, "every person so offending shall for every such offence forfeit £20," contemplate an habitual course of conduct on the part of the defendant, and not an isolated act.

Where, therefore, a defendant had given advice and had prescribed and supplied medicine to three separate persons on different occasions on the same day, without a certificate, and was sued for three separate penalties,

Held (affirming the county court judge), that only one offence had been committed in law, and that only one penalty was therefore recoverable.—*Apothecaries' Co.* v. *Jones*, Q.B.D. 267—[1893] 1 Q. B. 89; 68 L. T. 677.

APPORTIONMENT.—See TENANT FOR LIFE AND REMAINDERMAN, 2.

APPRENTICE.—See MASTER AND SERVANT, 1; POOR LAW, 1.

ARBITRATION :—

1. *Arbitrator—Unfitness—Injunction to restrain proceeding with arbitration—Jurisdiction.*—A contract by which the plaintiff undertook to construct a dock for the defendant company provided that any dispute should be referred to the company's engineer. A dispute arose whether the contract required the interior of an embankment to be made of stone, so that if the contractor, by direction of the engineer, used stone it would be an extra. A correspondence took place between the contractor and the engineer, in which the engineer stated his view to be that the contractor was bound to use stone, and that it was not an extra. The company then referred the dispute to the arbitration of the engineer. After this the engineer wrote to the contractor a letter in which he repeated his former view. The plaintiff brought this action to restrain the company from proceeding further with the arbitration.

Held, that considering the position of the engineer who must necessarily have expressed an opinion upon the point in dispute, his writing after the commencement of the arbitration a letter repeating the same opinion would not disqualify him from acting as arbitrator unless on the fair construction of the letter it appeared that he had made up his mind so as not to be open to change it on argument;

And held, by Lindley and Bowen, L.JJ. (A. L. Smith, L.J., dissenting), that the letter in question did not show that the engineer had precluded himself from keeping his mind open, and *quære* whether there was jurisdiction to grant an injunction.—*Jackson* v. *Barry Railway Co.*, C.A.—[1893] 1 Ch. 238; 68 L. T. 472.

2. *Compulsory reference—Question in dispute in part a matter of account—Reference of all issues in the cause to an official referee—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 14.—The Arbitration Act, 1889, is an amending, not a consolidating, Act, and, under section 14, the court has jurisdiction to order a compulsory reference of a whole cause to an official referee if the main, but not the only, question in dispute between the parties is a matter of account.—*Hurlbatt* v. *Barnett*, C.A. 33—[1893] 1 Q. B. 77; 62 L. J. Q. B. 1; 67 L. T. 818.

3. *Condition precedent—Fire policy—Arbiters not named—Contract depending upon the clause—Action excluded until arbitration.*—A policy of fire insurance provided, *inter alia*, that "where the company did not claim to avoid its liability under the policy on the ground of fraud or non-fulfilment of any of the conditions therein set forth, but a difference at any time arose between the company and the insured as to the amount payable in respect of any alleged loss or damage by fire, every such difference when and as the same arose should be referred to the arbitration of persons chosen by the parties"; and it was expressly "declared to be a condition of the making of the policy," where the company did not deny liability on the ground of fraud or non-fulfilment, "that the insured should not be entitled to commence any action at law . . . till the amount should have been awarded as thereinbefore provided," and that the "obtaining such an award should be a condition precedent to the commencement of any action upon the policy." The arbiters were not named in the policy.

Held, reversing the decision of the Court of Session (18 Ct. Sess. Cas., 4th series (Rettie), 1219), first, that the condition to ascertain the damage by arbitration was incorporated with and formed an integral part of the contract of indemnity, and was a condition precedent to the bringing of any action upon the policy; secondly, that the contract, being one upon which no cause of action accrued until the amount of damage had been determined by arbitration, was excepted from the rule of Scotch law that a reference to arbiters not named cannot be enforced.

Scott v. *Avery*, 5 H. L. Cas. 811, followed.—*Caledonian Insurance Co.* v. *Gilmour*, H.L. (Sc.)—[1893] A. C. 85.

4. *Costs — Taxation — Fees of arbitrators and umpire—Jurisdiction to tax—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 2, *and First Schedule, provision* (i).—Where, in an arbitration, an umpire, after making his award, had fixed the amount of the fees due to himself and the arbitrators, but had not made them a part of his award,

Held, that provision (*i*) in the Frst Schedule to the Arbitration Act, 1889, did not apply, and that the fees were subject to taxation in the High Court.—*In re Prebble and Robinson*, Q.B.D. 30—[1892] 2 Q. B. 602; 67 L. T. 267.

5. *Inspection—Reference of action for trial—Order for inspection of premises—Jurisdiction of referee—R. S. C.*, 1883, *ord.* 36, *r.* 50—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 14, 15.—A referee or arbitrator to whom an action has been referred for trial under section 14 of the Arbitration Act, 1889, has jurisdiction under ord. 36, r. 50, to make an order for inspection of premises the subject-matter of the action.

Hayward v. *Mutual Reserve Association*, 39 W. R. 624, [1891] 2 Q. B. 236, approved.

The court or a judge has also jurisdiction to make an order for inspection, but, as a general rule, the most convenient course is to apply to the referee or arbitrator in the first instance.—*Macalpine & Co.* v. *Calder & Co.*, C.A. 436—[1893] 1 Q. B. 545; 68 L. T. 426.

6. *Remitting award—Discovery of new evidence—Jurisdiction to remit—Absence of request by arbitrator to remit—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 10.—The court has power, under section 10 of the Arbitration Act, 1889, to remit an award to an arbitrator upon the ground that new evidence has been discovered since the award was made, though the arbitrator does not join in asking the court to remit the award.—*In re an Arbitration between Keighley, Maxsted, & Co.* v. *Bryan, Durant, & Co.*, C.A. 437—[1893] 1 Q. B. 405; 62 L. J. Q. B. 105; 68 L. T. 61.

7. *Revocation of submission—Possibility of bias—Jurisdiction of court.*—Where litigation took place between one of the parties to the submission to arbitration and the arbitrator, the court revoked the submission, though the litigation commenced subsequent to the date of the submission and was in respect of a totally distinct matter.—*In re Baring Brothers & Co. and Doulton & Co.*, Q.B.D.—61 L. J. Q. B. 704.

8. *Staying proceedings—Enlargement of time by consent for delivering defence—"Step in the proceedings"—Arbitration Act*, 1889, *s.* 4—*R. S. C.*, 1883, *ord.* 64, *r.* 8.—In an action by the plaintiffs against their contractor under an agreement which provided that all disputes should be referred to arbitration, the defendant had delivered no pleadings, but when the original time for putting in a defence was about to expire, he wrote to the plaintiffs asking for fourteen days further time to put in his defence, which was granted, and subsequently wrote asking for ten days further time, which was also granted. On motion by the defendant to stay proceedings under the Arbitration Act, 1889, s. 4,

Held, that obtaining by consent an enlargement of time wherein to plead was not "taking a step in the proceedings" within the Arbitration Act, s. 4, and that there must be an order to stay proceedings.—*Brighton Marine, &c., Co.* v. *Woodhouse*, CH.D. NOR., J. 488—[1893] 2 Ch. 486; 68 L. T. 669.

9. *Submission—Agreement in writing—Counsels' indorsements on briefs—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 5, 27.—At the trial of an action terms were agreed upon by both sides, *inter alia*, that the counter-claim be referred to arbitration, and counsel on both sides indorsed their briefs to that effect.

Held, that these indorsements constituted a submission to arbitration within the definition in section 27 of the Arbitration Act, 1889.—*Aitken* v. *Bachelor*, Q.B.D.—62 L. J. Q. B. 193; 68 L. T. 530.

See also BUILDING SOCIETY, 1; CONTRACT, 3; FRIENDLY SOCIETY, 1.

ARREST:—

Privilege—Witness returning from court—Commitment for non-payment of poor rates—Civil process—12 & 13 Vict. c. 14, *ss.* 2, 3.—Commitment for non-payment of poor rates where there is no distress recoverable, under 12 & 13 Vict. c. 14, ss. 2, 3, Schedule D, is merely a civil process for enforcing payment, so that a witness in a suit returning from the court in which such suit has been heard is privileged from arrest under an order for such commitment.—*Ex parte Hobern, Hobern* v. *Fowler*, Q.B.D.—62 L. J. Q. B. 49.

ASSAULT.—See JUSTICES, 3.

ASSIGNMENT of DEBT:—

Equitable assignment—Notice of prior charge—Company—Debenture—Constructive notice—Clause restricting creation of prior charge—Priority.—The plaintiffs were applied to by the E. Corporation for a loan to be secured by a mortgage of certain insurance moneys due to the E. Corporation from a fire insurance office. The E. Corporation had issued a series of first mortgage debentures, whereby they charged their undertaking and all their property whatsoever and wheresoever, both present and future. The debentures were to be a first charge on the property thereby charged, and the charge thereby created was to be a floating security, but so that the corporation were not to be at liberty to create any mortgage or charge in priority thereto. During the negotiations for the loan the plaintiffs' solicitor, being informed that the corporation had issued debentures, asked the manager of the corporation whether the debentures were secured by any trust deeds which covered the insurance moneys proposed to be mortgaged. The manager replied in the negative. The loan was advanced and the mortgage executed, and the plaintiffs gave notice thereof to the insurance office. The E. Corporation having gone into liquidation, and claims being made on the insurance moneys by the plaintiffs, and also by the defendant representing the debenture-holders, interpleader proceedings were instituted by the insurance office. At the trial the plaintiffs' solicitor said that at the time of the negotiations he had never seen or heard of debentures which prohibited the creation of any charge in priority thereto.

Held (affirming the judgment of Charles, J.), that the plaintiffs ought not to be fixed with constructive notice of the contents of the debentures, and that, therefore, the plaintiffs' claim against the insurance moneys ought to take priority over the claim of the debenture-holders.—*English and Scottish Investment Co.* v. *Brunton*, C.A. 133—[1892] 2 Q. B. 700; 62 L. J. Q. B. 136; 67 L. T. 406.

BANKER:—

1. *Customer—Stockbroker paying into credit of his own account—Money of client.*—The appellants, who held as trustees fifty shares in the Commercial Bank of Scotland, instructed a stockbroker in Edinburgh to sell the shares and to deposit the proceeds in certain colonial banks in the names of the appellants. The shares were sold by the broker in the ordinary course of business, the dealing being between him and another member of the Stock Exchange, who knew him only in the transaction and accordingly gave in payment for the shares in the ordinary way a cheque payable to the broker or order. This cheque was paid by the broker to the credit of his account with the respondent bank. At the time when the cheque was paid in, the broker's account with the respondent bank was overdrawn to an amount exceeding the amount so paid. The broker having become insolvent, the appellants claimed to be entitled to

have the amount of the cheque repaid to them by the respondent bank. After the date of the receipt of the cheque some small amounts were drawn upon his account by the broker, but the amount so drawn was much less than the sum paid in. The respondent bank were aware that the cheque was the proceeds of the sale of shares, but did not know, and had made no inquiry, whether the money paid in was in the broker's hands as agent or otherwise.

Held, affirming the decision of the Court of Session (18 Ct. Sess. Cas., 4th series (Rettie), 751), that the respondent bank was entitled to retain the money in discharge *pro tanto* of the debt due to them from the broker.—*Thomson* v. *Clydesdale Bank*, H.L. (Sc.)—[1893] A. C. 282.

2. *Deposit of securities—Negotiable instrument—Broker*—Bonâ fide *holder for value.*—S. was a customer of H., D., & Co., stockbrokers, and had left in the hands of D., one of the members of H., D., & Co., for custody, a number of bonds known as "Cedulas." On the 12th of October, 1887, D., desiring to raise money for purposes of his own, and without any authority from S., contracted to sell these bonds, and on the same day he made a further contract to repurchase similar bonds for the 28th of October. On the 28th of October D. delivered the bonds which he had contracted to sell in three separate lots, and on the same day he took delivery of the other similar bonds which he had contracted to buy. For the bonds so delivered to him he paid by a crossed cheque, and in order to put himself in funds to meet it he sent the bonds of which he had taken delivery, with other securities, to the appellant bank, on receipt of which the appellants placed £6,000 to his credit. Out of this sum the cheque was cashed. The bonds so deposited remained in the custody of the bank till D. absconded in June, 1888, when S. applied to the bank for the bonds, which, however, had been sold for a price which was admitted to have been fair. In an action against the bank by S. to recover the price of these bonds,

Held (reversing the decision of the Court of Appeal, 39 W. R. 449, [1891] 1 Ch. 270), that, the Cedula bonds being negotiable instruments, the bank, taking them in good faith and for value, acquired a good title.

Lord Sheffield v. *London Joint-Stock Bank*, 37 W. R. 33, 13 App. Cas. 333, distinguished.—*London Joint-Stock Bank* v. *Simmons*, H.L. (E.) 108—[1892] A. C. 201; 61 L. J. Ch. 723; 66 L. T. 625.

3. *Deposit of securities — Customer's securities — Authority of broker to pledge*—Contango—*Duty of inquiry*—Bonâ fide *holder for value—Estoppel.*—B., the plaintiff in this action, employed H., D., & Co. as brokers to purchase and sell shares for him on the Stock Exchange. The shares were bought for resale, not as investment. As a rule, H., D., & Co. found the money for the purchases and retained the shares purchased, together with other shares deposited by B. as cover, as security for the money so advanced. H., D., & Co. deposited the shares so held by them with the defendant bank to secure a current loan account. In June, 1888, H., D., & Co. stopped payment. There were then in the hands of the bank, among other securities deposited by H., D., & Co. to secure their current loan account, certain securities belonging to B., and held by H., D., & Co. as security in manner aforesaid. B. brought this action claiming to redeem these securities upon paying what was due from him to H., D., & Co. (about £13,000). The bank claimed to hold them as security for the sum due to them from H., D., & Co. (about £42,000), which was more than their value. The securities were of three classes: (1) foreign bonds payable to bearer; (2) stocks and shares requiring a registered transfer, which had been transferred to officers of the bank by instruments executed by B.; (3) similar stocks and shares so transferred by instruments executed by other persons.

Held, as to all three classes of securities, that the burden of proof that H., D., & Co. had exceeded their authority by pledging the securities to the bank for their full amount was on the plaintiff, and he had not proved it. If they had exceeded their authority, then as to (1) it was admitted that the case was covered by *The London Joint-Stock Bank* v. *Simmons*, 41 W. R. 106, [1892] A. C. 201, decided pending this action; as to (2) and (3) Held that there was nothing to put the bank on inquiry whether H., D., & Co. had authority to deal with the securities or not; and as to (2) that B. was estopped from saying that H., D., & Co. had no authority to pledge these securities.

Semble, the fact that by the general practice of the Stock Exchange most loans on the security of stock are effected by way of *contango* justified the bank in assuming that H., D., & Co. had absolute power to deal with the securities deposited.—*Bentinck* v. *London Joint-Stock Bank*, CH.D. NOR., J.—[1893] 2 Ch. 120; 62 L. J. Ch. 358; 68 L. T. 315.

4. *Deposit of securities — Pledge — Fraudulent pledge of share certificates—Transfers executed in blank—Estoppel.*—The plaintiffs, who were registered owners of certain shares in the Pennsylvania Railroad Co. transferable in the books of the company, entrusted the share certificates, with indorsed transfers executed by them, with blanks for the names of the transferees, to D., a stockbroker, as "margin" to cover a loan with which D. was to purchase shares in certain other companies for the plaintiffs. D. deposited the certificates, together with certain other securities, with the defendants as security for a loan. D. did not purchase any shares for the plaintiffs, but sent contract notes purporting to have done so. The plaintiffs did not learn of D.'s fraud until the 24th of December, 1890, when D. absconded. On the 24th of January, 1891, the plaintiffs gave notice to the defendants that they were the owners of the shares. In May, 1891, the defendants, having filled up the transfers, were duly registered in the books of the company. The defendants claimed to hold the shares as security for the amount advanced by them to D.

Held, that the plaintiffs, having delivered to D. share certificates with indorsed transfers signed by them, though in blank, were estopped from asserting their ownership against the defendants, who had taken them *bonâ fide* for value, without notice express or implied of the plaintiffs' title.—*Waterhouse* v. *Bank of Ireland*, V.C. (Ir.)—29 L. R. Ir. 384.

5. *Deposit of securities—Negotiable instrument—Shares in company—Certificates—Pledge by stockbroker—Notice—Estoppel.*—The plaintiff, who was the registered owner of shares in the St. Louis Breweries Co., which he had deposited with the Provincial Bank as security for an overdraft, instructed D., a stockbroker, to purchase for him certain shares in the Bristol Brewery Co., for which D. was to provide the purchase-money, and advance to the plaintiff sufficient to pay off the overdraft and release the St. Louis shares, which the plaintiff agreed to transfer to D. as security, together with the Bristol shares, when purchased, for the amount so advanced. The Bristol shares were not purchased by D. D. then obtained a loan

from the defendants on the security of the St. Louis shares, and transferred them to the defendants. At the time of the transfer the share certificates were not produced, and the defendants accepted a certificate of D. that the certificates were with the company. The company declined when the transfers were forwarded to register them, not having the certificates, and the defendants having called on D. for an explanation, he stated that he had been misinformed by his client that the certificates were with the company. Subsequently D. obtained an order from the plaintiff directing another stockbroker, who held the certificates, to deliver them to him, and D. forwarded them to the company, who registered the transfers to the defendants. D. paid the defendants the amount of their loan, and having sold the shares tendered to the defendants transfers from the defendants to the purchasers, which were duly executed and registered in the books of the company. In an action to have the defendants declared trustees for the plaintiff of the shares,

Held, that the defendants, having had the transfers perfected to them without any notice of fraud or illegal dealing on the part of D., were purchasers for value without notice of any defect in their title. —*Collis* v. *Hibernian Bank*, C.A. (Ir.)—31 L. R. Ir. 261.

See also EVIDENCE.

BANKRUPTCY:—

ACT OF BANKRUPTCY—

1. *Assignment of whole of property—Assignment to trustees for creditors generally—Exception of leaseholds —Declaration of trust of leaseholds—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (a).—Section 4, sub-section 1 (*a*), of the Bankruptcy Act, 1883, provides that a debtor commits an act of bankruptcy "if, in England or elsewhere, he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally."

A debtor executed a deed by which he conveyed and assigned all his property, with the exception of his leasehold property, to trustees for the benefit of his creditors generally. The deed contained a declaration that the debtor should stand possessed of all leaseholds and leasehold interests in trust for and to convey and assure the same as the trustees should from time to time direct. The value of the leaseholds was about one-quarter of the value of the whole property of the debtor.

Held, by Lindley and Lopes, L.JJ. (Lord Esher, M.R., dissenting) (affirming the decision of the Divisional Court), that the execution of the deed was an act of bankruptcy within section 4, sub-section 1 (*a*), of the Bankruptcy Act, 1883.

Ex parte Foley, In re Spackman, 38 W. R. 368, 24 Q. B. D. 728, distinguished.—*Ex parte Hughes, In re Hughes*, C.A. 466—[1893] 1 Q. B. 595; 62 L. J. Q. B. 358; 68 L. T. 629.

2. *Bankruptcy notice—"Final judgment"—Decree for dissolution of marriage—Order for payment of costs—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (e) (g).—A decree *nisi* in a suit for dissolution of marriage on the ground of adultery contained an order that the co-respondent should pay the petitioner's costs. The decree was made absolute and the costs taxed, and an order was made that the co-respondent should pay the amount within a specified time. He did not comply with the order, upon which the petitioner issued a bankruptcy notice against him, with which he again did not comply. A bankruptcy petition was then presented against him.

Held (affirming an order dismissing the petition), that the order of the Divorce Court for payment of the costs was not a "final judgment" within sub-section 1 (*g*) of section 4 of the Bankruptcy Act, 1883, and that a bankruptcy notice could not, therefore, be issued in respect of it against the co-respondent; and that there was, therefore, no act of bankruptcy.—*In re Binstead, Ex parte Dale*, C.A. 452—[1893] 1 Q. B. 199; 62 L. J. Q. B. 207; 68 L. T. 31.

3. *Bankruptcy notice — Judgment debt — Married woman—Separate estate—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-sections* 1 (g), 2—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-section* 5.—A bankruptcy notice cannot be issued against a married woman under section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883. —*Ex parte Lester & Co., In re Lynes*, C.A. 488—[1893] 2 Q. B. 113; 62 L. J. Q. B. 372; 68 L. T. 739.

4. *Notice of suspension of payment—Letter marked "without prejudice" — Admissibility — Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (h). —A bankruptcy petition presented against the debtor alleged as the act of bankruptcy that specified in section 4, sub-section 1 (*h*), of the Bankruptcy Act, 1883—namely, that the debtor had given notice to the creditor that he had suspended, or was about to suspend, payment of his debts. The notice was given by a letter written by the debtor to the creditor, such letter being marked "Private and Confidential. Without prejudice"; and, on the hearing of the petition, the question was raised whether the letter could be looked at by the court for the purpose of determining whether an act of bankruptcy had been committed.

Held, that the letter was admissible in evidence, and, the act of bankruptcy being thereby proved, a receiving order must be made against the debtor.—*In re Daintrey, Ex parte Holt*, Q.B.D., BKCY. 590—[1893] 2 Q. B. 116.

ASSETS—

5. *Assignment of debts—Claim by trustee—Interpleader issue — Application by trustee to set aside assignment—Estoppel.*—An assignee of book debts having sued one of the debtors for a debt of £27, the trustee in bankruptcy of the assignor claimed the money, and on the trial of an issue as to the ownership of the debt disputed the assignment on the ground that the assignee had at the time of the assignment notice of an act of bankruptcy committed by the assignor. The trustee, being unsuccessful, afterwards applied to set aside the assignment upon other grounds.

Held (dismissing the application), that, as the trustee might have raised these other grounds at the trial of the issue, and did not do so, he could not set them up upon the present application.—*In re Hilton, Ex parte March*, Q.B.D., BKCY.—67 L. T. 594.

6. *Commission for effecting sale.*—By section 44 of the Bankruptcy Act, 1883, property divisible amongst creditors includes (i.) "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve upon him before his discharge."

An agent employed to find a purchaser for certain property became bankrupt, but succeeded in effecting the sale of the property before obtaining his discharge. The final contract of sale was not completed nor the purchase-money paid until after the date of discharge.

Held, that, as all the service rendered by the

agent was rendered before his discharge, and nothing was done by him subsequent thereto which was essential to the completion of the contract, the trustee in bankruptcy was entitled to the commission money, and not the agent himself.—*In re Byrne, Ex parte Henry*, Q.B.D., BKCY.—67 L. T. 230.

7. *Partnership—Joint and separate estates—Rules as to consolidation—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 40.—By the Bankruptcy Act, 1883, s. 40, "In the case of partners the joint estate shall be applicable in the first instance in payment of their joint debts, and the separate estate of each partner shall be applicable in the first instance in payment of his separate debts. If there is a surplus of the separate estates it shall be dealt with as part of the joint estate; if there is a surplus of the joint estate it shall be dealt with as part of the respective separate estates in proportion to the right and interest of each partner in the joint estate."

On the bankruptcy of partners who had previously carried on business separately the joint liabilities were £1,200, and the assets £900. One of the partners having become entitled under a will to a sum of £988, the county court judge ordered the joint and separate estates of the partners to be consolidated, upon the authority of a suggested exception laid down in "Lindley on Partnership" to the above section, that where the two estates are so inextricably blended together as to make it impossible to separate them, the court will consider the two estates as one fund.

Held (assuming the exception still to exist), no order to consolidate ought to be made, as the principal asset, *i.e.*, the money coming under the will, was separate and distinct, and was more than one-half of the total assets.—*In re Kriegel, Waring, & Co., Ex parte Trotman*, Q.B.D., BKCY.—68 L. T. 588.

8. *Relation of trustee's title—Solicitor—Costs—Payment by debtor to solicitor for future services in preparing balance-sheet and calling meeting of creditors—Execution of deed of assignment by debtor—Services rendered after act of bankruptcy—Right of trustee in bankruptcy to repayment—Set-off—Mutual credit.*—The debtor, who was then indebted to his solicitor in the sum of £40, consulted his solicitor as to his position, with the result that it was resolved that a balance-sheet should be prepared and a meeting of creditors called. The solicitor declined to act for the debtor on credit, and a sum of £15 was accordingly paid by the debtor to the solicitor to secure his services in the matter. After services to the amount of about £3 had been rendered the debtor committed an act of bankruptcy by executing a deed of assignment for the benefit of his creditors, and, on the application of the official receiver as trustee in the bankruptcy, the county court judge refused to allow the solicitor to retain the balance of £12 in respect of services rendered after such act of bankruptcy, and directed him to hand it over to the trustee.

Held (affirming the decision of the Divisional Court, 41 W. R. 89), that, the title of the trustee under the bankruptcy relating back to the act of bankruptcy, whereby the solicitor's authority to act for the debtor, and consequently the specific purpose for which the £15 was paid, was determined, the balance of that sum appropriated to costs incurred after the act of bankruptcy was repayable to the trustee; that there was no such necessity for the employment of the solicitor after the act of bankruptcy as brought the case within the principle of *In re Sinclair, Ex parte Payne*, 15 Q. B. D. 616, 34 W. R. Dig. 19, which must not be extended; and, further, that the solicitor was not entitled to set off the balance in respect of the outstanding debt of £40.—*In re Pollitt, Ex parte Minor*, C.A. 276—[1893] 1 Q. B. 455; 62 L. J. Q. B. 236; 68 L. T. 366.

EXAMINATION—

9. *Witness—Examination before special examiner—Refusal to answer questions—Action pending against witness—Duties of official receiver.*—A witness under examination refused to answer certain questions put to him by the official receiver upon the ground that his answers might be used against him, and so might prejudice his defence to an action brought against him and the bankrupts by the petitioning creditor. The questions were relevant to the issues in the action, and the solicitor who was employed by the official receiver was the solicitor appearing for the plaintiff in the action.

Held, that the examination would be allowed to proceed only on the petitioning creditor undertaking to enter a stay of proceedings in the action. —*In re Desportes, Ex parte Official Receiver*, Q.B.D., BKCY.—68 L. T. 233.

EXECUTION—

10. *Costs of execution—Interpleader order—Receiving order—Possession money—Notice of receiving order—Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11.—After seizure by the sheriff under a writ of *fi. fa.* the goods of the debtor were claimed under a bill of sale, and an interpleader order was made, but, a receiving order having been made against the debtor, notice was given to the sheriff requiring him to hand over the goods to the official receiver. The sheriff declined to hand over the goods pending the interpleader order, and in the bill of costs subsequently brought in by him under section 11 of the Bankruptcy Act, 1890, he claimed possession money down to the date when such order was discharged.

Held, that the sheriff was not entitled to claim under section 11 any costs of execution subsequent to the time when he received the notice mentioned in the section, and that the taxing officer was right in disallowing all possession money after that date. —*In re Harrison, Ex parte Sheriff of Essex*, Q.B.D., BKCY. 512—62 L. J. Q. B. 266; 68 L. T. 590.

11. *Costs of execution—Possession retained without selling, at request of execution creditor and the debtor — Receiving order — Possession money — —Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11, *sub-section* (1).—After seizure under a writ of *fi. fa.* the sheriff remained in possession of the debtor's goods without selling, at the request of the execution creditor and of the debtor. A receiving order was subsequently made against the debtor, and the sheriff handed over the goods to the official receiver, and brought in his bill of costs under section 11 of the Bankruptcy Act, 1890, in which he claimed possession money for the time he remained in possession. This claim was allowed on taxation by the county court registrar, but on a review at the instance of the Board of Trade the High Court taxing master allowed eight days' possession money only.

Held, that the possession money claimed by the sheriff was part of the costs of the execution within the meaning of section 11 of the Bankruptcy Act, 1890, and as such ought to be allowed.—*In re Hurley*, Q.B.D., BKCY. 653.

FRAUDULENT PREFERENCE—

12. *Retransfer of bill of lading to vendor—Bankruptcy of purchaser — Stoppage* in transitu.—The decision of the Divisional Court (66 L. T. N. S.

619) reversed, and the appeal allowed upon the ground that, upon the true view of the correspondence and facts, there had not been a concluded agreement between the vendors and the bankrupt to return the bill of lading, and that consequently there had not been a fraudulent preference.—*In re O'Sullivan, Ex parte Ferd, Baller, & Co.*, C.A.—67 L. T. 464.

OFFICIAL RECEIVER—

13. *Arrears owed by debtor for gas—Discontinuance of supply by company—Refusal to continue supply at request of official receiver unless arrears paid—"Owner" or "occupier" of premises—Gas Acts*, 1860 *and* 1871—*Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *ss.* 9, 70.—At the date of the receiving order the debtor was in arrear in respect of gas supplied to his premises during the previous quarter, and the company in consequence cut off the supply, and declined to reconnect it at the request of the official receiver until the arrears were paid. The official receiver paid the amount claimed under protest. On application by the trustee in the bankruptcy for repayment,

Held, that the official receiver could not be said to be owner or occupier of the premises within section 11 of the Gas Act, 1871, and was, therefore, not entitled to call on the company to supply him with gas, and that the application of the trustee must fail.—*In re Smith, Ex parte Mason*, Q.B.D., BKCY. 159—[1893] 1 Q. B. 323; 67 L. T. 596.

ORDER AND DISPOSITION—

14. "*Trade or business*"—*Lodging-house keeper not providing board—Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 44.—A person who takes lodgers, but does not provide them with board, carries on a "trade or business" within the meaning of section 44 of the Bankruptcy Act, 1883.—*In re Harrison, Ex parte Official Receiver*, Q.B.D., BKCY.—67 L. T. 600.

PETITION—

15. *Judgment creditor—Cost book mining company—Action by secretary for and on behalf of shareholders—Stannaries Act*, 1869 (32 *&* 33 *Vict. c.* 19), *ss.* 2, 13.—Section 13 of the Stannaries Act, 1869, which empowers cost book mining companies to sue, in the name of their purser or secretary, shareholders for the amount of unpaid calls, does not empower the company to institute bankruptcy proceedings, in the name of the secretary, in respect of a judgment recovered in such an action.—*Ex parte Ashmead, In re Nance*, C.A. 370—[1893] 1 Q. B. 590; 68 L. T. 733.

16. *Service—Petition not served—Hearing—Non-attendance of petitioner—Dismissal of petition—Bankruptcy Rules*, 1886, *rr.* 157, 158, 163.—A petition may be dismissed through non-attendance of the petitioning creditor or his representative, even though such petition has not been served.—*In re Stockley, Ex parte Discount Banking Co.*, Q.B D., BKCY.—68 L. T. 589.

PROOF—

17. *Loan to trader—Interest varying with profits—Allowance to be made on inability to pay agreed interest by reason of deficiency of profits—Agreement void for uncertainty—Partnership Act*, 1890 (53 *&* 54 *Vict. c.* 39), *ss.* 2 (3) (d), 3—28 *&* 29 *Vict. c.* 86 (*Bovill's Act*), *ss.* 1, 5.—By an agreement between A. and B., which recited that a statement of account signed by A., showing the credits and liabilities of his business, was the basis of the proposal thereinafter made, and that B. had agreed to advance A. the sum of £4,500, it was provided that, in consideration of the said sum paid to A. by B., A. would punctually pay interest on the same by two regular half-yearly payments of £462 10s. for every half-year; and that, in case A. should be unable to pay any portion of the half-yearly payments upon any part of the said sum of £4,500 by reason of the deficiency of the profits of A., then and upon every such occasion a due allowance should be made by B. to A. in respect of the same in a fair and reasonable manner.

In pursuance of this agreement the sum of £4,500 was advanced by B. to A. Subsequently A. was adjudicated a bankrupt, and B. tendered a proof for the amount of his loan, which was rejected on the ground that it was an advance to a person in business on a contract that the lender should receive a rate of interest varying with the profits, and that, by 28 & 29 Vict. c. 86 (Bovill's Act), s. 5, B. was postponed to the other creditors.

Held, that there was nothing in the agreement to show how the allowance in respect of interest was to be calculated; that, as the agreement showed that some allowance was contemplated, and the intention was expressed in such vague terms that no allowance could have been enforced, the whole agreement was void for uncertainty; consequently, the loan was outside Bovill's Act altogether, and B. was entitled to prove for the amount with the other creditors.

Decision of the Queen's Bench Division (40 W. R. 428) reversed.—*In re Vince, Ex parte Baxter*, C.A. 138—[1892] 2 Q. B. 478; 61 L. J. Q. B. 836; 67 L. T. 70.

18. *Mistake—No debt—Application to withdraw proof.*—Decision of Vaughan Williams, J. (40 W. R. 608), affirmed, on the ground that the debt, in respect of which the proof in the bankruptcy was tendered, did not exist, and that, therefore, the proof might be withdrawn.—*Ex parte Clarke, In re Burr*, C.A. 116—67 L. T. 349.

19. *Surety—Liability of co-surety to contribute—Debt provable—Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 37.—Under section 37 of the Bankruptcy Act, 1883, the liability of a bankrupt co-surety to contribution, though unascertained at the time of the bankruptcy proceedings, is a debt provable in the bankruptcy.—*Wolmershausen* v. *Gullick*, CH.D. WRL., J.—[1893] 2 Ch. 514; 68 L. T. 753.

RECEIVING ORDER—

20. *Judgment debt—Power of court to go behind judgment—Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (g); *s.* 7—*Partnership—"Holding out" as partner—Liability of retiring partner for debts of firm contracted after dissolution of partnership.*—Upon the hearing of a creditor's petition for a receiving order against a judgment debtor, the Court of Bankruptcy has power, at the instance of the debtor himself, to go behind the judgment and to inquire into the validity of the debt, even though the debtor has previously applied in the action to set aside the judgment, and his application has been refused, and the refusal affirmed by the Court of Appeal.

A partnership having been dissolved by mutual consent and proper notices of the dissolution given, the mere fact that the retiring partner allows the continuing partner to carry on business in the old firm name is not such a "holding out" of the former as a partner as will render him liable for a debt of the firm contracted after the dissolution with a person who had not dealt with the old firm, and who had no knowledge of the dissolution.—*In re Fraser, Ex parte Central Bank of London*, C.A.—[1892] 2 Q. B. 633; 67 L. T. 401.

21. *Rescission—Consent of petitioning creditor.*—

A receiving order having been made against a debtor, he paid the petitioning creditor's debt and applied to the registrar to rescind the receiving order. The only fact proved before the registrar was that the petitioning creditor consented to the rescission. The registrar rescinded the receiving order.

Held, that the registrar had not sufficient evidence before him on which he could rescind the receiving order.—*Ex parte Official Receiver, In re Flatau*, C.A. 529—[1893] 2 Q. B. 219; 68 L. T. 740.

SECURED CREDITOR—

22. *Receiver—Judgment creditors—Appointment of receiver of equitable interest—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 9, 45, 168.—In July, 1891, judgment was obtained by the appellants in an action for £316, under which execution was issued against the debtor's goods with no effect. In January, 1892, the debtor became entitled, under the will of his mother, to a share in her residuary real and personal estate. In March, 1892, the appellants obtained on an *ex parte* application an order appointing a receiver in respect of such share. In May, 1892, the debtor was adjudged bankrupt. The appellants moved for a declaration that they were secured creditors in respect of the share to which the debtor was entitled in the residuary estate under his mother's will by virtue of the order appointing the receiver.

Held (affirming the decision of Vaughan Williams, J., 41 W. R. 255), that the order did not constitute them secured creditors.

Per Lindley and Bowen, L.JJ.—An order appointing a receiver ought not to be made on an *ex parte* application to the judge in chambers.—*In re Potts, Ex parte Taylor & Sons*, C.A. 337—[1893] 1 Q. B. 648; 62 L. J. Q. B. 392.

23. *Valuation of security—Proof—Valuation in bulk—Dividends on securities.*—The bankrupt, prior to his bankruptcy, by five similar agreements borrowed sums of money from G., depositing on each occasion certain shares as collateral security. The agreements provided that the securities should extend to any sums of money in which the bankrupt might be indebted to G. while the shares remained in his hands, and G. was authorized to use and employ all such securities at his own risk. At the date of the bankruptcy the amount due by the bankrupt to G. was £26,900. Some of the securities deposited were then comparatively worthless, some were valuable, but G. valued the whole in bulk at £19,000. Since the bankruptcy G. had received as dividends on the shares held by him £1,775, but did not give credit for this sum in his proof, claiming to set it off *pro tanto* against the interest due to him on the amount represented by the securities.

Held, that, under the circumstances, G. was entitled to retain the dividends so received, and that under the agreements he was not compellable to valuable separately the securities held by him.—*In re Du Bedat*, BKCY. (Ir.)—29 L. R. Ir. 324.

See also BANKRUPTCY, 24.

STAYING PROCEEDINGS—

24. *Writ of sequestration—Power of court to restrain—Petition—Secured creditor—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 9, 10, 45.—By section 10 of the Bankruptcy Act, 1883, the court may at any time after the presentation of the bankruptcy petition stay any action, execution, or other legal process against the property or person of the debtor.

By section 9, on the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and . . . no creditor to whom the debtor is indebted . . . shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action, &c. . . . but this section shall not affect the power of any secured creditor to realize or otherwise deal with his security.

The debtor, who was trustee of A. B.'s estate, was ordered to pay into court in a chancery action a certain sum of money, being part of such estate. On his failing to comply with the order, a writ of sequestration was issued under which his property was taken possession of. A receiving order was subsequently made against the debtor, and on the application of the official receiver and the petitioning creditors all further proceedings under the writ of sequestration were restrained. On appeal,

Held, that the decision was correct, and that the plaintiff in the chancery action being a creditor and not a secured creditor, was properly restrained under section 10 from enforcing the writ of sequestration.

Semble, the order in chancery, even when followed by the writ of sequestration, did not make the plaintiff a secured creditor within the meaning of section 45.—*In re Hastings, Ex parte Hammond-Brown*, Q.B.D., BKCY.—61 L. J. Q. B. 654; 67 L. T. 234.

VOLUNTARY SETTLEMENT—

25. *Gift of diamonds by husband to wife within two years of the bankruptcy—Claim of trustee—"Settlement"—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.—A gift of diamonds by a husband to his wife is a "settlement" on the wife within the meaning of section 47 of the Bankruptcy Act, 1883, and, in the event of the husband becoming bankrupt within two years afterwards, such settlement will be void as against his trustee.—*In re Vansittart, Ex parte Brown*, Q.B.D., BKCY. 32—[1893] 1 Q. B. 181; 62 L. J. Q. B. 277; 67 L. T. 592.

26. *Purchaser—Pledge of settled property by donee to third parties before settlement declared void—Title of trustee in bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.—The operation of section 47 of the Bankruptcy Act, 1883, is confined to the person who claims under the voluntary settlement as donee, and does not extend to a purchaser for valuable consideration in good faith from such donee, at any rate where such purchaser had no notice of the settlement.—*In re Vansittart, Ex parte Brown* (No. 2), Q.B.D., BKCY. 286—[1893] 1 Q. B. 181; 62 L. J. Q. B. 279; 68 L. T. 233.

27. *"Void"—Mortgage of settled property by donee before settlement declared void*—Bonâ fide *purchaser for valuable consideration—Title of trustee in bankruptcy—Construction of statute—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.—The true meaning of the word "void" in section 47 of the Bankruptcy Act, 1883, is "voidable." The title of a purchaser for valuable consideration in good faith from the donee under a voluntary settlement prior to the avoidance of such settlement cannot afterwards, therefore, be defeated by the trustee in bankruptcy of the settlor.—*In re Brall, Ex parte Norton*, Q.B.D., BKCY. 623.

See also DEBTORS ACT, 2; FRIENDLY SOCIETY, 2; LANDLORD AND TENANT, 11; PARTNERSHIP, 1; PRACTICE, 25; VENDOR AND PURCHASER, 13.

BANKRUPTCY (IRELAND):—

1. *Composition—Instalments—Surety—Election of remedy—Claim to prove in administration action for original debt.*—A debtor carried in an arrangement for a composition payable in three instalments, the

last secured by the promissory note of the debtor and a surety. The last instalment not having been paid, a creditor sued the surety on the promissory note, and recovered judgment, but was unable to realize anything under it. The debtor having died, in an action to administer his estate, the creditor sought to prove for the amount of his original debt, after giving credit for the amount of the two first instalments.

Held, that the creditor had elected to enforce the composition, and that he could only prove for the amount of the unpaid promissory note.—*Manton* v. *Magrath*, M.R. (Ir.)—31 L. R. Ir. 106.

2. *Debtor's summons—Judgment debt assigned in trust—Bankruptcy (Ireland) Act*, 1872 (35 & 36 *Vict.* c. 58), *s.* 21, *sub-section* 6; *s.* 30.—The assignee of a judgment debt for sufficient amount, though a trustee of the moneys due thereon for other persons, is entitled to obtain in his own name a debtor's summons. — *In re O'Brien, Ex parte Morris*, BKCY. (Ir.)—31 L. R. Ir. 111.

3. *Promise to pay debt discharged by certificate—Corrupt agreement by creditor as to composition*—20 & 21 *Vict.* c. 60, *s.* 147—35 & 36 *Vict.* c. 58, *ss.* 64, 76. —The court, upon the evidence, affirmed the order of the Vice-Chancellor (27 L. R. Ir. 431) that the defendant was entitled to hold the proceeds of a policy of insurance as security for the balance due on a trading account.—*Mahalm* v. *M'Cullagh*, C.A. (Ir.)—29 L. R. Ir. 496.

4. *Settlement—Trader—After-acquired property—Bankruptcy (Ireland) Amendment Act*, 1872, *s.* 52.—In 1883 a trader, by a marriage settlement, assigned to trustees his leasehold premises in which he carried on business, and all property then belonging to him, or thereafter until the raising of the sum of £600, upon trust for the husband, or until he should be adjudicated bankrupt, and upon his death or bankruptcy, upon trusts over. It was thereby declared that all the future property of the husband thereby expressed to be assigned should be subject to the trusts of the settlement, although the same or any part thereof might not be capable of passing at law by the assignment. The husband was allowed by the trustees to remain in undisturbed possession of the property he had at the date of the settlement and all subsequently acquired property until he was adjudicated a bankrupt.

Held, that the settlement, in so far as it purported to charge after-acquired property not actually paid or transferred at the date of the adjudication, was void as against his assignees in bankruptcy under section 52 of the Bankruptcy (Ireland) Act, 1872.—*In re M'Crohan*, BKCY. (Ir.)—31 L. R. Ir. 225.

BETTING.—See GAMING, 1, 2.

BILL of EXCHANGE:—

1. *Foreign bill—Protest for non-payment—Protest for better security—Acceptance* suprà *protest for honour of drawer—Commission—Measure of damages—Bills of Exchange Act*, 1882 (45 & 46 *Vict.* c. 61), *ss.* 51 (2) (5), 57 (1), 65-68, 97 (2).—The drawer who has been compelled to pay a bill may recover from the acceptor the expenses of a necessary protest under the Bills of Exchange Act, 1882.

Secus, with the expenses of an unnecessary protest.

The B. Bank claimed to prove against the E. Bank, in liquidation, for the expenses of protest for non-payment of bills drawn by B. in Brazil and accepted by E. in England, and also for the expenses of protest for better security in the case of bills that had been so protested, and for the amount of a commission paid by the B. Bank to their bankers in London for the acceptance of the bills for honour, and for providing the money required to meet that acceptance.

Held, that the B. Bank might prove for the expenses of protest for non-payment, but not for the expenses of protest for better security or the amount of the commission.

Ex parte Robarts, In re Gillespie, 34 W. R. 258, 35 W. R. 128, 16 Q. B. D. 702, 18 Q. B. D. 286, and *Prehn* v. *Royal Bank of Liverpool*, 18 W. R. 463, L. R. 5 Ex. 92, explained and distinguished.—*In re English Bank of the River Plate, Ex parte Banco de Brazil*, CH.D. CHI., J. 521—[1893] 2 Ch. 438; 62 L. J. Ch. 578.

2. *Injunction to restrain negotiation—Bearer—Holder—Delivery without indorsement—Subsequent indorsement—Solicitor—Contempt of court—Bills of Exchange Act*, 1882 (45 & 46 *Vict.* c. 61), *ss.* 2, 31, *sub-sections* 1, 3, 4.—L. was, in July, 1892, restrained by injunction from "negotiating, pledging, or disposing of" certain bills of exchange, which were payable to order. He had, previously to that date, deposited with his solicitor, Y., the bills in question to secure a debt, and in October, 1892, while the injunction was still in force, he, at the request of Y., indorsed one of the bills. On a motion to commit L. and Y. for contempt of court, on the ground that the bill had been negotiated contrary to the injunction,

Held, that, by the indorsement in October, 1892, Y., who up to that time had been merely the transferee of the bill, became the "holder" of it within the meaning of the Bills of Exchange Act, and the bill was for the first time "negotiated" within the meaning of section 31, sub-section 1, and that there had been a contempt of court.—*Day* v. *Longhurst*, CH.D. STI., J. 283—62 L. J. Ch. 334; 68 L. T. 17.

3. *Promissory note—Note payable to order—Transfer by delivery only—Liability of maker to transferee—Bills of Exchange Act*, 1882 (45 & 46 *Vict.* c. 61), *s.* 31, *sub-section* 4.—A promissory note made payable to the payee or order was transferred by delivery without indorsement to the plaintiff as security for the repayment of an advance. The transferor did not intend to part with the whole of his rights in the note, nor to indorse it.

Held, that the plaintiff could not recover upon the note against the maker, section 31, sub-section 4, of the Bills of Exchange Act, 1882, not giving him any such right of action.—*Good* v. *Walker*, Q.B.D.—61 L. J. Q. B. 736.

4. *Renewal—Guarantee—Variation—Discharge of surety.*—This was a claim in an administration action. The following letter was sent to the claimant's firm by the testator, dated the 24th of December, 1866:—"In reply to your letter of the 22nd inst., I hereby guarantee the payment by F. of two bills you intend to renew for him, one for £1,048 10s. 5d., and the other for £462 6s. 6d., due respectively the 28th inst. and the 4th prox." Two bills were drawn by the claimant's firm on F. for three months, both dated the 22nd of December, 1866, one for £1,025 6s. 11d., and the other for £485 10s. These bills were not met.

North, J., held that a "renewed" bill meant a bill between the same parties for the same amount for the same period as and commencing from the date of expiration of the original bill; and that in this case there was such a variation of the liability guaranteed that the guarantor's estate was released.

Held, by the Court of Appeal, that the word "renew" was not used in its technical sense by the

testator, but that he meant to guarantee the payment of the amount of the old bills, and that nothing had happened to discharge him from his guarantee.

Decision of North, J. (40 W. R. 618), reversed.—*Barber* v. *Mackrell*, C.A. 341—68 L. T. 29.

5. *Validity—Bill payable to "—— order"—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *ss.* 3, 5, 7, 55.—An instrument was made payable to "—— order," and the blank was never filled in.

Held, that it was payable to "my order," that is the order of the drawer, and that it was a valid bill of exchange.—*Chamberlain* v. *Young*, C.A.—[1893] 2 Q. B. 206.

See also POWER OF ATTORNEY, 2.

BILL of SALE:—

1. *Building agreement—Assignment of building agreement, with plant and materials, as security for loan—Whether such assignment is, as regards plant and materials, a bill of sale—Bills of Sale Acts*, 1878 (41 & 42 *Vict. c.* 31), *s.* 4, *and* 1882 (45 & 46 *Vict. c.* 43), *s.* 8.—A document assigning to a stranger, as security for a loan, a building agreement made between the assignor (a builder) and a landowner, together with all plant and materials then on the premises, or which might be brought on the premises, but giving no express power of seizure or sale in case of default of payment, though the mortgagee had power in certain events to take possession of plant and materials and complete, is a bill of sale as regards such plant and materials, and requires registration; otherwise such document, as regards the plant and materials, will be void.

Climpson v. *Coles*, 38 W. R. 110, 23 Q. B. D. 465, distinguished.—*Church* v. *Sage* (*Froy, claimant*), Q.B.D. 175—67 L. T. 800.

2. *Default in payment—Seizure of goods—Conditional tender of amount due—Removal of goods—Trespass—Redemption—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 7.—The grantor of a bill of sale in the form prescribed by the Bills of Sale Act, 1882, having made default in payment of a sum of money thereby secured, the grantee seized the goods comprised in the bill of sale. More than five days afterwards, the goods not having been yet removed from the grantor's premises, the grantor tendered payment of the amount due under the bill of sale, subject to a condition as to the giving of a receipt. The grantee declined to comply with the condition, and removed the goods.

Held, that the grantor could not maintain an action of trespass against the grantee for the removal of the goods, but might redeem them on payment of principal, interest, and expenses incurred by the grantee in the seizure, and the costs of the claim for redemption.—*Johnson* v. *Diprose*, C.A. 371—[1893] 1 Q. B. 512; 62 L. J. Q. B. 91; 68 L. T. 485.

3. *Execution by attorney—Grantee of bill appointed attorney—Payment on demand—Bills of Sale Acts*, 1878, *s.* 10, *sub-section* 1; *and* 1882, *s.* 10.—Debtors covenanted, in case of default of payments, to execute such a bill of sale as their creditor's solicitor might reasonably require on its being tendered to them, and in case of non-execution appointed their creditor their attorney for the purpose. Creditor presented a bill in which the money owing was payable on demand.

Held (following *Hetherington* v. *Groome*, 33 W. R. 103, 13 Q. B. D. 789), that the bill presented was invalid, as not in statutory form, but that the creditor was entitled to tender, and, if necessary, to execute, a proper bill of sale.—*Furnivall* v. *Hudson*, CH.D. NOR., J. 358—[1893] 1 Ch. 335; 62 L. J. Ch. 178; 68 L. T. 378.

4. *Form in schedule—Untrue statement of consideration—"Term for the defeasance of the security"—Agreement to have prior recourse to other securities—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 8, 9; *Form in schedule.*—A bill of sale, given by way of security for an advance, was expressed to be made in consideration of a sum of money paid by the grantee to the grantor. At the time of the execution of the bill of sale an agreement was made between the grantor and the grantee that the grantee would not enforce the bill of sale until certain other securities in the hands of the grantee were first realized or attempted to be realized. This agreement was not inserted in the bill of sale. In an action by the grantor to have the bill of sale declared void and delivered up to be cancelled, upon the ground that it was void under section 9 of the Bills of Sale Act, 1882, as not being in accordance with the form in the schedule, the grantee counter-claimed for the principal sum and interest under a covenant for repayment by the grantor contained in the bill of sale. At the trial it was proved that the consideration was not truly stated.

Held, first, that the untrue statement of the consideration did not make the bill of sale void under section 9, as not being in accordance with the form, but only made it void within section 8 in respect of the personal chattels comprised therein; and, secondly, that the agreement that the bill of sale should not be enforced until the other securities were realized or attempted to be realized was not a "term for the defeasance of the security" within the meaning of those words in the form, and that, therefore, the non-insertion of this agreement in the bill of sale did not make the bill of sale void under section 9.

Held, therefore, that the covenant for repayment by the grantor remained unaffected, but that, as the other securities had not been exhausted, the counter-claim was premature.—*Heseltine* v. *Simmons*, C.A. 67—[1892] 2 Q. B. 547; 62 L. J. Q. B. 5; 67 L. T. 611.

5. *Pledge—Transfer of property—Possession—Bills of Sale Acts*, 1878 (41 & 42 *Vict. c.* 31) *and* 1882 (45 & 46 *Vict. c.* 43).—The sheriff having seized the goods of A. under a *fi. fa.*, the appellant (an auctioneer) agreed verbally with A. to pay out the sheriff, provided he was put into possession, with authority to sell by auction and to repay himself, handing over the balance (if any) to A. The sheriff was paid out, the man in possession remaining in possession, not for the sheriff, but for the appellant, and a document was then drawn up embodying this arrangement.

Held (reversing the decision of the Court of Appeal, 39 W. R. 1, 25 Q. B. D. 421), that the appellant did not get his title under the document, but by virtue of the transaction, and, consequently, that there was no bill of sale within the Bills of Sale Acts, 1878 and 1882.

Ex parte Hubbard, 35 W. R. 2, 17 Q. B. D. 690, approved.—*Charlesworth* v. *Mills*, H.L. (E.) 129—[1892] A. C. 231; 61 L. J. Q. B. 830; 66 L. T. 690.

6. *Receipt—Execution—Goods sold privately—Receipt given by sheriff—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 8, 10.—Goods seized by the sheriff under a writ of execution were sold privately by leave of the court, and a receipt was given by the sheriff to the purchaser in the following

form:—"Received from, &c., . . . the sum of £122 1s. 9d., being for the goods, chattels, and effects now in and upon the premises No. 471, Bethnal Green-road, which were seized by the sheriff of the county of London under and by virtue of a writ of *fi. fa.*, and hereby sold as far as he lawfully can or may, without any warranty of title, and with the consent of the defendant, who is a builder, and under an order of the master." The goods were left by the purchaser in the possession of the debtor until the presentation of the bankruptcy petition.

Held, that the document was a bill of sale within the meaning of the Bills of Sale Act, 1878, and, not being registered, must be declared void.—*In re Hood, Ex parte Blandford*, Q.B.D., BKCY. 558—68 L. T. 591.

7. *Re-registration — Accidental omission to re-register—Extension of time—Bankruptcy of grantor supervening—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 11, 14.—Under section 14 of the Bills of Sale Act, 1878, the court will not rectify an accidental omission to re-register a bill of sale by extending the time to re-register, as against the trustee in bankruptcy of the grantor, where the bankruptcy has intervened between the lapsing of the original registration and the application for extension of time.

Crew v. *Cummings*, 36 W. R. 908, 21 Q. B. D. 420, followed.

In re Dobbin, 56 L. J. Q. B. 295, 35 W. R. Dig. 33, not followed.

Decision of the Queen's Bench Division (Lord Coleridge, C.J., and Collins, J.) affirmed.—*In re Parsons and Furber's Bill of Sale*, C.A. 468—[1893] 2 Q. B. 122; 62 L. J. Q. B. 365; 68 L. T. 777.

8. *Specific description—Inventory or schedule therein referred to—Registration—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-section* 2—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 4.—A bill of sale was given in respect of the furniture and other chattels in the grantor's house. The schedule annexed to the bill specified the furniture and other chattels in each room of the house. Under the heading "Study" was the item, "Eighteen hundred books, as per catalogue." The bill of sale and the schedule were registered, but not the catalogue. No evidence was given that there was any difficulty in identifying the books.

Held (affirming the judgment of Cave, J.), that the catalogue was not referred to in the bill of sale within the meaning of section 10, sub-section 2, of the Bills of Sale Act, 1878, and that the non-registration of the catalogue did not, therefore, render the bill of sale void; and that the books were "specifically described" in the schedule within section 4 of the Bills of Sale Act, 1882.—*Davidson* v. *Carlton Bank*, C.A. 132—[1893] 1 Q. B. 82; 62 L. J. Q. B. 111; 67 L. T. 641.

9. "*True owner*"—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 5.—The "true owner" of the personal chattels described in a bill of sale at the time of its execution, within the meaning of section 5 of the Bills of Sale Act, 1882, must be taken to include the person who is the legal owner thereof at that time, irrespective of whether he is also the equitable owner or only trustee for another.—*In re Sarle, Ex parte Williams*, Q.B.D., BKCY.—[1892] 2 Q. B. 591; 67 L. T. 597.

BUILDING SOCIETY:—

1. *Arbitration—Power to direct arbitrators to state a case—Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *s.* 36—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 19, 24.—Section 19 of the Arbitration Act, 1889, which provides that any arbitrator may, at any stage of the proceedings in the reference, and shall, if so directed by the court, state, in the form of a special case for the opinion of the court, any question of law arising in the course of the reference, applies to arbitrations under the Building Societies Act, 1874.

Where an order *nisi* has been obtained by a party who has no notice of an award having been made, it lies upon those who contest it to show that the award was in fact executed prior to the order being made.

Decision of the Court of Appeal (39 W. R. 507, [1891] 2 Q. B. 63) affirmed.—*Tabernacle Permanent Building Society* v. *Knight*, H.L. (E.) 207—[1892] A. C. 298; 62 L. J. Q. B. 50; 67 L. T. 483.

2. *Mortgage—Proviso for redemption—Advanced member—Subsequent alteration of rules—Contract of membership and of mortgage—Liability of mortgagor.*—An advanced member of a building society executed a mortgage in favour of the society, the proviso for redemption being upon payment of "the several sums, whether consisting of monthly subscriptions, fines, interest, or other payments which, under the constitution of the said society and the rules and regulations thereof, ought to be by him paid in respect of the share or shares by virtue of which money is now or shall be hereafter advanced to him by the trustees of the said society." At the date of the mortgage the rules of the society did not provide for any contribution by advanced members in respect of losses; but after the date of the mortgage the rules were amended so as to give the directors power to direct a levy upon members to provide for contribution to losses. A levy was duly made under the rules as amended. The mortgagor claimed to redeem without paying any part of the levy.

Held, that the mortgagor's contract was one of membership and mortgage combined; that, by virtue of it, he was bound by the amended rules, although the mortgage deed did not refer to the rules "for the time being"; and that, therefore, he was not entitled to redeem except upon payment of the amount of the levy apportioned in respect of his shares.—*Bradbury* v. *Wild*, CH.D. KEK., J. 361—[1893] 1 Ch. 377; 62 L. J. Ch. 503; 68 L. T. 50.

3. *Winding up — County court — Special case—Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *s.* 32, *sub-section* (4)—*Companies* (*Winding-up*) *Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 3, *sub-section* (3)—*County Court Rules, ord.* 41, *r.* 9.—In the winding up in the county court of a building society registered under the Building Societies Act, 1874, a special case for the opinion of the High Court may be stated under section 3, sub-section (3), of the Companies (Winding-up) Act, 1890.—*In re Portsea Island Building Society*, CH.D. WILL., J. 587.

4. *Withdrawal—Member—Notice of withdrawal—Alteration of rules after notice and before payment—Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *ss.* 16, 18.—By the rules of a building society a member, on giving the prescribed notice, might withdraw his shares, and the rules might be altered by the prescribed majority of members.

The society altered a rule to the detriment of a member, P., after P. had given notice to withdraw, but before P. was repaid.

Held, that, though P had a vested right to be paid when he gave his notice, that right was liable to be divested by an exercise of the power left in

the society, and liable to be exercised against P., of altering the rules; and that P. was, therefore, bound by the altered rule.

Davies v. *Second Chatham Building Society*, 61 L. T. N. S. 680, 38 W. R. Dig. 24, followed.—*Pépé* v. *City and Suburban Building Society*, CH.D. CHI., J. 548—[1893] 2 Ch. 311; 62 L. J. Ch. 501; 68 L. T. 846.

BURIAL.—See ECCLESIASTICAL LAW, 1, 2.

CANADA, LAW of:—

1. *British North America Act*, 1867—*Relations between Crown and provinces—Winding up of bank—Priority of provincial government over other simple contract creditors—Prerogative of the Crown.*—The British North America Act, 1867, has not severed the connection between the Crown and the provinces, the relation between them is the same as that which subsists between the Crown and the Dominion in respect of the powers executive and legislative, public property, and revenues as are vested in them respectively. In particular all property and revenues reserved to the provinces by sections 109 and 126 are vested in her Majesty as Sovereign of each province.

Held, affirming a judgment of the Supreme Court of Canada, that the provincial government of New Brunswick, being a simple contract creditor of the Maritime Bank of the Dominion of Canada in respect of public moneys of the province deposited in the name of the Receiver-General of the province, is entitled to payment in full over the other depositors and simple contract creditors of the bank, its claim being for a Crown debt to which the prerogative attaches.—*Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, P.C.—[1892] A. C. 437; 61 L. J. P. C. 75; 67 L. T. 126.

2. *Fraud—Failure of prrof—New issue as to negligence cannot be raised in appeal.*—Where a writ and declaration alleged that the defendant had been guilty of wilful deceit, and had fraudulently effected a transference of fire insurance in his books after a fire had occurred from a company of which he was agent to the appellants, of whom he was also agent, with a specific fraudulent purpose, and such charges of fraud and deceit failed,

Held, that the appellants could not be allowed in a final appeal to contend for the first time that the pleadings and evidence disclosed such negligence or breach of duty by the respondent as their agent as is in law sufficient to infer his liability for the amount paid by them under the insurance so transferred. Fraud was of the essence of the declaration, and the evidence of the respondent directed to that issue cannot be accepted as representing all that he would have brought forward to rebut a charge of negligence; nor had the points connected with that issue been submitted to the courts below. —*Connecticut Fire Insurance Co.* v. *Kavanagh*, P.C. —[1892] A. C. 473; 61 L. J. P. C. 50; 67 L. T. 508.

3. *Manitoba—Dominion Statute*, 33 *Vict. c.* 3—*Manitoba Public Schools Act*, 1890—*Denominational schools—Powers of provincial Legislature.*—According to the true construction of the Constitutional Act of Manitoba, 1870 (33 Vict. c. 3) (Dominion statute), having regard to the state of things which existed in Manitoba at the date thereof, the Legislature of that province did not exceed its powers in passing the Public Schools Act, 1890.

Section 22 of the Act of 1870 authorizes the provincial Legislature exclusively to make laws in relation to education so as not to "prejudicially effect any right or privilege with respect to denominational schools which any class of persons have, by law or practice in the province, at the union."

Held, that the Act of 1890, which abolished the denominational system of public education established by law since the union, but which did not compel the attendance of any child at a public school, or confer any advantage in respect of attendance other than that of free education, and at the same time left each denomination free to establish, maintain and conduct its own schools, did not contravene the above proviso; and that accordingly certain bye-laws of a municipal corporation which authorized assessments under the Act were valid.—*City of Winnipeg* v. *Barrett, City of Winnipeg* v. *Logan*, P.C.—[1892] A. C. 445; 61 L. J. P. C. 58; 67 L. T. 429.

4. *Nova Scotia—Revised Statutes of Nova Scotia (5th series), c.* 7, *s.* 19—*Appointment of arbitrator in default of the proprietor—Notice not necessary.*—Where the warden of the municipality had, under Revised Statutes of Nova Scotia (5th series), c. 7, s. 19, appointed an arbitrator on behalf of the respondent to estimate damages to be paid to him by the appellants under the statute, and it appeared that the respondent had received and neglected a notice under section 18 to appoint,

Held, that such appointment was not a judicial act, and that a fresh notice to the respondent in relation thereto was not a condition precedent to its validity.

Where an award gave a landowner a fixed sum as estimated damages for all works or occupation necessary to or required by the mining lessee,

Held, that, having regard to the subject-matter and scope of the Act, such award was not bad for uncertainty.—*Palgrave Gold Mining Co.* v. *McMillan*, P.C.—[1892] A. C. 460; 61 L. J. P. C. 85; 67 L. T. 425.

5. *Quebec—Action of ejectment—Effect of Act* (18 *Vict. c.* 3) *as to defendant's title—Prescription—Immemorial possession—Disclosure of title with its infirmities.*—In an action of ejectment by the Crown, it appeared that the appellant company derived title through a grant made in 1661 by the French Government, which gave no seigneurie over the land in suit, but only a right to make establishments for hunting and fishing within certain limits; that an ordonnance in 1733, together with the action of the French Crown thereunder, did not create or recognize any title in the heirs of the grantee to such seigneurie; that down to 1854 there was no evidence of either its creation or recognition by the British Crown, but that in 1854 the Canadian Act (18 Vict. c. 3) (amended by subsequent Acts), recognized that there was a seigneurie of Mingan, being part of the disputed land the boundaries whereof were conclusively established by a schedule authorized by the Acts.

Held, that the High Court was right in dismissing the suit as regards the scheduled lands. If a mistake had been made the Legislature alone could correct it; a court of law must give effect to the enactment as it stands.

Held, further, with regard to the claim of the company to hold the whole of the land in suit by prescription and immemorial possession, that inasmuch as it had disclosed the true roots of its title, the law of prescription did not apply.—*Labrador Co.* v. *The Queen*, P.C.—[1893] A. C. 104; 62 L. J. P. C. 33; 67 L. T. 730.

6. *Quebec—Interpretation of Code—Civil Code, ss.* 1056, 2262 (2)—*Prescription—Widow's right of action distinct from that of deceased.*—An appeal to earlier law and decisions for the purpose of

interpreting the provisions of a statutory code can only be justified on some special ground, such as the doubtful import or previously acquired technical meaning of the language used therein.

Held, that the Civil Code of Lower Canada does not make it a condition precedent to the right of action given by section 1056 to the widow of a person dying as therein mentioned, that the deceased's right of action should not have been extinguished in his lifetime by prescription under section 2262 (2). The death is the foundation of the right given by the former section, which is governed by the rule of prescription contained therein and is exempt from the rule of prescription which barred the claim of the deceased.—*Robinson* v. *Canadian Pacific Railway Co.*, P.C.—[1892] A. C. 481; 61 L. J. P. C. 79; 67 L. T. 505.

CANAL:—

Minerals—Right of support—Compensation—Lapse of time—Fulfilment of conditions precedent to be assumed—Statutory powers.—Ordinarily, where land is granted by private grant for the construction of specific works, the grant, in the absence of a contrary intention appearing on the face of it, carries by implication the right of reasonable and necessary support for the works to be constructed.

The same principle applies to titles and rights created by Act of Parliament, and, where an express statutory right is given to make and maintain a thing necessarily requiring support, the right to necessary support is, in the absence of a contrary context, implied to accompany the right to make and maintain the thing requiring support; and, in cases where a mode of compensation is provided for the owners of the lands furnishing such support, the reason for implying that such right of support is intended by the Act are overwhelming.

By a private Act of 1754 the plaintiffs' predecessors in title were empowered to convert a brook and its branches into a navigable river for the use of the public, and to make and maintain such cuts and canals in, upon, and through the lands of owners adjoining as might be proper and requisite for the navigation and carrying out of the undertaking. The Act provided for "the said undertakers, their heirs and assigns, doing as little damage as may be in the premises, and first giving satisfaction to the owners or proprietors of such lands, tenements, and tithes or hereditaments respectively, as shall be digged, cut, removed, or otherwise made use of, or that in any wise shall be diminished, prejudiced, or damaged by or for the carrying on, effecting, or preserving the said navigation, or for maintaining or managing the same," as the commissioners under the Act or a jury should decide.

The undertaking was carried out, and the undertakers paid an annual sum, under the provisions of the Act, to landowners in respect of the lands required and used for the purposes of the canal; but there was in the Act no express power for the undertakers to purchase lands (though persons under disability were authorized to sell lands required for the navigation), and no conveyances of surface lands were ever executed to them.

Under another private Act of 1864 the canal became vested in the plaintiffs. The defendants, who were lessees and owners of coal in the subjacent and adjacent lands over which the canal was constructed, in the ordinary course of working their coal endangered the canal. Upon the plaintiffs asking for an injunction to restrain the defendants from so working their mines as to cause damage to the canal,

Held, that provisions for compensation to those whose lands would be required for the making and maintenance of the canal were to be found in the Act of 1754, authorizing the undertaking; that the right of support required for the canal and the value of the minerals underlying the lands taken and used might have been—whether or not they in fact were—taken into account and estimated in the price to be calculated and given to the landowners before the works were undertaken, had the landowners been sufficiently prescient to demand it; that, after so great a length of time, it must be presumed that all was paid for which was thought worth claiming for, and that all conditions precedent were fulfilled which were requisite to give the plaintiffs' predecessors the necessary right of support; and that the plaintiffs were therefore entitled to an injunction.

Decision of Kekewich, J., reversed.—*London and North-Western Railway Co.* v. *Evans*, C.A. 149—[1893] 1 Ch. 16; 62 L. J. Ch. 1; 67 L. T. 630.

CARRIER:—

Through rate—Wharfinger—Principal and agent—Liability of wharfinger.—The defendants, who were wharfingers in London, in answer to a request by the plaintiffs quoted a through rate for the carriage of machinery from London to Cork, at owners' risk, including collection within three miles and delivery at other side, and freight and wharfage at both ends. The plaintiffs paid the through rate, and delivered the machinery to the defendants. The machinery was damaged while on board a steamer belonging to a steam packet company.

Held, that there was no concluded contract in the above documents between the plaintiffs and the defendants, and that parol evidence was admissible to prove that the defendants received the goods as wharfingers, and acted in the carriage as agents only, and that they were not liable.—*Pontifex & Wood* v. *Hartley & Co.*, C.A.—62 L. J. Q. B. 196.

CHARITY:—

1. *Mortmain—Will made before passing of Act—Death of testator after passing of Act—Mortmain and Charitable Uses Act*, 1891 (54 & 55 *Vict. c.* 73) *s.* 9.—A testator by his will, dated before the passing of the Mortmain Act, 1891, gave his residuary estate, consisting of realty and personalty, "in trust to pay such part of my said residuary estate which may by law be given for charitable purposes to the Brompton Hospital." He gave the remainder of his residuary trust estate to his wife's niece. Testator died after the passing of the Mortmain Act, 1891.

Held, that the hospital was entitled to the whole of testator's residuary estate.—*In re Bridger. Brompton Hospital for Consumption* v. *Lewis*, CH.D. NOR., J. 104—[1893] 1 Ch. 44; 62 L. J. Ch. 146; 67 L. T. 549.

2. *Mortmain — Contingent bequest to charity—Investment on mortgage—Discretion of trustees.*—A testator bequeathed the residue of his personal estate to trustees on trust for sale, conversion, and investment, and to stand possessed of the same on trust for his niece for life, with remainder to her issue, and on her decease without issue on trust to transfer the same or so much thereof as might by law be so applied for the benefit of a charity. He gave his trustees power to postpone the conversion of his mortgage securities, and also power to invest on real securities. The trustees invested part of the residuary personal estate on mortgage of real estate; and some part of the residuary personal estate, consisting at the decease of the testator of real securities, was left unconverted. Testator's niece died without issue.

Held, that the charity could only take such parts

of the residuary estate as, at the decease of the testator's niece, consisted of pure personalty.—*In re Corcoran, Corcoran* v. *Riddell*, CH.D. NOR., J. 311—62 L. J. Ch. 267; 67 L. T. 751.

3. *Mortmain—Interest in land—Surplus lands stock of Metropolitan Railway—Metropolitan Railway Act*, 1885 (48 & 49 *Vict. c. lxxxix.*), *s.* 39—*Mortmain and Charitable Uses Act*, 1888 (51 & 52 *Vict. c.* 42), *ss.* 4, 10.—By a series of Acts passed between 1862 and 1880 the Metropolitan Railway Co. was empowered to deal with its surplus lands otherwise than in accordance with the provisions of the Lands Clauses Act, 1845, and was vested with extensive power of sale and leasing for the benefit of the company and its shareholders. By an Act of 1885 the company was empowered to divide its ordinary stock into two portions, which should be entitled respectively to the revenues arising from the surplus lands and estates, and to the ordinary revenue arising from the working and use of the railways, works, and stations. By section 39 the surplus lands were vested in the company, together with powers of dealing with such lands. These powers, however, were to be exercised in accordance with the decision of a statutory committee thereby constituted, in whom were vested "the sole decision, control, and management of the lands, and the sale, lease, or other dealing with any part or parts thereof." The sole right of a stockholder under the section was to have the net annual income arising from the surplus lands applied "to the payment of interest upon the surplus lands stock."

Held, that such stock was not an interest in land within the Mortmain and Charitable Uses Act, 1888, and could therefore be validly bequeathed for charitable purposes.—*In re Hollon, Forbes* v. *Hardcastle*, CH.D. STI., J.—68 L. T. 160.

4. "*Religious societies*"—*Charitable purposes—Bequest.*—Testator bequeathed his residuary estate "to the following religious societies—viz."—then followed a blank—"to be divided in equal shares among them."

Held, (1) that this bequest was to be treated as a bequest for "religious purposes"; (2) that, being for "religious purposes," it was *primâ facie* a bequest for "charitable purposes"; and (3) that, as no religious society was particularly mentioned, there was nothing from which anything to the contrary of this *primâ facie* presumption could be shown; and, consequently, that a scheme for the application *cy-près* of the charitable gift should be directed.

Decision of Kekewich, J., reversed.—*In re White, White* v. *White*, C.A. 683—[1893] 2 Ch. 41; 62 L. J. Ch. 342; 68 L. T. 187.

5. *Sale of land—Consent of Charity Commissioners—Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *ss.* 24, 62, 66—*Charitable Trusts Amendment Act*, 1855 (18 & 19 *Vict c.* 124), *ss.* 29, 48.—Land conveyed to a charitable corporation by a voluntary settlement was afterwards sold by the corporation to a purchaser who took exception to such sale as *ultrà vires* without the consent of the Charity Commissioners.

Held, that this land, not being subject to any specific trust, did not require the consent of the Charity Commissioners for its sale.—*In re Corporation of the Sons of the Clergy and Skinner.*—CH.D. NOR., J. 461—[1893] 1 Ch. 178; 62 L. J. Ch. 148; 67 L. T. 751.

6. *Sale of land—Consent of Charity Commissioners—Sale to tenants.*—Lands were vested in the College of Physicians upon trust to apply the rents and profits towards payment of the salaries of professors in connection with the college, and the balance of the rents for the benefit of a hospital. The college had the power of leasing for thirty-one years, but they were restrained by a statute of 15 Geo. 2, which had been passed to regulate the charity, from alienating or disposing of the land otherwise. The college having entered into agreements with their tenants for sale under the Lands Purchase Acts,

Held, that the vendors were entitled to sell, but not without obtaining the sanction of the Court of Chancery, or the consent of the Charity Commissioners.—*In re College of Physicians*, C.A. (Ir.)—32 L. R. Ir. 341.

See also WILL, 22, 23.

CHURCHWARDEN.—See ECCLESIASTICAL LAW, 4.

CITY of LONDON COURT.—See COMPANY, 47.

CLUB.—See LICENSING ACTS, 1.

COMMON. — See COPYHOLD; LANDS CLAUSES ACTS, 5.

COMPANIES CLAUSES ACT:—

Transfer of stock—Trustee—Deposit of certificate—Blank transfer—Subsequent filling up by transferee—Delivery—Execution—Purchase for value without notice—Legal title—Companies Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 16), *ss.* 14, 15, 18.—M. E., the executor of a sole surviving trustee of a marriage settlement, held on behalf of the trust a sum of stock of a company which was governed by the provisions of the Companies Clauses Consolidation Act, 1845; his name was indorsed as executor on the certificate, and the certificate bore on the face of it that "no interest in this stock can be acquired by the deposit of this certificate." He deposited the certificate with a bank to secure an overdraft, stating that the stock belonged to him absolutely; he also signed and deposited a loan note, undertaking when called upon to execute a proper assignment or transfer; and he further deposited a blank transfer, signed and sealed by him, purporting to transfer the stock. The period of credit having run out, the bank, after giving notice to him that they proposed to register the stock in their name, filled in the blank transfer with their own name as transferees, and got themselves registered as owners of the stock. The transfer, at the time of and after being filled up, was never seen by M. E., but the bank afterwards wrote and told him that they had received the dividend on the stock, and that they proposed to credit him with the amount, and they were subsequently authorized by him to sell the stock, but it was not, in fact, sold.

Held, that there had been nothing amounting to a redelivery of the transfer by the transferor after the blanks had been filled in by the bank, and that the bank had no legal title to the stock.

Decision of Wright, J., affirmed.—*Powell* v. *London and Provincial Bank*, C.A. 545.

COMPANY:—

BORROWING POWERS—

1. *Debenture—Compromise—Meeting—Majority binding minority—Notice—"Fourteen clear days"—Arrangement to receive shares instead of debentures—Dissentient minority.*—A company issued a class of debentures which charged all its property, and it was provided that a meeting of debenture-holders should have power, by special resolution, "to sanction any modification or compromise of the rights of the debenture-holders against the company or against the property." The company afterwards transferred its assets to a new company, subject to the debentures, and was dissolved. The new company, in August, 1892, passed resolutions

for voluntary winding up, with a view to reconstruction. Its funds were exhausted, and its property consisted of certain mining rights in California, which would be forfeited unless fees to a considerable amount were paid by the end of 1892. A scheme was formed for a new company with a larger capital, as part of which scheme the debenture-holders were to accept ordinary shares in the new company instead of their debentures. This scheme was duly sanctioned by the shareholders, and was also sanctioned by a special resolution of a meeting of debenture-holders on the 31st of October, 1892. A dissentient debenture-holder brought his action to restrain the carrying out of this scheme, on the ground that it was beyond the powers of a meeting of debenture-holders to sanction it so as to bind any dissentient debenture-holders. North, J., refused an interlocutory injunction, on the ground that the plaintiff was not damnified by the proceedings if they did not bind him.

Held, by the Court of Appeal, the motion being treated as the trial, that the difficulty in the way of the debenture-holders enforcing their rights made the case one in which the power to compromise arose, and that this was a compromise of the rights of the debenture-holders against the property which it was within the power of a meeting of debenture-holders to sanction by special resolution so as to bind the dissentient debenture-holders, and the action was dismissed.

But where under a similar power a resolution approving a similar scheme to exchange debentures for shares was passed by a body of debenture-holders whose rights were undisputed and capable of being enforced without difficulty,

Held, that the power to compromise had not arisen, and that the resolution did not bind a dissentient minority: *Mercantile Investment and General Trust Co.* v. *International Co. of Mexico*, [1893] 1 Ch. 384n.

The question what is a "compromise" discussed.

An advertisement in the newspaper convening a meeting of debenture-holders under a trust deed is sufficient notice, unless the deed expressly requires notice to be given by circular.

Notice "at least fourteen days before the date" of a meeting of debenture-holders means fourteen clear days between the issue of the advertisement or circular calling the meeting and the day of meeting; and the notice so given is effectual, though it may not actually reach any debenture-holders until some days afterwards.—*Sneath* v. *Valley Gold* (*Limited*), C.A.—[1893] 1 Ch. 477; 68 L. T. 602.

2. *Debenture — Construction — "Property and assets"—Uncalled capital—Charge.*—The principal and interest payable upon each debenture in a company was secured by a first charge and mortgage upon all and singular the property, assets, and revenues of the company. The defendant company had power by the articles of association to raise money upon debentures charged upon the property and rights of the company both present or future, or either, including uncalled capital. By the memorandum of association one of the objects of the company was expressed to be to borrow money by the issue of debentures charged on the company's property, present or future, including its uncalled capital.

Held, that the uncalled capital was included in the debentures under the word "assets," even if the word "property" was not sufficient.—*Page* v. *International Agency and Industrial Trust*, CH.D. STI., J.—62 L. J. Ch. 610; 68 L. T. 435.

3. *Debenture—Debenture-holders' security in danger—Interest on debentures—Time for payment—Receiver and manager.*—In a debenture-holders' action, where the security was endangered, but no interest was due on the debentures, and the time for payment had not arrived, the court, on the motion of the debenture-holders, made an order for the appointment of a receiver and manager.—*Edwards* v. *Standard Rolling Stock Syndicate*, CH.D. NOR., J. 343—[1893] 1 Ch. 574; 62 L. J. Ch. 605; 68 L. T. 194.

4. *Debenture—Debenture trust—Failure of trust—Return of money to debenture-holders—Minority of debenture-holders.*—A company, incorporated under Spanish law, obtained a concession from the Spanish Government to construct and work a railway in Spain. The line was to be constructed in three sections, and was to form part of a through route. The company created by deed first mortgage debentures to bearer, and hypothecated the railway to secure the same. The company entered into contracts with a construction company to make the line and provide rolling stock, and by the contracts engaged to issue certain of the debentures, the proceeds of which were to be paid to three commissioners as trustees for the debenture-holders, to be applied, subject to interest and amortization of bonds, in completing the railway. The company thereupon issued a prospectus inviting subscriptions. £320,000 was raised and paid to Paris bankers, but, owing to litigation in Paris, was only paid to the commissioners after considerable delay, reduced by expenses and the service of the loan. Meanwhile the construction of the railway was impeded for lack of funds. One section only was partially completed, and the other two had not been commenced. The concession, owing to breaches thereof, was liable to forfeiture. In 1890 the contracts with the construction company were put an end to and the contractors released, whereupon a temporary contract was entered into with another company to keep the works going. Two actions were commenced by a small, but substantial, minority of the bondholders, who desired a return of their money, and a third action by other bondholders, who desired to have the scheme carried out.

Held, that the court must decide whether the company possessed resources *in præsenti* or *in prospectu* available to complete the line; that, on the evidence, there was no reasonable hope, as a matter of business, that the line could be completed out of such resources; that a portion of the line was comparatively valueless; that the minority of the bondholders were entitled to a return of their money, subject to costs and charges properly incurred, and subject to a sufficient part of the funds being applied to properly realize the property of the company charged in favour of the bondholders; that payment of interest and the amortization of outstanding bonds must cease; and an inquiry directed to ascertain in what way the property charged could best be realized.—*Collingham* v. *Sloper; Foreign, American, and General Investment Trust Co.* v. *Sloper*, CH.D. NOR., J. 550—[1893] 2 Ch. 96; 62 L. J. Ch. 416.

5. *Debenture—First and second issue—Priority—Reissue—"Outstanding"—Series of debentures.*—A limited company had power under its memorandum to raise money by the issue of debentures secured by mortgage or otherwise upon all or any part of its property. The company shortly after its

incorporation issued a series of debentures headed "Issue of £10,000 Six per Cent. Mortgage Debentures." Each debenture was to secure £100, and the company charged all its property, subject to the conditions indorsed thereon. The conditions stated that the debenture was one of a series issued or about to be issued by the company upon and subject to the like conditions for securing an aggregate sum and interest, and that the debentures as and when respectively issued should operate as creating continuously-overriding floating charges upon the undertaking and property of the company, subject to a certain mortgage for securing to the holders rateably and equally *inter se*, and without any preference or priority one over another, but in priority to all other debts for the time being owing by the company (save as aforesaid), of the principal moneys and interest owing upon the debentures, and as precluding the company, whilst any of the debentures should remain in force, from creating or making any further mortgage, charge, incumbrance, or security upon or over its undertaking or its property, in competition with or otherwise than subject or in subordination to the debentures then outstanding. Subsequently the company issued a second series of debentures in similar form to the first, except that the conditions stated that these latter debentures were "subject and in subordination to the debentures which have already been issued by the company for securing an aggregate principal sum of £10,000 and interest at the rate of £6 per cent. per annum, or such of them as are now outstanding." Neither series of debentures was secured by a trust deed. Some of the first series of debentures were issued before the date of the second charge, and others of the first series were issued subsequently to the second charge.

Held, that the words "debentures already issued" meant the series of, and not the particular debentures already issued, and that the words "or such of them as are now outstanding" meant such of them as, having been issued, had not been paid off, and that, consequently, all the second debentures were postponed to all the first debentures, whenever issued, except such of them as had been reissued.—*Lister* v. *Lister & Son* (*Limited*), CH.D. WILL., J. 330—62 L. J. Ch. 568; 68 L. T. 826.

6. *Debenture—Debenture-holders' action—Protection of mortgage security—Assets of company not in actual jeopardy—Principal and interest not immediately payable—Application for appointment of receiver and manager—Practice.*—Upon the principle that a mortgagee is entitled to the protection of his security, the court will, at the instance of a debenture-holder of a limited company, where the debenture creates a floating charge on the property of the company, appoint a receiver of the property so charged, if the security is in jeopardy through the insolvency of the company, even though the principal secured by the debenture is not immediately payable, and default has not yet been made in payment of interest for the period prescribed by the debenture.

Decision of Kekewich, J., affirmed.—*Thorn* v. *Nine Reefs* (*Limited*), C.A.—67 L. T. 93.

7. *Debenture—Receiver and manager—Action by debenture-holder—Authority to charge assets in priority to debentures—Salvage—Jurisdiction.*—A company, carrying on the business of music-hall proprietors, issued debentures charged on all the property of the company. In a debenture-holders' action a receiver and manager of the property and business of the company was appointed, with liberty to raise a loan of £1,000, and to charge the same on the assets of the company in priority to the debentures. The receiver and manager carried on the business at a loss, which was defrayed out of the said sum. The plaintiff applied that the receiver and manager might be at liberty to raise a further sum of £1,000 to be secured in the same manner as the previous loan; and the company consented to the application. There was evidence that the closing of the music-hall would considerably diminish the value of the property, and that it was very desirable to sell the business as a going concern. The hall itself was subject to mortgages having priority to the debentures.

Held, that the court had jurisdiction to sanction expenditure which was necessary to prevent property in the hands of its officers from being destroyed or forfeited, but that the necessity for the expenditure must be shown to be especially urgent whenever all the parties interested were not before the court.

Held, that a debenture-holder, suing on behalf of himself and all others the debenture-holders of a company, did not represent other debenture-holders for the purpose of binding them by any agreement or representation.

And, that the proposed expenditure was merely speculative, that special urgency was not shown, and that the application must be refused.—*Securities and Properties Investment Corporation* v. *Brighton Alhambra* (*Limited*), CH.D. KEK., J.—62 L. J. Ch. 566; 68 L. T. 249.

See also ASSIGNMENT OF DEBT; COMPANY, 26, 27.

CHANGE OF NAME—

8. *Irregularity—Registrar of Joint-Stock Companies—Certificate—Jurisdiction—Board of Trade—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 13, 18, 174.—An order was made altering the name of a limited company, and a certificate was issued by the Registrar of Joint-Stock Companies that the company had changed its name. It was then found that the resolutions upon which the order was based were bad.

On motion to direct the registrar to restore the old name, and also to discharge the order,

Held, that the court had no jurisdiction over the Registrar of Joint-Stock Companies, he being an officer of the Board of Trade, and not of the court. —*In re Australasian Mining Co.*, CH.D. KEK., J.—68 L. T. 437.

DIRECTORS—

9. *Liability—Breach of duty—Gift of bonus, debentures, and shares—Approval of shareholders—* Ultrà vires.—The directors of a company entered into an agreement with a firm of contractors, under which the contractors agreed to execute certain works on behalf of the company for a specified sum in debentures and fully-paid shares of the company, and by means of a stipulated portion of those debentures and shares to carry out the provisions of certain contemporaneous agreements under which debentures and fully paid-up shares of the company were to be made over to third parties without consideration. Each of the shareholders and debenture-holders for the time being of the company took a benefit under one or other of the agreements.

Held, that, to the extent to which the contractors had been provided with debentures and shares to be made over to third parties without consideration, the transaction was *ultrà vires* of the company; and that the directors were liable to make good the loss occasioned thereby.

If, acting fairly, honestly, and reasonably, directors mistake the legal powers of their company, they

may not be made answerable, either in an action or in a winding up. But if they in fact know, or with due care ought to have known, that the acts done are beyond the powers of the company, then if they do those acts even in the honest belief of necessity in the interests of the company, they take the risks of the consequences.—*London Trust Co.* v. *Mackenzie*, CH.D. WRI., J.—68 L. T. 380.

See also COMPANY, 32-34.

DIVIDENDS—

10. *Sale of business—Profit and loss account—Profits on capital—Payment of—Dividends out of capital.*—A banking company which had a nominal capital of £1,000,000, divided into 100,000 shares of £10 each, had issued all its shares, the sum of £5 having been paid on each share, which thus constituted a paid-up capital of £500,000. The company sold a part of its business for £875,000, realizing thereby a net profit of £205,000 after bringing the £500,000 into account, and after making certain payments to the purchasers.

Held, that the company was justified in carrying the £205,000 to the profit and loss account, and applying the same as dividends, the capital of the company (*i.e.*, the £500,000) being intact.—*Lubbock* v. *British Bank of South America*, CH.D. CHI., J. 103—[1892] 2 Ch. 198; 61 L. J. Ch. 498; 67 L. T. 74.

FORMATION—

11. *Expenses of private Act—Receipt by agent of fixed sum for payment of such expenses—Fiduciary position—Liability to account—Private advantage—Ratification by directors*—Ultrà vires.—The pursuers were a company incorporated by special Act for the construction of certain tramways, the Act containing the usual clause that the expenses of obtaining the Act should be paid by the company. The pursuers, through the defender, M., their solicitor, entered into an agreement with contractors for the execution of the work for £93,000, the contract providing that the expenses of procuring the special Act should be paid by the contractors. On the following day another agreement was entered into between the contractors, the defender M., and the defender B., the latter being the engineer of the company. By this agreement the defenders undertook to relieve the contractors of the liability to pay the expenses of obtaining the Act in consideration of a sum of £17,000, £5,000 of which was paid in cash.

Held (affirming the decision of the Court of Session, 18 Ct. Sess. Cas., 4th series (Rettie), 1140), that the defenders were liable to account for the £17,000, which they had received under the agreement, without charging against the pursuers any expense which was not within the definition of the clause of the Act, for the agreement, so far as it provided for the retention by the defenders of the balance of the £17,000 after defraying the expenses sanctioned by the Act, was illegal and void; that the facts did not show any adoption of the agreement by the pursuers, but that, even if the agreement had been adopted by the directors and shareholders, such adoption would have been *ultrà vires* the Act.—*Mann and Beattie* v. *Edinburgh Northern Tramways Co.*, H.L. (Sc.)—[1893] A. C. 69; 62 L. J. P. C. 74; 68 L. T. 96.

MEMORANDUM—

12. *Alteration of memorandum—Jurisdiction—Sanction of court—Winding-up court—Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62), *s.* 1—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *ss.* 1, 2, 32, *sub-section* (2)—*Order of Lord Chancellor of 26th of March*, 1892,—The judge to whom the jurisdiction of the High Court in the winding up of companies has been assigned by the order of the Lord Chancellor of the 26th of March, 1892, has jurisdiction to make orders under the Companies (Memorandum of Association) Act, 1890.—*In re Mining Shares Investment Co.*, CH.D. WILL., J. 376—[1893] 2 Ch. 660; 62 L. J. Ch. 434; 68 L. T. 578.

13. *Sale of assets to new company—Shares in purchasing company—Voluntary winding up—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 16.—It is competent for a company, by its memorandum of association, to exclude the operation of the 161st section of the Companies Act, 1862, in the event of a sale by the company of its undertaking to another company, the whole or part of the consideration for such sale being shares in the purchasing company, notwithstanding that, at the time of the execution of the contract for sale, it is in contemplation to wind up the selling company voluntarily.—*Cotton* v. *Imperial and Foreign Agency and Investment Corporation*, CH.D. CHI., J.—[1892] 3 Ch. 454; 61 L. J. Ch. 684.

PROSPECTUS—

14. *Misrepresentation—Concealment of facts—Rescission of contract to take shares.*—The prospectus of a company, which was issued in February, 1889, contained (*inter alia*) statements to the following effect:—(1) That the company was formed for the purpose of purchasing patent rights of a most formidable projectile, the invention of S.; (2) that the projectile contained a charge of dynamite or other high explosive, which had "been fired with safety from rifled, smooth-bored, muzzle, and breech-loading guns with a full charge of gunpowder"; that there was no necessity for any alteration of the guns or of the charge of powder; and that the projectile was destined to play an important part in naval and military operations; (3) that "the experimental firing last summer demonstrated the practicability and utility of the invention, and attracted the attention of the military authorities of several foreign countries as well as our own; and at the earnest solicitation of the Senate military committee, and the representatives of several foreign Governments, further experiments were made on the Potomac. The results were astonishing, and showed the invention to be all that the inventor claimed for it.—The *Independent Journal*, New York."

The facts were that, as to (1), no patent was in existence at the date of the issue of the prospectus. A provisional specification had been granted on the 7th of December, 1888, to S. for his invention, and this had ripened into a patent on the 29th of June, 1889. As to (2) and (3) "the experimental firing" referred to had taken place in America some four years before the date of the prospectus, and in respect of a different patent. At one of these American trials the experiments had resulted in nothing but disaster, two guns having been destroyed by the projectile bursting in the bore, and the trials on the Potomac were only partially successful. At a subsequent trial in Wales, after the commencement of the action, it had been proved that dynamite shells could be fired out of a gun with ordinary service charges of powder without bursting the gun. The plaintiff having agreed to take shares on the faith of the statements in the prospectus, brought an action for rescission of his contract, on the ground of misrepresentation and concealment of facts.

Held, that the prospectus was not an honest, candid, and straightforward document, for it suggested that which was untrue, and was in the

highest degree misleading; and that, therefore, the plaintiff was entitled to the relief which he sought.—*Scott* v. *Snyder Dynamite Co.*, C.A.—67 L. T. 104.

15. *Misrepresentation — Action of deceit.*—Held, that a material statement in a prospectus of a company was false to the knowledge of the directors, who issued the prospectus, at the time it was made, that the plaintiff was thereby induced to take certain shares in the company, and that an action of deceit against the directors would accordingly lie.—*Knox* v. *Hayman*, C.A.—67 L. T. 137.

See also COMPANY, 44.

REDUCTION OF CAPITAL—

16. *Jurisdiction — Confirmation of reduction — Companies Act*, 1867 (30 & 31 *Vict.* c. 131), *ss.* 9, 11, 12—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict.* c. 63), *ss.* 1, 2, 32 (*sub-section* (2)), 33—*Order of the Lord Chancellor, March* 26, 1892.—The judge to whom the jurisdiction of the High Court in the winding up of companies has been assigned by the order of the Lord Chancellor of the 26th of March, 1892, has jurisdiction to confirm a reduction of the capital in the case of a company which may be wound up in the High Court under the Companies (Winding-up) Act, 1890. — *In re Ocean Queen Steamship Co.*, CH.D. WILL., J. 570—[1893] 2 Ch. 666; 68 L. T. 828.

17. *Payment of shares by appropriation of reserve fund—Companies Act*, 1867, *ss.* 9, 11, 13, 14, 25—*Companies Act*, 1877 (40 & 41 *Vict.* c. 26), *ss.* 3, 4.—A company set aside a reserve fund, and expended the greater part thereof in improving their property. On a further issue of shares the existing shareholders were credited with a number of shares as fully paid up equal in value to the amount of the reserve fund, which was carried to the capital account in the books of the company. On petition by the company for reduction of capital,

Held, that, as the proposed reduction of the capital of the company did or might involve the diminution of liability in respect of unpaid capital, the petition must stand over until creditors had been advertised for.—*In re Eastern and Australian Steamship Co.*, CH.D. NOR., J. 373—68 L. T. 321.

18. *Purchase by company of its own shares—Sale by company of assets for good consideration—Shares in excess of wants of company—Companies Act*, 1867 (30 & 31 *Vict.* c. 131), *s.* 9—*Companies Act*, 1877 (40 & 41 *Vict.* c. 26), *s.* 3.—A company was registered in 1889 to carry on the business of hotel proprietors, with a capital of £130,000, divided into 26,000 shares of £5 each. In 1891 the company took on lease the M. Hotel, and increased their capital by creating 5,000 new shares of £5 each. Debentures to the amount of £75,000 were issued, all of which were outstanding, and there were very few other creditors. Upwards of £23,000 was expended on the M. Hotel, and it was worked at a loss. The company agreed with B., who was one of the lessors of the M. Hotel, to hand over the possession of the M. Hotel to B., who should pay the rent and carry on the hotel. The directors undertook to obtain, and obtained, from the shareholders the necessary resolutions for reducing the capital of the company by writing off £23,710 of fully-paid ordinary shares held by B. and his associates, and undertook to obtain the sanction of the High Court of Justice in England to such reduction, whereupon such shares should be extinguished. B was to pay to the company, for stores and goodwill, 15,000 dols. The company had power, under its articles of association, to reduce its capital by cancelling capital.

Held, that this transaction was not a purchase by the company of its own shares, but was a sale by the company of some of its assets for less than their cash value, in consideration of a release from heavy burdens and of a surrender of shares.

Held, also, that the sanction of the court to the transaction was only necessary for the permanent extinguishment of the shares, and that the court had jurisdiction to, and would, sanction the transaction.

Trévor v. *Whitworth*, 36 W. R. 145, 12 App. Cas. 409, distinguished.—*In re Denver Hotel Co.*, C.A. 339—[1893] 1 Ch. 495; 62 L. J. Ch. 450; 68 L. T. 8.

SHARES—

19. *Fully-paid shares—Syndicate—Opening up of business—Issue of shares as fully paid up—Consideration—Registered contract—Companies Act*, 1862 (25 & 26 *Vict.* c. 89), *ss.* 8, 38 (4)—*Companies Act*, 1867 (30 & 31 *Vict.* c. 131), *s.* 25.—A company limited by shares registered under the Companies Act, 1862, has no power to issue shares as fully paid up for which no consideration is given. This is so, although the shares are issued under a contract filed in accordance with the provisions of section 25 of the Companies Act, 1867.

The company is not estopped by recitals in the agreement purporting that consideration has been given from showing that there was none.—*In re Eddystone Marine Insurance Co.*, C.A. 642.

20. *Fully-paid shares — Bonus shares—Issue of fully-paid shares to persons taking up debentures of company—Companies Act*, 1867 (30 & 31 *Vict.* c. 131), *s.* 25.—The directors of a company issued a circular to the shareholders, inviting applications for debentures of the company upon the terms that the company should issue to the persons taking the debentures, and paying the amount due thereon in full, two free and fully paid-up shares of £5 each in the company for each debenture of £10. In accordance with the terms of the circular, and in pursuance of an agreement made between the company and the debenture-holders, which had been previously filed with the Registrar of Joint-Stock Companies, the company allotted to each debenture-holder a number of fully paid-up shares. The company was ordered to be wound up, and the liquidator sought to put the holders of these bonus shares upon the list of contributories as holders of shares upon which nothing had been paid up.

Held, that the agreement to issue shares as fully paid up was *ultrâ vires* the company, and was void; and that, therefore, there was in fact no registered contract within the meaning of the Companies Act, 1867, s. 25.

Held, therefore, that the owners of the bonus shares were liable to pay up the full amount thereof in cash.—*In re Railway Time Tables Publishing Co.*, CH.D. KEK., J.—68 L. T. 649.

21. *Issued at a discount — Registered contract — Companies Act*, 1862, *ss.* 8, 38—*Companies Act*, 1867, *s.* 25.—A company incorporated with limited liability under the Companies Acts cannot issue its shares at a discount.

In re Almada and Tirito Co., 36 W. R. 593, 38 Ch. D. 415, approved.

Per Lord Herschell.—Though the company cannot exclude the liability of shareholders in a winding up to the extent unpaid on their shares for the benefit of creditors, the company may, where the memorandum of association permits, enter into any undertaking with those invited to become shareholders as to the terms on which the shares shall be taken, and as to the rights of the

respective shareholders *inter se.—Ooregum Gold Mining Co.* v. *Roper; Wallroth* v. *Roper*, H.L. (E.) 90—[1892] A. C. 125; 61 L. J. Ch. 337; 66 L. T. 427.

22. *Issued at a discount—Winding up—Contributory—Purchase by shareholder—Constructive notice.*—A company issued shares at a discount. In respect thereof a contract, in which the numbers of the shares were specified, was registered with the Registrar of Joint-Stock Companies. A shareholder subsequently purchased shares in the open market, and the company issued to him certificates, in which it was stated that the shares were fully paid up. The shares so purchased were part of the shares issued by the company at a discount. The shareholder was aware that the company had issued shares at a discount. He did not, however, search the register of joint-stock companies, and, in fact, had no notice that the shares purchased by him had been improperly issued. In the winding up of the company, it was sought to place him on the list of contributories in respect of the said shares.

Held, that the shareholder, in omitting to search the register, had not been guilty of gross or culpable negligence, and consequently that he ought not to be settled on the list.—*In re New Chile Gold Mining Co.*, CH.D. STI., J.—68 L. T. 15.

23. *Lien—Lien on member's shares for debt due to company—Waiver—Transfer—Articles of association.*—A lien conferred by articles of association on the shares of any member indebted to the company is valid, any transfer by such indebted member being thereby made dependent on the consent of the directors.

Bradford Banking Co. v. *Briggs*, 35 W. R. 521, 12 App. Cas. 29, approved.

Such a lien may be discharged by a new arrangement between creditor and debtor, the terms of which are incompatible with its retention. But the mere fact of the debtor agreeing to give his creditor authority to sell part of the subjects without notice, upon his making default, is not sufficient to warrant the inference that the creditor is not to realize the other parts of his security.

Where a shareholder indebted to a company applied for time, and gave such an authority with respect to certain shares other than those in question in this action,

Held, that no limitation of the lien in regard to the shares in the action was contemplated, and that a transfer of such shares by the indebted shareholder should not be registered.—*Bank of Africa* v. *Salsbury Gold Mining Co.*, P.C. 47—[1892] A. C. 281; 61 L. J. P. C. 34; 66 L. T. 237.

24. *Lien—Lien on members' shares for debt due to company—Payment of mortgage debt—Right of shareholder to require transfer of security to his nominee in lieu of reconveyance—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict.* c. 41), *ss.* 2, 15.—The articles of association of a company provided that the company should have a first and paramount lien upon the shares of each member for his debts to the company, and that, for the purpose of enforcing the lien, the directors might, on default in payment of a debt, sell the shares and execute a transfer of the shares sold to the purchaser.

Held, that this lien constituted a "charge" upon the shares within the meaning of section 2, sub-section 6, of the Conveyancing Act, 1881, for a debt due from the shareholder to the company, and that, consequently, section 15 applied, and entitled the shareholder to require the company, on payment of the sum due, to assign the debt and their lien on the shares to his nominee.

The shareholder undertaking, on four days' notice by the company, to pay to them the sum due from him upon their transferring their lien to his nominee, an injunction was granted restraining the company, until the trial of the action or further order, from selling or transferring the shares.—*Everitt* v. *Automatic Weighing Machine Co.*, CH.D. NOR., J.—[1892] 3 Ch. 506; 62 L. J. Ch. 241.

25. *Transfer — Refusal to register — Certificate issued under forged transfer—Warranty—Estoppel—Measure of damages—Jurisdiction to order inquiry as to damages under the Companies Act*, 1862 (25 & 26 *Vict.* c. 89), *s.* 35.—On the 6th of April, 1892, G. bought shares in a company, and received from the vendor a transfer and a certificate under the seal of the company signed by two directors and the secretary, certifying that the vendor was the proprietor of the shares. On the same day G. sent the transfer executed by himself, and accompanied by the certificate, to the company's office for registration. The company's clerk refused to accept the documents, saying that he had orders not to do so. G. and his solicitor again tendered the transfer and certificate, which the company's solicitor took, but stated that the company did not undertake to register G. as the owner of the shares. It appeared that the former secretary of the company had made fraudulent transfers, and had, by means of fraud, induced two of the directors to affix the seal of the company to the certificate in question, and that, in consequence of the discovery of the fraud on the 5th of April, the registration of G. had been refused. At a board meeting on the 13th of April, 1892, the consideration of the transfer was ordered to stand for further consideration, and the transfer and certificate were returned to G. On the 31st of May, 1892, G. moved, under section 35 of the Companies Act, 1862, that the register of members of the company might be rectified by inserting his name as the holder of the shares, and that the company might be ordered to pay him the damages occasioned by their refusal to register him as such holder. Between the 6th and the 13th of April the shares went down in value.

Stirling, J., made no order as to rectification, but directed an inquiry as to damages. The chief clerk certified that the amount of damages was the amount G. had paid for the shares on the 6th of April. The company moved to vary the certificate by decreasing the amount to the value of the shares on the 13th of April. Stirling, J., held that the company had refused the transfer on the 6th of April, and that the chief clerk was right in his assessment of the damages. The company appealed.

On the hearing of the appeal the court doubted whether Stirling, J., had jurisdiction to direct an inquiry as to damages under section 35 of the Companies Act, 1862, where there was no order for rectification, but, with the consent of the parties, agreed to treat the case as within that section.

Held, that the cause of action was not the representation contained in the certificate, but the refusal of the company to register, and that the date of such refusal was the 6th of April.

In re Bahia and San Francisco Railway Co., 16 W. R. 862, L. R. 3 Q. B. 584, considered.—*In re Otto's Kopje Diamond Mines (Limited)*, C.A. 259—[1893] 1 Ch. 618; 62 L. J. Ch. 166; 68 L. T. 133.

25a. *Underwriting agreement—Agreement to take shares not taken by public—Right to notice of amount of liability.*—A. signed an agreement with L., an agent employed by the promoters of a company to

arrange for the issue of its capital, that A. would subscribe, or find responsible subscribers, for 200 ordinary shares on the terms of the company's prospectus, and apply for the said shares on the first day when the list opened. The agreement contained provisions that if the whole issue of shares was *bonâ fide* subscribed for by the public, A.'s responsibility was to cease, and no allotment to be made to him; and that if the public should not subscribe the full amount of the issue, but should *bonâ fide* subscribe any smaller amount, A.'s undertaking was to stand for the number of shares constituting his *pro ratâ* contribution with the other underwriters to make up the difference between the amount subscribed by the public and the amount underwritten; and that the agreement should be irrevocable on A.'s part, and sufficient in itself to authorize L., in the event of A.'s not applying for shares as above mentioned to apply for such shares in his name and on his behalf. A. made no application for shares. The public applied only for a small part of the capital underwritten. After the list was closed L. applied in A.'s name for 164 shares, and the company allotted them to A., sending him notice that they were allotted in pursuance of his underwriting agreement. A. brought an action to have his name removed from the register on the ground that he had only agreed to take a proportion of the shares which the public had not applied for, and had had no notice how many the public had applied for, and no opportunity of exercising his option to subscribe himself or find other subscribers.

Held, that A.'s obligation under the contract was to apply for shares the first day the list opened, and that, therefore, no such notice was necessary to enable him to discharge it or to exercise his option, and the shares had been rightly allotted to him.—*Shaw* v. *Bentley & Co. and the Yorkshire Breweries* (*Limited*), CH.D. NOR., J.—68 L. T. 812.

WINDING UP—

26. *Calls—Debentures charging uncalled capital—Debenture-holder's action—Official receiver—Duty to make call—Companies Act*, 1862, *ss.* 92, 95, 98, 102—*Companies* (*Winding-up*) *Act*, 1890, *ss.* 12, 13—*Companies Winding-up Rules*, 1890, *r.* 92.—When an order has been made for the winding up of a company by the court, the power of the company and its directors to make calls is *ipso facto* at an end, and the only power to make calls is in the liquidator in the winding up. Consequently, an application after the winding up, asking that a company, by the official receiver, should make a call on shareholders for the amount unpaid on their shares, and that a receiver appointed in a debenture-holder's action should get in the amounts due on the shares, must be intituled in the winding up, as well as in the debenture-holder's action.—*Fowler* v. *Broad's Patent Night Light Co.*, CH.D. WILL., J. 247—[1893] 1 Ch. 724; 62 L. J. Ch. 373; 68 L. T. 576.

27. *Calls—Debenture—Equitable assignment—Calls prior and subsequent to winding up—Set-off—Companies Act*, 1862, *s.* 75.—T., who was the registered holder of debentures in a company, in March, 1890, deposited some of them with a bank to secure a debt, and executed a memorandum of deposit and a blank transfer, but no notice was given to the company. These debentures were exchanged for others subsequently issued by the company, and the new debentures were deposited with the bank by T. on the 3rd of September, 1890, who did not execute any fresh memorandum or transfer. None of the new debentures were payable before the 31st of December, 1890.

T. was also holder of ordinary shares in the company, which were not fully paid up, and on the 3rd of November, 1890, a call was made upon the ordinary shares, payable on the 20th of November, 1890, at the bank, who were also the company's bankers. On the 4th of November, 1890, notice of the call was given to the bank, who were authorized to retain the proceeds of the call in payment of an overdraft. On the 6th of November, 1890, the bank gave the company notice of the deposit of T.'s debentures. The bank on the 12th of November, 1890, commenced an action on behalf of the debenture-holders against the company, and on the 19th of November the company went into voluntary liquidation. In the action sufficient assets of the company had been realized to pay the debentures in full, and in the winding up calls had been made on T.'s shares which had not been paid.

Held, that, in respect of the call made on the 3rd of November, 1890, the company were entitled to set off the amount of such call against what was due on the debentures; but that, in respect of the calls made in the winding up, they were not entitled to do so. The liability to pay calls did not, under section 75 of the Companies Act, 1862, become a debt due until the winding up commenced, and therefore the case was governed by *Watson* v. *Mid-Wales Railway Co.*, 15 W. R. 1107, L. R. 2 C. P. 593.—*Christie* v. *Taunton, Delmard, Lane, & Co.*, CH.D. STI., J. 475—[1893] 2 Ch. 175; 62 L. J. Ch. 385; 68 L. T. 638.

28. *Costs—Liquidator—Priority—Voluntary winding up—Supervision order—Costs of liquidator and petitioning creditor—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 110, 114.—Where, on the petition of a creditor, an order is made continuing the voluntary winding up of a company under the supervision of the court, the costs of the liquidator incurred previously to the order are payable in priority to the petitioner's costs of obtaining the order; but those costs are payable in priority to the costs of the liquidator incurred subsequently to the order.—*In re New York Exchange Co.*, CH.D. KEK., J.—[1893] 1 Ch. 371; 68 L. T. 247.

29. *County court—Jurisdiction—Title to property—Stranger—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 98—*Companies* (*Winding-up*) *Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 1.—Before the date of presentation of a petition in a county court for the winding up of a company, under the Companies (Winding-up) Act, 1890, s. 1, sub-section 3, the manager of the company transferred certain wine to a stranger. The judge of the county court made an order for the delivery up of the wine to the liquidator, on the ground that, the manager having acted *ultrà vires*, the transfer was void.

Held, that the county court judge had no jurisdiction to decide a question as to the title of property which arose before the date of the winding up between the company and a stranger, and that the order was therefore bad.—*In re Ilkley Hotel Co.*, Q.B.D. 639—[1893] 1 Q. B. 248; 62 L. J. Q. B. 333; 68 L. T. 164.

30. *Debenture-holders' action—Receiver of debenture-holders—Rights of debenture-holders as mortgagees — Liquidator.* — Debenture-holders whose interest was in arrear, and whose debentures constituted a charge on all the property, present and future, of the company, brought an action for foreclosure or sale, and obtained an order for the appointment of a receiver, with liberty to proceed with their action, notwithstanding the winding up of the company, against whom a creditor's winding-

up petition had previously been presented. A winding-up order was subsequently made, and the debenture-holders' action was transferred to the judge having jurisdiction in the winding up. The amount due on the debentures largely exceeded the assets of the company, and there was no uncalled capital. No evidence had been adduced to impeach the validity of the debentures.

Held, on these facts, that the debenture-holders, as mortgagees, were entitled to have their own receiver, and that, as creditors outside the winding up, their rights ought not to be interfered with by the winding-up proceedings; and, accordingly, that an order made on the application of the liquidator, discharging the debenture-holders' receiver, was wrong, and should be discharged.—*Strong* v. *Carlyle Press (Limited)*, C.A. 404—[1893] 1 Ch. 268; 62 L. J. Ch. 541; 68 L. T. 396.

31. *Debentures covering whole of assets including uncalled capital—Petition to wind up by outside creditor—Discretion of court—Companies Act*, 1862, *s.* 91.—Where debentures have been issued by a company covering the whole of its assets including its uncalled capital, and there are insufficient assets to meet the claims of the debenture-holders, the court will refuse to make a winding-up order upon the petition of an outside creditor.

Observations on the unsatisfactory nature of debenture-holders' actions as a means of liquidation.—*In re Edgbaston Brewery Co.*, CH.D. WILL., J. —68 L. T. 341.

32. *Directors—Concealed profits—Gift by promoter and vendor—Extent of liability—Knowledge and acquiescence of shareholders—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.—Where the vendor to and promoter of a company agreed to give A., B., C., and D. a share of his profits as such vendor if they would become directors of the company, and A., B., C., and D., having consented and having become directors, took transfers accordingly from the vendor of shares in the company allotted to him in part payment of his purchase-money, although there were still matters open between him and the company at the time,

Held, on an application to make the directors liable for misfeasance under section 10 of the Companies (Winding-up) Act, 1890, that, a prospectus having been issued inviting the public to subscribe for shares, in respect of any shares so transferred by way of gift to the directors, as to which there had been concealment of the fact from the public, the directors were liable, and that the fact of knowledge of the transaction on the part of all the actual members of the company made no difference.

Held, also, that, these directors having paid full value for similar shares subscribed for by them, that raised as against them, in the case of the shares given to them, a presumption that these shares were of value.—*In re Postage Stamp Automatic Delivery Co.*, CH.D. WILL., J. 28—[1892] 3 Ch. 566; 61 L. J. Ch. 597; 67 L. T. 88.

33. *Directors—Misfeasance or breach of trust—Liability of directors*—Ultrà vires—*Negligence—Form of summons—Evidence required from applicant—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.—A summons in the voluntary winding up of a company under section 10 of the Companies Winding-up) Act, 1890, directed the respondents to attend on the hearing of an application by the liquidator for a declaration that all persons, being directors of the company, who in any manner authorized, sanctioned, or participated in the two payments to G. out of the company's money therein specified, were jointly and severally liable to repay to the liquidator the amount so paid, with interest at five per cent.

The grounds of the liquidator's application not being sufficiently defined thereby, this form of summons is not correct. A summons like this, with the affidavits in support, should show the nature of any misfeasance thereby charged.

In order to make directors liable under the section for negligence, the court must be satisfied that they did not really exercise their judgment and discretion as agents of the company in the transaction complained of.

The directors of a financial company having, in exercise of their powers, resolved to lend money of the company to A. against his promissory note and a deposit of shares by him, the resolution was immediately acted upon by handing over a cheque to the solicitor of the company.

Held, that this was not in itself an act of misfeasance.—*In re New Mashonaland Exploration Co.*, CH.D. WILL., J. 75—[1892] 3 Ch. 577; 61 L. J. Ch. 617; 67 L. T. 90.

34. *Directors—Qualifying shares—No allotment.*—The articles of association of a joint-stock company provided that the qualification of a director should be the holding of fifty shares. A. was elected and acted as a director, but no shares were ever allotted to him by the company, nor did he apply for any, nor did he obtain shares from any other source.

Held, that there ought to be inferred an agreement between A. and the company that A. should serve as director on the terms specified in the articles, including a contract to take his qualifying shares, within a reasonable time, from the company itself if not obtained from any other source, and that A. must accordingly be fixed on the list of contributories under the Companies Act, 1862, s. 23.—*In re Bread Supply Association, Konrath's case*, CH.D. KEK., J.—62 L. J. Ch. 376; 68 L. T. 434.

See also COMPANY, 9.

35. *Examination—Official receiver—Report—Suggestion of fraud—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 8, *sub-sections* (1), (2), (3). —To obtain an order under section 8, sub-section (3), of the Companies (Winding-up) Act, 1890, the official receiver need not state in his further report in terms that, in his opinion, fraud has been committed by persons in the promotion or formation of the company, but it is sufficient if the facts mentioned in the report (*a*) suggest fraud by some person or persons who have taken part in the formation, or been directors, of the company, and (*b*) that the persons to be examined come within the category of a person who has taken part in the promotion or formation of the company, or has been a director or officer of the company.

The object of section 8, sub-section (3), in such a case is to find out whether such fraud as the facts suggest has or has not been committed.

In re Trust and Investment Corporation of South Africa and *In re Bertram Luipaards Vlei Gold Mining Co.*, 40 W. R. 689, discussed.—*In re Laxon & Co.*, CH.D. WILL., J. 62—[1893] 1 Ch. 210; 62 L. J. Ch. 206; 67 L. T. 654.

36. *Examination — Practice — Discovery—Production of documents—Examination of witness—Depositions—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 115.—The liquidator of a joint-stock company, which had been ordered to be wound up, commenced an action in the name of the company to set aside a contract for the purchase of lands. The liquidator then obtained an order under section 115 of the Companies Act, 1862, for the examination of certain persons. Subsequently to their examina-

tions being taken, a commission was issued in the action to take evidence abroad, and one of the witnesses who had been examined under section 115 was examined under the commission on behalf of the defendants, and, upon his cross-examination, certain of his answers were read to him from the depositions taken under section 115, and he was asked whether the statements therein contained were correct, and he said that they were. Certain questions were also put to him from the depositions with regard to the answers given by other witnesses. The defendants applied for inspection of those parts of the depositions which had been referred to on the cross-examination.

Held (affirming the decision of Kekewich, J.), that the defendants were not entitled to the inspection claimed.—*North Australian Territory Co.* v. *Goldsborough, Mort, & Co.*, C.A. 501—[1893] 2 Ch. 381; 62 L. J. Ch. 603; 69 L. T. 4.

37. *Foreign company—Branch office in England—Voluntary liquidation abroad—Compulsory winding up in England—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63).—A colonial company, having a branch office in England, was being wound up voluntarily in the colony, subject to the supervision of the court. Upon a creditor's petition for a compulsory winding up in England, it was arranged between the petitioner and the company that the English manager should be appointed attorney of the colonial liquidator, and that the petition should stand over generally, upon the undertaking of the company not to remove the English assets without the leave of the court, and to give notice to the petitioner of any action which might be thereafter commenced against the company.

Vaughan Williams, J., refused to sanction this arrangement, and made a compulsory order, on the ground that this course was for the interest of all parties, but limited the powers of the official receiver to the collection of the English assets, and the settling the English list of creditors, and intimated that some limitation ought to be placed on his remuneration.

Held, on appeal, that, the question being one of convenience, the court would not interfere with the discretion so exercised.—*In re Federal Bank of Australia*, C.A.—62 L. J. Ch. 561; 68 L. T. 728.

37a. *Fraudulent preference—Amount unpaid on shares—Arrears of directors' fees—Set-off—Mutual credits—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 164—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 38, 48.—Section 164 of the Companies Act, 1862, which enacts that that shall be a fraudulent preference in the case of a company which would be a fraudulent preference in the case of an individual trader, cannot be construed as having imported into it section 38 of the Bankruptcy Act, 1883, so as to prevent, by allowing mutual credits, any transaction from being a fraudulent preference which would otherwise be so.

Decision of Vaughan Williams, J. (that no fraudulent preference was established), reversed.—*In re Washington Diamond Mining Co.*, C.A. 681.

38. *Liquidator—Voluntary liquidation—Removal—Retirement—Motion—Appointment of new liquidator—Jurisdiction—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 141.—The court has jurisdiction under section 141 of the Companies Act, 1862, to appoint a new liquidator of a company in voluntary liquidation not only on the removal but also on the retirement of an existing liquidator.—*In re Sheppey Portland Cement Co.*, CH.D. KEK., J.—68 L. T. 83.

39. *Mutual credits — Life insurance company — Action for money lent—Release—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 38—*Joint-Stock Companies Arrangement Act*, 1870 (33 & 34 *Vict. c.* 104), *s.* 2.—In August, 1887, a petition was presented for the winding up of the plaintiff company. In May, 1888, two policies held by the defendant in the plaintiff company matured, and the amount insured thereby became payable by the plaintiff company to the defendant. These policies had been previously assigned by the defendant to the plaintiff company as security for loans to him, which loans had not been repaid. In July, 1889, a winding-up order was made, and in April, 1890, a deed of arrangement was entered into, under the Joint-Stock Companies Act, 1870, between the plaintiff company and the Sun Life Assurance Co., whereby it was provided that the policies of the plaintiff company should be transferred to the Sun Co., and that the holders of policies in the plaintiff company should, in full satisfaction of all claims upon the plaintiffs, accept certain reduced payments from the Sun Co. This deed of arrangement was agreed to by a statutory majority of policy-holders; but the defendant, whose policies had matured before the date of the deed of arrangement, did not assent to it. The plaintiff company, by its liquidator, in December, 1890, sued the defendant for the sums lent to him.

Held (affirming the decision of Charles, J., 40 W. R. 443), that the defendant was entitled, by way of defence to the action, to set off the amount due on his policies against the debt owing by him to the company; that the defendant did not belong to the class of creditors who agreed to the deed of arrangement, and that he was not bound by it, and that, therefore, it did not operate as a release of his claim against the company.

Ex parte Price, In re Lankester, 23 W. R. 844, L. R. 10 Ch. App. 648, distinguished.—*Sovereign Life Assurance Co.* v. *Dodd*, C.A. 4—[1892] 2 Q. B. 573; 62 L. J. Q. B. 19; 67 L. T. 396.

40. *Petition—Petition for compulsory winding up—Supervision order—Readvertisement of petition—Wishes of creditors—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63).—Since the Companies (Winding-up) Act, 1890, the making of a supervision order on a petition for a compulsory order, where the petitioners and the creditors and contributories are all, so far as is known, desirous of a supervision order, is not so much a matter of course as it was before the Act.

Where two petitions as presented and advertised prayed for the compulsory winding up of an important banking company, but a supervision order only was asked for at the hearing,

Held, that the petitions must stand over for the issue of fresh advertisements stating that at the hearing a supervision order would be asked for.—*In re New Oriental Bank Corporation*, CH.D. WILL., J. 16—[1892] 3 Ch. 563; 62 L. J. Ch. 63; 67 L. T. 87.

41. *Petition—Shareholder's petition for compulsory winding up—Subsequent resolution for voluntary winding up—Preponderating influence of one shareholder.*—Where, after the presentation of a shareholders' petition for the winding up of a company by the court, a special resolution is passed for voluntary winding up, the court will inquire into the composition of the majority voting for the voluntary winding up, and if it is found that there are matters requiring investigation, and that the resolution was passed by the preponderating influence of one shareholder, a compulsory order will be made.

In re West Surrey Tanning Co., 14 W. R 1009,

L. R. 2 Eq. 737, followed.—*In re The Varieties*, CH.D. WILL., J. 296—[1893] 2 Ch. 235; 62 L. J. Ch. 526; 68 L. T. 214.

42. *Petition—Fully paid-up shareholder—Grounds for winding up*—Ultrà vires—*Issue of shares at a discount—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 79, *sub-section* (5).—A fully paid-up shareholder presented a petition to wind up the above-named company, alleging that a number of the shares had been issued at a discount, and that the petitioner and the other shareholders had been prejudiced thereby; that the company was insolvent, but that the assets were of considerable value, and, if prudently realized, would be sufficient, not only to pay and satisfy the company's debts and liabilities, but to pay a substantial dividend to the members; and that, under the circumstances, it was "just and equitable" that the company should be wound up.

Held, that the fact that a winding up would result in a surplus for the shareholders, if those who had obtained shares at a discount were made to pay up the difference between what they had actually paid and the nominal amount of their shares, did not give the petitioner the right to a winding-up order, and that the petition must, therefore, be dismissed.

The distinction drawn by Lord Herschell in *Ooregum Gold Mining Co. of India* v. *Roper*, 41 W. R. 90, [1892] A. C. 125, was not between a company as a going concern and a company in liquidation, but between the rights of the company and the rights of the creditors of the company.—*In re Pioneers of Mashonaland Syndicate*, CH.D. WILL., J. 492—[1893] 1 Ch. 731; 62 L. J. Ch. 507; 68 L. T. 163.

43. *Proceedings against company — Secured creditor—Debt—Scotch process—Pending action—Attachment of assets of company in Scotland—Arrestment on the dependence — Arrestment* jurisdictionis fundandæ causa—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 87, 151.—Alleged creditors of an English company, which was being wound up subject to supervision, took proceedings against the company in the Scotch courts prior to the liquidation, which proceedings had, according to Scotch law, put them in the position of secured creditors, subject only to their obtaining a decree in Scotch courts establishing their debt.

Held, that in these circumstances, the creditors not being able to enforce their security in the winding up, the proceedings in the Scotch court ought to be allowed to continue.—*In re West Cumberland Steel and Iron Co.* (*Limited*), CH.D. WILL., J. 265—[1893] 1 Ch. 713; 62 L. J. Ch. 367; 68 L. T. 751.

44. *Prospectus—Misrepresentation—Repudiation of shares*—Laches.—In February, 1889, A. was induced in consequence of statements contained in the prospectus of a company to take certain shares therein. In July, 1889, he received from B., a shareholder, a circular stating that he had commenced an action against the company for a return of the money paid by him for his shares on the ground of misrepresentations contained in the prospectus. A. thereupon informed his friend C., who was a director of the company, that he intended to pay nothing further in respect of his shares until he had ascertained the result of B.'s action. A. did not, however, give any formal notice of this intention to the company. On the 19th of February, 1892, judgment was given in B.'s action in favour of B. On the 17th of March, 1892, the directors gave notice by a circular issued to all the shareholders that an extraordinary general meeting of the company would be held on the 25th of March, 1892, for the purpose of considering a resolution for a voluntary winding up. On the 21st of March, 1892, A. took out an originating summons asking that the register of shareholders might be rectified by removing his name therefrom in respect of the shares held by him, and for repayment of the amount paid by him on account of such shares. On the 25th of March, 1892, the meeting summoned by the notice of the 17th of March was held, at which a resolution for the voluntary winding up of the company was passed and a liquidator was appointed.

Held, that A. was not entitled to await the result of B.'s action before repudiating his shares, but that, even if he were so entitled, it was clearly his duty to take very prompt steps after learning the result; that the delay between the 19th of February and the 21st of March was too long; and that consequently his application failed.—*Snyder Dynamic Projectile Co., In re Skelton's case*, CH.D. STI., J.—68 L. T. 210.

See also COMPANY, 14, 15.

45. *Purchase by company of its own shares—Extinguishment—Contributories.*—Reduction of capital is a necessary consequence of a statutory power enabling a company to invest its assets in the purchase of its own shares. Shares so purchased are, by the purchase, *ipso facto* extinguished; and, in a winding up of the company, neither can the company be put on the list of its own contributories, nor can any call be made upon the other shareholders in respect of such shares.—*In re Sovereign Life Assurance Co.*, C.A. 1—[1892] 3 Ch. 279; 62 L. J. Ch. 36.

46. *Sale of business to another company—"Reorganization or reconstruction" of a company—Meaning of words—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 161.—Certain debentures were issued by the W. Co., securing payment of principal in 1896, and containing covenants respectively to pay the same in accordance with the conditions indorsed thereon; and in each case condition (1) was that the defendant company might, after one year from the date thereof, redeem the debenture by giving three months' notice and paying to the holder £105 for every £100 capital secured, with interest up to the date of payment; and condition (4) was that, "if the company commenced to be wound up otherwise than for the purposes of reorganization or reconstruction," the principal should become immediately payable. In 1892 the W. Co. proceeded to wind itself up for the purpose of carrying out an agreement for its amalgamation with the N. Co., an existing company on a larger scale.

Held, that the principal secured by the debentures became payable when the resolution for winding up took effect under the 4th condition, and that the W. Co. were, therefore, entitled to pay off the debentures at par, with interest only up to the date of the commencement of the liquidation.

The meaning of the expressions "reconstruction" and "reorganization" of a company, considered.—*Hooper* v. *Western Counties and South Wales Telephone Co.*, CH.D. CHI., J. 84—68 L. T. 591.

47. *Transfer of liquidation proceedings—Jurisdiction—Court without bankruptcy jurisdiction—Building society — City of London Court — Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 1, *sub-section* (5); *s.* 3, *sub-section* (1)—*Order of Lord Chancellor of the 29th of November*, 1890—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 96.—There is no jurisdiction to order the transfer of the

winding-up proceedings of a limited company which is being wound up under the Companies (Winding-up) Act, 1890, to the City of London Court, the last-mentioned court being excluded from having jurisdiction to wind up under the Companies (Winding-up) Act, 1890.—*In re Real Estates Co.*, CH.D. WILL., J. 157—[1893] 1 Ch. 398; 62 L. J. Ch. 213; 68 L. T. 24.

48. *Unlimited liability—Reduction of capital—Memorandum and articles—Clause in articles giving right of withdrawal.*—An unlimited company was incorporated under the Companies Acts, 1862 to 1880, with the object (as stated in the memorandum) of, among other things, lending money to its members. The articles provided that the capital of the company should not be of any fixed nominal amount, that every person should be deemed to be a member who became possessed of a share, and that any member desirous of withdrawing before his share or shares were fully paid should give notice to the company, and, if the committee allowed his withdrawal, he might, on payment of all moneys due to the company, receive back his subscription according to a scale. The company went into voluntary liquidation, and the liquidator took out a summons to have members withdrawing in accordance with the memorandum and articles of the company declared liable for calls on shares they had held.

Held, that, according to the observations of Lord Herschell in *Trevor* v. *Whitworth*, 36 W. R. 145, 12 App. Cas. 409, there was a distinction between a limited and an unlimited company with respect to the validity of a clause of withdrawal like the above, and that persons who had withdrawn from membership in pursuance of such clause were under no liability in the winding up.—*In re Borough Commercial and Building Society*, CH.D. WILL., J. 313—[1893] 2 Ch. 242; 62 L. J. Ch. 456.

49. *Voting—Extraordinary resolution—Proxies—Companies Act*, 1862, *ss.* 51, 129; *Schedule I., Table A, clauses* 42, 43, 48, 51.—Where a company is governed by articles which provide that "votes may be given either personally or by proxy," proxies may be counted in ascertaining the three-fourths majority required for the passing an extraordinary resolution by section 51 of the Companies Act, 1862.

The Caloric Engine, &c., Co., 52 L. T. N. S. 846, questioned.—*In re Bidwell Brothers (Limited)*, CH.D. WILL., J. 363—[1893] 1 Ch. 603; 62 L. J. Ch. 549; 68 L. T. 342.

CONFLICT of LAWS:—

Foreign judgment—Action on—Defendant not resident or domiciled in foreign country—No appearance by defendant or submission to jurisdiction—Judgment by default in foreign country—Right of plaintiffs to sue in this country on judgment.—An action was brought in this country upon a judgment obtained by the plaintiffs against the defendants in a New Zealand (N. Z.) court. The defendants had by letter authorized one O. in N. Z. to accept bills against documents with a view to shipments of wool being made by O. from N. Z. to the defendants in England. This letter was shown to the plaintiffs, who in consequence discounted bills for the defendants, but a subsequent letter by the defendants to O., limiting his credit, was not shown to the plaintiffs. O., in fraud of his instructions, took bills to the plaintiffs, who discounted the same, and, as the defendants refused to accept these bills, the plaintiffs brought an action in the N. Z. court and recovered judgment. The writ and statement of claim in this action were served upon the defendants in England, but they did not appear, and judgment was given against them in default of appearance. The defendants were not natives of N. Z., and were not resident or domiciled there.

Held (by Wright, J.), that, as there was no appearance, and no submission by the defendants to the jurisdiction of the N. Z. court, and as they were not resident or domiciled in that country, the judgment of the N. Z. court was wholly without jurisdiction, and could not be sued upon in this country.—*Turnbull* v. *Walker*, Q.B.D—67 L. T. 767.

CONSPIRACY:—

Trade union—Procuring breach of contract—Contract in way of trade—Intention to injure plaintiff—Malice—Combination to induce persons not to contract with plaintiff—Damage.—The plaintiff, who was a mason and builder, refused to conform to certain rules laid down by three trade unions connected with the building trade. The defendants, who were members of a joint committee of the three trade unions, with the intention of injuring the plaintiff, and so forcing him to conform to the said rules, induced and procured certain persons, who had, as the defendants knew, entered into contracts with him in the way of trade, to break those contracts, in consequence whereof the plaintiff sustained damage. The defendants also, with the like intention, conspired to induce, and did induce, certain persons not to enter into contracts with the plaintiff, in consequence whereof the plaintiff's business fell off.

Held, that the plaintiff was entitled to maintain an action against the defendants, both for the procuring breaches of contract and also for the conspiracy to induce persons not to enter into contracts with the plaintiff.—*Temperton* v. *Russell* (*No.* 2), C.A. 565—[1893] 1 Q. B. 715; 62 L. J. Q. B. 412.

See also CONTRACT, 2.

CONTAGIOUS DISEASES (ANIMALS) ACTS:—

Dairies Order, 1886—*Cowsheds—Regulations—Removal of manure—Local authority—Contagious Diseases Animals Acts*, 1878, 1886.—Regulations made by a local authority under the Contagious Diseases (Animals) Acts, 1878, 1886, and the Dairies, &c., Order of July, 1886, do not require for their validity confirmation by the Local Government Board.

A regulation prescribing the removal of manure from cowsheds at intervals not exceeding seven days, held, to be authorized by the Acts and order. —*Lord Mayor, &c., of Dublin* v. *Menton*, EX.D. (Ir.) —30 L. R. Ir. 451.

CONTEMPT of COURT:—

1. *Election petition—Intimidation—Priest and congregation.*—The court will punish, as an interference with the course of justice and of a fair trial, the use of language calculated to affect the minds of persons who might otherwise be willing to give evidence in a pending cause, or to deter them from coming forward as witnesses. The fact that such language was used by a priest at the altar to his congregation does not thereby confer any privilege, or mitigate the contempt.—*Dalton* v. *Fulham*, Q.B.D. (Ir.)—30 L. R. Ir. 659.

2. *Nature of the offence—Obstruction to public justice—Power of Crown to remit sentence.*—Where a letter published in a colonial newspaper contained criticisms on the conduct of the chief justice of the colony, of such a nature that it might have been made the subject of proceedings for libel, but was not in the circumstances calculated to obstruct or interfere with the course of justice or the due administration of the law:

Held, that the same did not constitute a contempt of court.

It appearing that the editor had, on notice from the court, refused to discover the name of the writer, and had thereupon been sentenced to fine and imprisonment during pleasure for the publication, and to fine or imprisonment for the refusal, but had been released by order of the governor,

Held, (1) that the chief justice had no legal authority to require either the name of the writer or the manuscript of the letter; (2) that the governor had under his commission power in the circumstances to remit the sentence. There may not be imported into a case of this kind any matter which was not in evidence against the defendant, nor will their lordships permit any such matter to be laid before them.—*In re a Special Reference from the Bahama Islands*, P.C.—[1893] A. C. 138; 68 L. T. 105.

See also BILL OF EXCHANGE, 2; LANDED ESTATES COURT (IRELAND), 3; PRACTICE, 8, 9, 10; SOLICITOR, 21.

CONTRACT:—

1. *Advertisement — Reward — Consideration — Acceptance—Notification of acceptance—Wagering—Insurance against disease*—8 & 9 *Vict. c.* 109—14 *Geo.* 3, *c.* 48, *s.* 2.—The defendants, who were the proprietors and vendors of a medical preparation called "The Carbolic Smoke Ball," in November, 1891, published the following advertisement:—"£100 reward will be paid by" the defendants "to any person who contracts the increasing epidemic, influenza, after having used the ball three times daily for two weeks" in a certain specified manner; "£1,000 is deposited with the A. Bank, showing our" (the defendants') "sincerity in the matter." The plaintiff, on the faith of this advertisement, purchased from a chemist one of the defendants' smoke balls, and used it three times a day from the 20th of November, 1891, to the 17th of January, 1892, when she contracted influenza.

Held, that the advertisement was not a mere puff, but an offer to contract intended to be acted upon; that, by the performance of the conditions therein contained, the offer had been accepted by the plaintiff, and a contract thereby constituted between the plaintiff and the defendants; that, having regard to the character of the transaction, no notification of acceptance of the offer was necessary; that there was consideration moving from the plaintiff; and, consequently, that a binding contract by the defendants to pay the plaintiff £100 in the event which happened had been constituted.

Held, also, that such contract was neither a contract by way of wagering within 8 & 9 Vict. c. 109, nor a policy of insurance within 14 Geo. 3, c. 48, s. 2, and that the plaintiff was entitled to recover.

Decision of Hawkins, J. ([1892] 2 Q. B. 484), affirmed.—*Carlill* v. *Carbolic Smoke Ball Co.*, C.A. 210—[1893] 1 Q. B. 256; 62 L. J. Q. B. 257; 67 L. T. 837.

2. *Illegality—Agreement to make a market for shares—Illegality not pleaded—Criminal conspiracy—In pari delicto potior est conditio possidentis—Judicial notice.*—In these consolidated actions the plaintiffs sought to recover from the defendants, who were stockbrokers, the price paid by the plaintiffs for shares in a new company, upon the ground (amongst others) that the defendants had transferred to the plaintiffs the defendants' own shares, instead of purchasing them in the market in the usual way. Wright, J., before whom both actions were tried, nonsuited the plaintiffs in both actions, upon the ground that there was no evidence to go to the jury. The plaintiffs applied for a new trial, and in the course of the hearing the Court of Appeal took judicial notice of the fact that the correspondence and telegrams between the parties disclosed the nature of the transaction, which was an agreement between the plaintiffs and defendants to induce would-be buyers of shares in the company, contrary to the fact, to believe that there was a market for the shares, and that the shares were of greater value than they really were.

Held, that the transaction was illegal, and might be made the subject of an indictment for conspiracy, and that, although the illegality of the contract was not pleaded, the plaintiffs were not entitled to relief.—*Scott* v. *Brown, Doering, M'Nab, & Co.; Slaughter* v. *The Same*, C.A. 116—[1892] 2 Q. B. 724; 61 L. J. Q. B. 738; 67 L. T. 782.

3. *Validity—Arbitration clause—Award not to be impeached for fraud—Public policy.*—A contract provided that an arbitrator's certificates, orders, or awards should not be impeached for fraud.

Held, in the absence of fraud of the contracting parties, a valid contract, and not void as against public policy.

Printing and Numerical Registering Co. v. *Sampson*, 23 W. R. 463, L. R. 19 Eq. 462, approved.—*Tullis* v. *Jacson*, CH.D. CHL., J. 11—[1892] 3 Ch. 441; 61 L. J. Ch. 655.

See also CONSPIRACY; INFANT, 2, 3; LUNATIC, 2.

COPYHOLD:—

1. *Common—Common appurtenant—Grant in fee to third person of part of tenant's occupation—"Together with all commons belonging."*—By a deed dated in 1859 the lord of the manor of B. granted to M. in fee simple "all that piece or parcel of land situate at B., containing fifty-three acres, now or late in the occupation of S. as tenant thereof, together with all ways, waters, watercourses, trees, woods, underwoods, hedges, ditches, commons, and all other rights, members, and appurtenances whatsoever to the said piece or parcel of land and hereditaments, or any part thereof, belonging." The parcel of land was a portion of a large farm held by S. under a lease dated in 1856, and which was unexpired. Under a succession of leases from 1809, S. and those who had held the farm before him, and the lord of the manor, had enjoyed rights of common of pasture and of estovers in respect of the whole farm over all the wastes of the manor. M. arranged with S. that the latter should give up to him possession of the piece of land granted by the deed, and paid S. a valuation accordingly. The plaintiff, who derived his title from M., claimed under the deed of 1859 a right of common over a particular one of the wastes in respect of the parcel of land granted by the deed. There was evidence that throughout the period, from 1824 to 1859, the particular waste over which the right was claimed by the plaintiff was not used, but another of the wastes was, for turning out thereupon the flock when folded upon that particular portion of the farm; and since that period up to the time of the action there had been no user of the alleged right.

Held, that the right of common did not pass.

Per Lindley, L.J.—The general words in the deed were not sufficient to pass or to create a right of common in respect of the parcel of land granted, in the absence of special circumstances as between the grantee in fee and the tenant under the lease; and the state of things and the position of the parties did not warrant the inference that it must

have been intended that any such right should be given, but the contrary.

Per Bowen, L.J.—The language of the deed, though vague, obscure, and ambiguous, might possibly have passed such a right if (which was not shown to be the case) it was the intention of the parties that it should.

Decision of Stirling, J., affirmed.

Doidge v. *Carpenter*, 6 M. & S. 47, distinguished. —*Baring* v. *Abingdon*, C.A. 22—[1892] 2 Ch. 374; 62 L. J. Ch. 105; 67 L. T. 6.

2. *Common—Custom for lord to make grants of waste—Consent of homage—Enfranchisement—Statutory reservation of right of common—Copyhold Act*, 1852 (15 & 16 *Vict. c.* 51), *s.* 45.—Where a custom existed in a manor for the lord, with the consent of the homage, to make grants of portions of the waste to be held on copyhold tenure, although a sufficiency of common was not left,

Held, that such a grant might be made by the lord, with the consent of the homage, as against a commoner, although his tenement had been enfranchised under the Copyhold Act, 1852, and he could therefore no longer attend the manor court. *Ramsey* v. *Cruddas*, C.A.—[1893] 1 Q. B. 228; 62 L. J. Q. B. 269; 68 L. T. 364.

3. *Common—Enfranchisement—Freeholds of the manor—Release of seignorial rights.*—The plaintiffs were respectively the owners in fee simple of two properties in the parish of W., situated on the north side of a lane used by them as the nearest way to the village and railway station. A short distance from the plaintiffs' properties the lane became a patch of green and then forked off into two branches. The defendant was the owner of a property situated between the two branches, the southern boundary of which adjoined the patch of green with a fence between.

The defendant had attempted to inclose the patch of green adjoining the end of his property, and by so doing had interfered with one of the branches of the lane.

The plaintiffs thereupon brought an action against him, claiming an injunction to restrain him from inclosing any part of the patch of green, on the ground (*inter alia*) that the patch of green was waste of the manor of W., and that they had rights of common of pasture and turbary thereon. It appeared that down to 1881 the plaintiffs' properties were freeholds of the manor of W. At that date the seignory thereof was released. The plaintiffs alleged that their predecessors in title, freehold tenants of the manor, were entitled in respect of the two properties and over the wastes of the manor, including the patch of green, to rights of common of pasture and turbary thereon.

The question, however, was whether the rights claimed by the plaintiffs had not been destroyed by a deed of enfranchisement, by which the lord of the manor had released all rents and services due to him by the freeholders.

Held, that, although rights of common annexed to copyholds were extinguished on enfranchisement, there was no similar doctrine with reference to the extinguishment of rights of common on the release of seignorial rights due by the freeholders of a manor; and, accordingly, that the plaintiffs' rights of common had not been extinguished by the enfranchisement in 1881.

Held, therefore, that they were entitled to the injunction claimed.

Decision of Stirling, J., in *Baring* v. *Abingdon*, [1892] 2 Ch. 374, followed.

Ramsey v. *Cruddas*, [1893] 1 Q. B. 228, distinguished.—*Broome* v. *Wenham*, CH.D. WRI., J.—68 L. T. 651.

See also LANDS CLAUSES ACTS, 5; LIMITATIONS, STATUTE OF, 3.

COPYRIGHT:—

1. *Author—Mutilated book—Libel—Trade libel—Publisher—Injunction.*—This was a motion on behalf of the plaintiff, an author, to restrain the defendant, a publisher, from publishing or selling a certain book otherwise than in the form in which it was prepared by the author, or from representing that the plaintiff was the author of the book published by the defendant. The book was originally published in its complete form in 1886. In 1892 the publisher issued an edition of the book, omitting the preface, table of contents, introduction, bibliographical notice, and index. The ground of the motion was that the publication of the book in a mutilated form caused an injury to the plaintiff's reputation as an author.

Held, that the plaintiff's remedy in law was libel; that, with the exception of a case of trade libel, the court will not grant an injunction to restrain a libel before the case has been submitted to a jury.—*Lee* v. *Gibbings*, CH.D. KEK., J.—67 L. T. 263.

2. *Books—"Map, chart, or plan"—Pattern sleeve—Subject-matter—Literary merit—Copyright Act* (5 & 6 *Vict. c.* 45), *ss.* 1, 2.—The plaintiff claimed copyright in a cardboard pattern sleeve containing a scale for adapting it to sleeves of any dimensions.

Held, that it was capable of copyright, under 5 & 6 Vict. c. 45, as a chart or plan.—*Hollinrake* v. *Truswell*, CH.D. WRI., J.—[1893] 2 Ch. 377; 62 L. J. Ch. 613; 68 L. T. 656.

3. *Design—Infringement—View of Westminster Abbey—Registration—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 47, 60.—A design for the handles of spoons, consisting of a representation, taken from a photograph, of a particular view of Westminster Abbey, is properly registered under section 47 of the Patents, Designs, and Trade-Marks Act, 1883.

Adams v. *Clementson*, 27 W. R. 379, 12 Ch. D. 714, discussed and questioned.—*Saunders* v. *Wiel*, C.A. 356—[1893] 1 Q. B. 470; 62 L. J. Q. B. 341; 68 L. T. 183.

4. *Directory of traders—Catchwords—Headings—Advertisements—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *s.* 18—*Injunction—Fiduciary relationship—Principal and agent—Obligation arising from confidential employment.*—Section 18 of the Copyright Act, 1842, provides that, when any proprietor of a work or book employs persons to compose the same or any portions thereof, and such work or any portions thereof shall be composed under such employment, "on the terms that the copyright therein shall belong to such proprietor and paid for by him," then the copyright in such work and in every part thereof so composed and paid for shall belong to such proprietor.

Held, that "the terms" referred to in this section need not be in writing or express, but might be implied from the general nature of the employment and of the business.

Sweet v. *Benning*, 3 W. R. 519, 16 C. B. 459, approved.

The plaintiff was the registered proprietor of a directory of foreign traders, which consisted of a series of catchwords or headings descriptive of various trades, arranged in alphabetical order, together with a collection—under and appropriate to

each heading—of advertisements obtained from the traders, containing their names and addresses, and in some cases illustrations of their trade-marks. These advertisements and headings, and translations thereof in several languages, were obtained and composed by the defendants and other persons employed and paid for doing so by the plaintiff, and the defendants, under their agreement with the plaintiff, undertook to devote themselves therein exclusively to the plaintiff's service. The agreement, however, did not contain any express stipulation as to copyright, nor any stipulation by the defendants not to engage in a similar business on behalf of themselves or others after their employment by the plaintiff had terminated. The defendants, having ceased to be employed by the plaintiff, proposed to supply to a rival publication copies of the headings and advertisements appearing in the plaintiff's work.

Held, that the "headings" in the plaintiff's publication were a good subject-matter for copyright; that, on the facts, the reasonable inference was that the headings were composed on the terms that the copyright therein should belong to the plaintiff; and that the plaintiff was entitled to an injunction to restrain infringement of his copyright in the "headings."

Semble, that the plaintiff would also be entitled to copyright in respect of the collocation and arrangement in his work of a series of the advertisements.

Held, also, that it was a reasonable inference from the nature and object of the defendants' employment that all documents and materials prepared and obtained by the defendants in the course of that employment were for the purposes of the plaintiff's publication only, and that the plaintiff was entitled, notwithstanding that his employment of the defendants had come to an end, to restrain the defendants making any use of such documents or materials for any other purpose—the plaintiff's right in this respect depending, not in any way on copyright, but on the ground that it would be contrary to the good faith implied by the nature and object of the defendants' employment that the defendants should use documents or materials compiled while in the plaintiff's employment for any other purpose than that of the plaintiff's publication.—*Lamb* v. *Evans*, C.A. 405—[1893] 1 Ch. 218; 62 L. J. Ch. 404; 68 L. T. 131.

5. *International copyright—Saving of rights and interests previously acquired—Trade-mark—Interest in advertising—Subsisting and valuable interests—Artistic work first produced in foreign country—International Copyright Act*, 1886 (49 & 50 *Vict. c.* 33), *s.* 6.—By the International Copyright Act, 1886, s. 6, upon an Order in Council being made with respect to any foreign country, the author and publisher of any artistic work shall be entitled to copyright in the United Kingdom in respect of works first produced before such order comes into operation, "provided that, where any person has, before the date of the publication of an Order in Council, lawfully produced any work in the United Kingdom, nothing in this section shall diminish or prejudice any rights or interests arising from or in connection with such production which are subsisting and valuable at the said date."

An Order in Council was made applying the Act to German subjects. Before the date of the publication of the order an artistic work, first produced in Germany, was lawfully produced in the United Kingdom and registered, and used as a trade-mark upon goods. The work was also reproduced by the proprietors of the trade-mark on showcards and trade lists for the purpose of advertising their goods. The trade-mark, as registered, had the words "trade-mark" printed on it, but these words were omitted in the showcards and trade lists. In an action to restrain infringement of copyright by the use of these showcards and trade lists.

Held, that the proprietors of the trade-mark had an interest, as such proprietors, in advertising it; that this was an interest arising from or in connection with the trade-mark itself, and subsisting and valuable at the date of the publication of the Order in Council; that the omission of the words "trade-mark" in the showcards and trade lists was immaterial; and, consequently, that the proprietors of the trade-mark were protected in their use of the showcards and trade lists by the proviso to section 6.

Moul v. *Groenings*, 39 W. R. 691, [1891] 2 Q. B. 443, explained.—*Schauer* v. *J. C. & J. Field*, CH.D. CHL., J. 201—[1893] 1 Ch. 35; 62 L. J. Ch. 72; 68 L. T. 81.

6. *International copyright—English copyright in foreign painting—Right to sue for infringement without registration—Fine Arts Copyright Act*, 1862 (25 & 26 *Vict. c.* 68), *s.* 4—*International Copyright Act*, 1886 (49 & 50 *Vict. c.* 33), *s.* 6—*Order in Council.*—Held, by Charles, J., that registration in accordance with section 4 of the Fine Arts Copyright Act, 1862, is not necessary in order to entitle the owner of the English copyright in a foreign painting to sue for infringement.

Held, also, by Charles, J., that section 6 of the International Copyright Act, 1886, applies to any literary or artistic work produced before the 6th of December, 1887 (the date at which an Order in Council of the 28th of November, 1887, made under the Act with respect to a foreign country came into operation), whether produced before or after the 25th of June, 1886, the date of the passing of the Act, and that the interest contemplated by the proviso in the section is a direct subsisting pecuniary interest in the continuation of the production.

Fishburn v. *Hollingshead*, [1891] 2 Ch. 37, dissented from.

Moul v. *Groenings*, 39 W. R. 691, [1891] 2 Q. B. 443, followed.—*Hanfstaengl Art Publishing Co.* v. *Holloway*, Q.B.D.—[1893] 2 Q. B. 1; 62 L. J. Q. B. 347; 68 L. T. 676.

CORONER:—

Treasure trove—Title of Crown—Prerogative—Grant to subject—Coroner's inquisition—Jurisdiction—Coroners Act, 1887 (50 & 51 *Vict. c.* 71), *ss.* 4, 18 (1), 36.—The Crown is *primâ facie* entitled to treasure trove, and it is not necessary that an inquest should be held for the purpose of informing the Crown as to its rights (following the case of *Reg.* v. *Toole*, 16 W. R. 439); but its rights may be displaced by a grant to a subject of the franchise of treasure trove.

Articles of silver were found concealed in the earth. The coroner for the district held an inquest on them before a jury, who unanimously agreed that the articles were treasure trove. The coroner then desired to hold a further inquisition to decide who was entitled to the treasure.

Held, that the coroner had no jurisdiction, either under the Coroners Act, 1887, or otherwise, to determine the question of title.—*Attorney-General* v. *Moore*, CH.D. STI., J. 294—[1893] 1 Ch. 67; 62 L. J. Ch. 607; 68 L. T. 574.

COST BOOK MINE.—See BANKRUPTCY, 15.

COSTS.—See ADMINISTRATION, 1; ADMIRALTY,

ARBITRATION, 4; BANKRUPTCY, 8, 10, 11; COMPANY, 28; COUNTY COURT, 7, 8; CROWN, 1; DIVORCE, 14, 15; LANDS CLAUSES ACTS, 3, 4; LUNATIC, 4; PARLIAMENT, 1; PARTITION ACTION; PRACTICE, 15-20; PROBATE, 20, 21; SOLICITOR, 1-14, 16, 17.

COUNTY COUNCIL.—See LOCAL GOVERNMENT, 4.

COUNTY COURT:—

1. *Administration—Estate exceeding £500—Transfer to High Court—County Courts Act*, 1888, *ss.* 67, 68.—Where an estate exceeding £500 has been administed in a county court, and the estate finally wound up, the High Court has discretion to refuse an order directing the matter to be reopened and the action transferred to the Chancery Division.—*Prangnell* v. *Prangnell*, Q.B.D.—62 L. J. Q. B. 346.

2. *Admiralty jurisdiction—Appeal—Judgment of county court varied by divisional court—Appeal to Court of Appeal—Leave to appeal—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 45—*County Courts Act*, 1875 (38 & 39 *Vict. c.* 50), *s.* 10.—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 188, *sub-section* 5.—Where a divisional court of the Probate, Divorce, and Admiralty Division alters on appeal the judgment of a county court in an admiralty action, an appeal lies without leave from the judgment of the Divisional Court to the Court of Appeal, notwithstanding the repeal of section 10 of the County Courts Act, 1875, by section 188 of the County Courts Act, 1888.—*The Dart*, C.A. 153—[1893] P. 33; 62 L. J. P. D. & A. 32.

3. *Appeal—Notice of appeal, service of—Service upon London agent of country solicitor—Remitted action—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 65—*County Court Rules*, 1889, *ord.* 33, *r.* 1.—An action was commenced in the High Court, and upon the writ the address of the plaintiff's solicitor, who carried on business in the country, as well as that of the London agents, were indorsed as addresses for service.

The action was remitted to a county court under section 65 of the County Courts Act, 1888, and upon the particulars lodged by the plaintiff with the registrar under ord. 33, r. 1, of the County Court Rules, 1889, the address of the country solicitor alone was indorsed as the address for service.

After the trial of the action the defendant served a notice of appeal from the judgment of the county court judge upon the London agents of the solicitor for the plaintiff.

Held, that the address for service indorsed upon the plaintiff's particulars was substituted for the addresses for service indorsed upon the writ, and that, therefore, the service of the notice of appeal upon the London agents was bad.

The appeal was ordered to be heard under ord. 59, r. 16, as there had been a slip, and the point was a fresh one, but the court felt considerable difficulty in making the order.—*Malley* v. *Shepley*, Q.B.D. 63—62 L. J. Q. B. 31; 68 L. T. 294.

4. *Appeal—Notice of appeal, service of—Service on London agent of country solicitor—R. S. C.*, 1883, *ord.* 59, *r.* 12.—In appeals from county courts to divisional courts, where the solicitor for the respondent carries on business in the country, it is not sufficient that the notice of appeal should be served by the appellant, within the proper time, upon the London agent of the respondent's country solicitor. Such notice must be served within the proper time upon the respondent's country solicitor.

Powell v. *Thomas*, 39 W. R. 224, [1891] 1 Q. B. 97, followed.—*Jackson* v. *Margrett*, Q.B.D. 267—68 L. T. 91.

5. *Appeal—No note of proceedings in court below—Order of Divisional Court for production and examination of witnesses examined at the trial—Jurisdiction—R. S. C.*, 1883, *ord.* 59, *r.* 8.—When no note of what occurred in the county court has been taken, a Divisional Court has, upon appeal, jurisdiction to order that the witnesses of both parties called and examined in the court below should be produced and examined on the hearing of the appeal; but care ought to be taken by the court to prevent fresh evidence being given, so that such appeal should not become practically a new trial.

Order of the Divisional Court (Jeune, P., and Barnes, J.) affirmed.—*The Crescent*, C.A. 533—62 L. J. P. D. & A. 63; 68 L. T. 556.

6. *Bailiff — "Misconduct" — Execution — Implements of trade—Seizure and sale of, by high bailiff—Error of judgment by high bailiff—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 50.—The seizure and sale of the implements of an execution debtor's trade by a high bailiff of a county court, in the levying of an execution under the judgment of the court, even though done recklessly and under a serious error of judgment, but not with any wrongful intent, is not "misconduct" within the meaning of section 50 of the County Courts Act, 1888.—*Moore* v. *High Bailiff of Brompton County Court*, Q.B.D. 557.

7. *Costs — Action commenced in High Court — Transfer before trial to county court—Jurisdiction of High Court—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *Part III.*, *s.* 65; *Part IV.*, *s.* 116.—In an action commenced in the High Court, and transferred to the county court before trial, there is no jurisdiction in the High Court to make any order after the transfer. Every proceeding in the action must be taken in the county court, as if the action had been originally commenced therein.

Decision of the Divisional Court (Day and Charles, JJ.), reported 40 W. R. 461, affirmed.—*Harris* v. *Judge*, C.A. 9—[1892] 2 Q. B. 565; 61 L. J. Q. B. 577; 67 L. T. 19.

8. *Costs—Action commenced in High Court and transferred to county court—Less than £20 recovered—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 65, 116.—Section 116 of the County Courts Act, 1888, applies to actions brought in the High Court and transferred to the county court under section 65. Therefore, where an action of contract for less than £50 is brought in the High Court and transferred to the county court, and less than £20 is recovered, the county court has no power to allow the plaintiff any costs of the action, notwithstanding the provisions as to costs contained in section 65.

Decision of the Divisional Court (Lord Coleridge, C.J., and Cave, J.), 41 W. R. 250, affirmed.

Armitage v. *Fison*, 67 L. T. N. S. 415, overruled.—*White* v. *Cohen*, C.A. 396—[1893] 1 Q. B. 580; 62 L. J. Q. B. 274; 68 L. T. 305.

9. *Interrogatories — Irrelevancy — Ord.* 16, *r.* 1 (*County Court Rules*, 1889).—In an action for damages for injuries alleged to have been caused by the fall of a piece of wood through the negligence of the defendant's servants, the plaintiff in the course of interrogatories asked the following question: "If you allege that the piece of wood was not knocked down by one of your servants, state the name and address of the person or firm in whose employ the person was, and the name of the person by whom and how it was so knocked down,

and for what he was on your premises." The defendant in his answer stated that the wood was knocked down, without the knowledge or consent of himself or his servants, by some person who was upon his premises as a customer, and declined to give the name and address of such person, on the ground that the information was not relevant and not required *bonâ fide* for the purpose of the action.

Held, on an application for a further and better answer, that the question went beyond the sphere of interrogatories, and that the defendant's objection to answer was good.—*Meek* v. *Witherington*, Q.B.D.—67 L. T. 122.

10. *Judgment debt—Married woman—Examination as to property—"Debtor"—County Court Rules*, 1889, *ord.* 25, *r.* 52.—A married woman against whom a judgment has been obtained is within the terms of ord. 25, r. 52, of the County Court Rules, 1889, and may be ordered to attend for examination as to whether she has means of satisfying the judgment.—*Aylesford* v. *Great Western Railway Co.*, Q.B.D. 42—[1892] 2 Q. B. 626.

11. *Payment into court without denial of liability—County Court Rules*, 1889, *ord.* 9, *r.* 11 (1)—*Forms* 103, 104A.—The plaintiff brought an action in the High Court for work and labour as an engineer, and the particulars of his claim consisted of various items. The action having been remitted to the county court, the defendants paid £10 into the county court under the County Court Rules, 1889, ord. 9, r. 11 (1), without denying liability, and without specifying any items as being those in respect of which the payment was made.

Held, that, by the payment into the county court, a cause of action was admitted, but not that something was due on every item of the account.

Steavenson v. *Corporation of Berwick*, 1 Q. B. 154, followed.—*Hennell* v. *Davis*, Q.B.D. 284—[1893] 1 Q. B. 367; 62 L. J. Q. B. 220; 68 L. T. 220.

12. *Registrar—Refusal to issue summons under Bills of Exchange Act—Order in nature of* mandamus *—County Courts Act*, 1888 (51 & 52 *Vict.* c. 43), *s.* 131. —The registrar of a county court declined to issue a summons under the Bills of Exchange Act, 1855 (now applicable to county courts).

Held, that the proper course was to apply to the High Court under section 131 of the County Courts Act, 1888, for an order calling upon him to show cause why he should not issue the summons, the county court judge having no jurisdiction over the registrar, as there was no cause in the county court.—*Reg.* v. *Registrar of Southampton County Court*, Q.B.D.—61 L. J. Q. B. 706.

13. *Remittal of counter-claim for trial—Counter-claim in tort—Action stayed except as to counter-claim —County Courts Act*, 1888 (51 & 52 *Vict.* c. 43), *s.* 66.—A counter-claim, even where by reason of the original action having been stayed it is the sole matter remaining to be tried between the parties, is not an "action" within section 66 of the County Courts Act, 1888, and the court has no power under that section to order it to be remitted for trial to the county court.—*Delobbel-Flipo* v. *Varty*, Q.B.D.—[1893] 1 Q. B. 663; 62 L. J. Q. B. 398; 68 L. T. 797.

14. *Remitted action—Costs—Action of contract brought in High Court—Action remitted to county court after certain proceedings in High Court—Amount recovered in county court less than £20—Right of plaintiff to costs incurred in county court—County Courts Act*, 1888 (51 & 52 *Vict.* c. 43), *ss.* 65, 116.—Where an action of contract, which might have been commenced in a county court, is brought in the High Court and after certain proceedings therein is transferred, under section 65 of the County Courts Act, 1888, to a county court, where it results in a judgment for the plaintiff with costs for a sum of less than £20, then the plaintiff is entitled, under section 65 of the Act, to his costs incurred in the county court subsequent to the transfer, though not to the costs incurred in the High Court before the transfer, unless he had a certificate for such costs given under section 116 of the Act.—*Armitage* v. *Fison*, Q.B.D.—67 L. T. 415. [Overruled: see *ante*, No. 8.]

See also ADMIRALTY, 2; COMPANY, 29, 47; LIVERPOOL COURT OF PASSAGE; PRACTICE, 5, 15, 16; PROBATE, 9; RIVER; SOLICITOR, 21.

COUNTY COURT (IRELAND):—

Committal of debtor—Liability to pay sheriff's fees. —A creditor who obtains in the county court a committal order against a debtor, on which the debtor is subsequently arrested, is not entitled to recover the sheriff's fees paid on the execution of the order.

Semble, the rules and forms made under the County Courts and Officers (Ireland) Act, 1877, so far as they throw upon the debtor the liability to pay these fees, are *ultrà vires*.—*Barrett* v. *Goodman*, Q.B.D. (Ir.)—32 L. R. Ir. 213.

CRIMINAL LAW:—

1. *Cruelty to animals—"Domestic animals"—Wild rabbits confined and coursed in enclosure*—12 & 13 *Vict.* c. 92, *ss.* 2, 29—17 & 18 *Vict.* c. 60, *s.* 3.—The respondents coursed with dogs, in an enclosed field, wild rabbits, which had been caught in nets five or six days previously, and since kept in confinement and fed, and cruelly tortured them. On a case stated on an information for cruelly torturing rabbits,

Held, that the rabbits were not "domestic animals," and therefore the respondents could not be convicted.—*Aplin* v. *Porritt*, Q.B.D.—[1893] 2 Q. B. 57; 62 L. J. M. C. 144.

2. *Evidence—Confession—Admissibility of.*—At the trial of a prisoner for the embezzlement of moneys of his master evidence was received of a confession made by the prisoner to his master. It was proved that shortly before this confession was made the master had said to the prisoner's brother, under circumstances from which it was to be inferred that his words would be conveyed to the prisoner, "It will be the right thing for Marcellus" (the prisoner) "to make a clean breast of it." The prisoner was convicted.

Held, by the court (Lord Coleridge, C.J., and Hawkins, Cave, Day, and Collins, JJ.), that the confession was not admissible in evidence, and that the conviction must be quashed.—*Reg.* v. *Thompson*, C.C.R. 525—[1893] 2 Q. B. 12; 62 L. J. M. C. 93; 69 L. T. 22.

3. *Manslaughter—Death accelerated by neglect—Implied duty.*—A prisoner, a woman between thirty and forty years of age, was indicted for manslaughter. It was proved that she had lived with the deceased, who was her aunt and was seventy-three years of age, and at her expense, for a considerable time; that for some days before her death the deceased was incapable through illness of moving about or attending to her wants or procuring assistance; that the prisoner continued to live in the house of the deceased, and to receive and use articles of food which were brought to the house by tradespeople; that she failed to supply the wants of the deceased, either as to food or the obtaining of medical or nursing attendance, or to make known the condition of the deceased to her

neighbours; and that the death of the deceased was substantially accelerated by neglect, want of food and of nursing and medical attendance. The prisoner was convicted.

Held, that, under the above circumstances, there was a duty implied by law on the part of the prisoner to attend to the wants of the deceased, and that, the prisoner's failure to perform that duty having assisted to cause the death of the deceased, the conviction was right.—*Reg.* v. *Instan*, C.C.R. 368—[1893] 1 Q. B. 450; 62 L. J. M. C. 86; 68 L. T. 420.

4. *Offences against the person—Male under the age of fourteen—Carnal knowledge of girl under the age of thirteen—Incapacity—Presumption of law—Criminal Law Amendment Act*, 1885 (48 & 49 *Vict. c.* 69), *s.* 4.—A male person under the age of fourteen years is presumed by the law to be incapable of having carnal knowledge, and cannot be convicted under section 4 of the Criminal Law Amendment Act, 1885, of having carnal knowledge of a girl under the age of thirteen years.—*Reg.* v. *Waite*, C.C.R. 80—[1892] 2 Q. B. 600; 61 L. J. M. C. 187; 67 L. T. 300.

5. *Offences against the person—Male under the age of fourteen—Indictment for carnal knowledge of girl under the age of thirteen—Acquittal—Conviction for indecent assault—Criminal Law Amendment Act*, 1885 (48 & 49 *Vict. c.* 69), *ss.* 4, 9.—A boy under the age of fourteen years, who has been put on his trial under section 4 of the Criminal Law Amendment Act, 1885, for carnally knowing a girl under the age of thirteen years, although by reason of his age he is entitled to be acquitted of that offence, may yet, under section 9 of the same Act, be convicted of an indecent assault.—*Reg.* v. *Williams*, C.C.R. 332—[1893] 1 Q. B. 320; 62 L. J. M. C. 69.

6. *Receiving stolen goods—Resumption of possession by the prosecutor after discovery of the larency—Subsequent receiving*—24 & 25 *Vict. c.* 96, *s.* 91.—Goods were intrusted to carriers for delivery to a consignee; it was discovered by the carriers that one of their servants had stolen them *in transitu*, and had readdressed them to the prisoners. The carriers ordered another servant of theirs to deliver them to the prisoners at the place to which the thief had addressed them, and placed them in a van for the purpose of such delivery. The goods were accordingly delivered to the prisoners, who received them knowing that they had been stolen. In the indictment the property in the goods was laid in the carriers.

Held, that the carriers had resumed possession of the goods, and that, therefore, when the prisoners received them they were not stolen property, and the prisoners could not be convicted of feloniously receiving them.

R. v. *Dolan*, Dears. C. C. 436, followed.—*Reg.* v. *Villensky*, C.C.R. 160—[1892] 2 Q. B. 597; 61 L. J. M. C. 218.

7. *Vagrant Acts—Gaming—Betting in a public place—"At any game or pretended game of chance"—Vagrant Act Amendment Act*, 1873 (36 & 37 *Vict. c.* 38), *s.* 3.—In order to obtain a conviction on a charge of betting by way of wagering, under section 3 of the Vagrant Act Amendment Act, 1873, it is necessary to allege and prove that the wagering was at some game or pretended game of chance.—*Ridgeway* v. *Farndale*, Q.B.D. 128—[1892] 2 Q. B. 309; 61 L. J. M. C. 199; 67 L. T. 318.

CROWN:—

1. *Costs—"Proceeding"*—18 & 19 *Vict. c.* 90, *s.* 2.—Upon a motion in a petition matter for an order declaring the petitioners entitled to moneys lodged in court by a railway company for lands acquired compulsorily, an affidavit was filed on behalf of the Crown resisting the motion and claiming the moneys.

Held, that this was a "proceeding" within section 2 of 18 & 19 Vict. c. 90, and the court, having decided in favour of the petitioners, awarded costs against the Crown.—*Ex parte Jordan*, V.C. (Ir.)—31 L. R. Ir. 1.

2. *Prerogative—Treaties—Interference with private rights—Acts of State.—Quære*, whether the Crown has the power of compelling its subjects to obey the provisions of a treaty made either for the purpose of putting an end to war or to preserve peace, or whether interference with private rights can be authorized otherwise than by the Legislature.

Where the Government justified certain acts, in derogation of the private rights of the plaintiff in regard to his lobster fishery, as acts and matters of State arising out of political relations between Her Majesty and the French Government, contending that they involved the construction of treaties and of a temporary *modus vivendi* for lobster fishing in Newfoundland and other Acts of State, and that they were matters which could not be inquired into by the court,

Held, that this defence disclosed no answer to the action.—*Walker* v. *Baird*, P.C.—[1892] A. C. 491; 61 L. J. P. C. 92; 67 L. T. 513.

See also CORONER; LIGHT, 2; POOR RATE, 2; PRACTICE (IRELAND), 6.

DAMAGES, MEASURE of.—See LANDLORD AND TENANT, 2, 4.

DEBENTURES.—See ASSIGNMENT OF DEBT; COMPANY, 1-7, 26, 27; FRAUDS, STATUTE OF, 2.

DEBTORS ACT:—

1. *"Default in payment of money"—Attachment—Jurisdiction—Order to pay money in pursuance of undertaking—Contempt of court—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *ss.* 4, 5.—An execution creditor gave, in interpleader proceedings, an undertaking to make good any deficiency on sale, which was embodied in an order made directing the sheriff to sell the goods seized. There was a deficiency on the sale, and the master made an order directing the amount to be paid by the execution creditor to the claimant. This order not being obeyed, an order was made by a judge attaching the execution creditor and committing him for contempt of court; but there was no proof of means to pay.

Held, that the case was one of "default in the payment of a sum of money" which had become due as a debt, and was within section 4 of the Debtors Act, 1869, and that there was, therefore, no jurisdiction to make the order for attachment.—*Buckley* v. *Crawford*, Q.B.D. 239—[1893] 1 Q. B. 105; 62 L. J. Q. B. 87; 67 L. T. 681.

2. *Trustee—Non-compliance with order to pay money into court—Bankruptcy of trustee—Jurisdiction—Exercise of discretion—Appeal—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 4 (3)—*Debtors Act*, 1878 (41 & 42 *Vict. c.* 54), *s.* 1—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 9—The court has jurisdiction to order the attachment of a trustee who has made default in payment of a sum of money which he has been ordered to pay into court, notwithstanding that a receiving order in bankruptcy has been made against him.

Where a judge to whom an application for an attachment is made appears to the Court of Appeal

to have exercised upon an erroneous ground the discretion conferred on the court by the Debtors Act, 1878, they will review his decision.—*In re Smith, Hands* v. *Andrews*, C.A. 289—[1893] 2 Ch. 1; 62 L. J. Ch. 336; 68 L. T. 337.

3. *Writ of* ne exeat regno—*Order for issue of writ—Application to discharge—Debtors Act*, 1869, *s.* 6—*Ord.* 69, *r.* 1; *ord.* 70, *r.* 1.—An application for the discharge of an order directing the issue of a writ of *ne exeat regno*, and of any writ issued pursuant thereto, may be made before the arrest of the person against whom the writ has been directed to be issued.—*Lewis* v. *Lewis*, CH.D. STI., J.—68 L. T. 198.

DEED:—

Unsealed instrument—Bond duly stamped and purporting to be sealed—Claim by obligee.—The executor of a testatrix discovered amongst her papers after her decease, which occurred in 1891, a bond dated in 1874, under the hand only of the obligor, in the sum of £800, in favour of S., one of her nieces, conditioned for the transfer by the obligor in her lifetime, or by her executors or administrators within six calendar months after her decease, into the name of S., for her separate use, or to her executors, administrators, or assigns, of the sum of £400 Three per Cent. Consols; and the bond contained a proviso that if the obligor should by her will or any codicil thereto bequeath to or in favour of S. a sum of Consols equal to or greater than such sum of £400 Consols therein mentioned, then such sum should be deemed a satisfaction of the whole or part, as the case might be, of such sum of £400 Consols. Although the bond bore the words "sealed with my seal," which preceded the date, and the attestation clause stated that the bond was "signed, sealed, and delivered" by the obligor, it did not appear that a seal had in fact ever been affixed, there being no mark, wafer, or seal visible on the face of the document. The bond was, however, properly stamped. S. nevertheless claimed to be entitled to enforce the bond against the estate of the obligor, as, the document being properly stamped, and purporting to have been sealed, and the attestation clause being in the usual form, there was *primâ facie* evidence that the document had been duly sealed, and the court would presume that it had been sealed.

Held, that the court could not, under the circumstances, presume that the bond had been sealed; and that, therefore, S., being a volunteer, was not entitled to enforce it.

In re Sandilands, L. R. 6 C. P. 411, distinguished.

Decision of North, J., affirmed.—*In re Smith, Oswell* v. *Shepherd*, C.A.—67 L. T. 64.

DEFAMATION:—

LIBEL—

1. *Injunction—Business—Trade union.*—An action was brought by a business firm against a trade union, and the secretary, president, vice-president, and treasurer of the union for an injunction to restrain them from publishing a circular in which the plaintiffs were accused of boycotting some lightermen. The circular was signed by the secretary. It was admitted that the vice-president did not belong to the union, and was joined as defendant by mistake. The names of the president and treasurer were printed upon the paper upon which the circular was written, but they gave evidence that the circular was issued without their knowledge and authority, and that they disapproved of it. The plaintiffs in their statement of claim stated that the statements in the circular were untrue, and "had been made maliciously and unjustifiably on the part of the defendants." An *interim* injunction had been granted.

Held, that the injunction must be made perpetual against the society, the secretary, and other officers, servants, or agents of the society, with costs. That the plaintiffs were justified in joining the president and treasurer as defendants; the court, therefore, gave them no costs.—*Pink* v. *Federation of Trade and Labour Unions*, CH.D. KEK., J.—67 L. T. 258.

1a. *Plea of justification—Particulars—Insufficiency of—Validity of plea.*—A general plea of justification in an action of libel, where the libel complained of consists of a general charge against the plaintiff, is bad, unless the defendant, in his particulars, states specifically the facts upon which he relies in support of the charge.—*Zierenberg and Wife* v. *Labouchere*, C.A. 675—[1893] 2 Q. B. 183.

2. *Privilege—Absolute privilege—Charges against solicitor under Solicitors Act*, 1888.—An action of libel was founded upon charges of professional misconduct against the plaintiff, a solicitor, made in an application to the Incorporated Law Society with an affidavit attached under the Solicitors Act, 1888.

Held, that the action must be dismissed as vexatious, the proceedings being judicial proceedings and the statements being absolutely privileged.—*Lilley* v. *Roney*, Q.B.D.—61 L. J. Q. B. 727.

3. *Privilege—Report of judicial proceeding—Application to justices for summons—Open court—Fairness of report—Burden of proof—Province of judge.*—Where justices specially summoned for the purpose sit in their council chamber to hear an application for the issue of a summons on a criminal charge, a fair report of what takes place on such proceeding is privileged, although no evidence is given on oath, and although such proceeding does not result in a final decision, but leads to a further inquiry.

The burden of showing that an alleged libel is a fair report of a judicial proceeding lies on the defendant; but it is sufficient if this clearly appears from the plaintiff's evidence. Where the plaintiff's contention is that the report is rendered unfair by certain omissions, if the judge thinks such omissions to be immaterial he may decline to leave the case to the jury, and order verdict and judgment to be entered for the defendant.—*Kimber* v. *Press Association*, C.A. 17—[1893] 1 Q. B. 65; 62 L. J. Q. B. 152; 67 L. T. 515.

See also COPYRIGHT, 1; EVIDENCE.

DETINUE.—See PLEDGE.

DIVORCE:—

1. *Bigamous marriage of petitioner—Bona fides of petitioner—No adulterous intent—Intervention by Queen's Proctor—Discretion of court—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 31—*Decree to be made absolute—Form of order.*—Where a petitioner acts purely in ignorance of the law, and has no intention to commit adultery, being in fact unaware that what he is doing amounts to adultery, the discretion conferred upon the court by section 31 of the Matrimonial Causes Act should be exercised in his favour.—*Snook* v. *Snook*, P.D. & A.D.—67 L. T. 389.

2. *Bigamous marriage of petitioner—Ignorance of law—Special circumstances—Discretionary bar—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 31.—On the hearing of a husband's petition for dissolution of the marriage on the ground of his wife's adultery, it was proved that the husband and wife signed a paper to the effect that they agreed to

separate, and that each was at liberty to marry again. The husband, who was in humble rank, was advised by a friend who had done the same thing himself, and to whom the husband mentioned that he wanted a divorce, that this document would be legal and binding; and the court found on the evidence that the husband believed this. The husband lived for eighteen months as a single man, and then met a lady to whom he communicated the above facts, and she consented to and did go through a ceremony of marriage with him, and they lived together as man and wife for three years, when someone informed the husband that he was living in adultery, and, after consulting a solicitor, and on learning that the second marriage was not legal, he separated from the lady and took his own wife back; she did not remain long with him, and the charge against her was proved.

Held, that, as the petitioner acted in ignorance of the law, and in the *bonâ fide* belief that the second marriage was legal, it was a proper case for the court to exercise its discretion under section 31 of the Matrimonial Causes Act, 1857, to excuse the adultery of the petitioner. The court accordingly pronounced a decree *nisi* for dissolution of the marriage.—*Whitworth* v. *Whitworth and Thomasson*, P.D. & A.D. 592—[1893] P. 85; 62 L. J. P. D. & A. 71; 68 L. T. 467.

3. *Bigamous marriage of petitioner—Desertion—Discretional bar.*—A wife, sixteen years after her husband had deserted her and believing him to be dead, married again. She subsequently discovered that her husband was living, and had also contracted a bigamous marriage nineteen years after he left his wife. The wife petitioned for dissolution of the marriage.

Held, following *Freegard* v. *Freegard*, 8 P. D. 186, that the court in the exercise of its discretion would grant a decree.—*Potter* v. *Potter*, P.D. & A.D.—67 L. T. 721.

4. *Condonation—Damages—Husband's petition—Dismissal of petition—Second petition.*—After a husband's petition for divorce had been presented, he condoned the offence, and abandoned the petition. Subsequently he presented a second petition charging his wife with adultery with the same co-respondent (alleging the same offences as were charged in the first petition) and another, and claiming damages.

Held, on motion to dismiss the first co-respondent from the suit, that the condonation was no bar to a claim for damages.—*Bernstein* v. *Bernstein*, P.D. & A.D.—[1892] P. 375; 62 L. J. P. D. & A. 16; 67 L. T. 529.

5. *Damages—Qualified verdict—Position of co-respondent—Further direction to jury—Reconsidered verdict—Judgment for increased amount.*—In an undefended suit for dissolution of marriage brought by the husband against his wife upon the ground of her adultery with the co-respondent, damages were claimed against the latter, and the jury awarded £150, adding that if the co-respondent had been in a better position they would have awarded more.

The President thereupon told them that this would not do, as the real question to be considered in such cases was the injury done to the petitioner through the wrongful act of the co-respondent, whose means and position were irrelevant upon the assessment by the jury of the quantum of damages. The jury then reconsidered their verdict upon this point, and awarded £500.—*Bikker* v. *Bikker & Whitewood*, P.D. & A.D—67 L. T. 721.

6. *Decree nisi not made absolute—Wife's petition—Petitioner married again—Resumption of cohabitation with respondent—Condonation—Cruelty—Revival—Discretionary bar—Decree absolute*—20 & 21 *Vict. c.* 85, *s.* 30.—In a petition by the wife for a divorce on the ground of adultery and cruelty, a decree *nisi* was pronounced, but no steps were taken to make it absolute. The petitioner, believing that the marriage was dissolved at the end of six months, went through a form of marriage with a man with whom she cohabited for some years until he died. She then resumed cohabitation with the respondent, but he was guilty of cruelty to her, and she left him after living with him a year and nine months.

Held, upon an application by the petitioner to make the decree *nisi* absolute, the Queen's Proctor intervening, that there was nothing in the circumstances to prevent the cruelty of which the respondent had been guilty during the second cohabitation from reviving the matrimonial offences on the ground of which the decree *nisi* had been pronounced, and that, inasmuch as it must be taken that she went through the form of marriage with another person in the honest belief that her marriage with the respondent was dissolved, the court was entitled to make the decree *nisi* absolute.—*Moore* v. *Moore*, P.D. & A.D.—[1892] P. 382; 62 L. J. P. D. & A. 10; 67 L. T. 530.

7. *Desertion—Husband willing to return but cohabiting with another woman.*—A husband may be guilty of desertion, even though he is willing to return to cohabitation with his wife, if at the time he is so willing he is actually cohabiting with another woman.—*Edwards* v. *Edwards*, P.D. & A.D. —62 L. J. P. D. & A. 33.

8. *Jactitation of marriage.*—In a suit of jactitation of marriage brought by the supposed wife, the jury found that she had at a former period acquiesced in the representations of the respondent that she was his wife.

Held, affirming the decision of Barnes, J., that upon this finding the petition must be dismissed. —*Thompson* v. *Bourke*, C.A.—[1893] P. 70; 62 L. J. P. D. & A. 46; 67 L. T. 788.

9. *Judicial separation—Custody of child—Guardianship of Infants Act*, 1886 (49 & 50 *Vict. c.* 27), *s.* 7—*Declaration as to unfitness of guilty parent—Effect.*—The court appended to its decree for judicial separation, granted upon the ground of gross misconduct on the husband's part, a declaration, in terms of section 7 of the Guardianship of Infants Act, 1886, that he was a person unfit to have the custody of the only child of the marriage (a girl), notwithstanding the fact that all the witnesses concurred in saying that the respondent was very fond of his child, and had never been cruel in any way to her personally.

The court (Barnes, J.) concurred with the view expressed by Jeune, J., in *Webley* v. *Webley*, 64 L. T. N. S. 839, as to the operation and effect of such a declaration.—*Hitchings* v. *Hitchings*, P.D. & A.D.—67 L. T. 530.

10. *Judicial separation—Separation deed—Prior adultery of wife—Mutual covenant not to commence or prosecute proceedings—Subsequent adultery by husband —Prior adultery of wife a bar to relief.*—A separation deed contained a clause, "No proceedings shall be commenced or prosecuted by or on behalf of either party against the other in respect of any cause of complaint which now exists or which has arisen before the date of these presents." Prior to the execution of the deed it was known that the wife had committed adultery. Subsequently the

husband committed adultery, and the wife filed her petition for a judicial separation.

Held, that the wife's prior adultery was a bar to the court granting her the relief prayed for, and that the husband was not precluded by the covenant from pleading it, as he was not thereby "commencing or prosecuting" proceedings.

Rose v. *Rose*, 30 W. R. 736, 31 W. R. 573, 7 P. D. 225, 8 P. D. 98, considered.—*Gooch* v. *Gooch*, P.D. & A.D. 655—[1893] P. 99; 62 L. J. P. D. & A. 73; 68 L. T. 462.

11. *Jurisdiction—English domicil—Foreign decree at suit of wife—Unjust allegations—Non-submission of husband to foreign jurisdiction—English suit—Philadelphian law.*—A domiciled Englishman married in England a native of the United States of America. After a time the wife left the husband of her own accord without any cause, and, returning to America, refused to return to this country. She applied for and obtained from the court at Philadelphia, under a recent Act of that court, a decree dissolving the marriage, on the ground of her husband's cruelty. The husband was served with a citation to appear in the proceedings, but, acting on advice, he refused to submit to the jurisdiction of the court of Philadelphia, and did not appear. The wife subsequently went through a ceremony of marriage in Philadelphia with the co-respondent, and they cohabited together.

Held, that, though the marriage in America was legal there, the decree there dissolving the English marriage was not binding in this country, and could not affect the petitioner, who was a domiciled Englishman and had never been resident in Philadelphia or submitted himself to the jurisdiction of that court, and that the English marriage was still valid and binding; and this court accordingly pronounced a decree *nisi* dissolving that marriage, on the ground of the adultery of the respondent and co-respondent.—*Green* v. *Green and Sedgewick*, P.D. & A.D. 591—[1893] P. 89; 68 L. T. 261.

12. *Non-consummation owing to wife's refusal—Bigamy and adultery of husband—Wife's petition—Unreasonable delay.*—Husband and wife lived together for some months, but the marriage was never consummated owing to the wife's refusal. The husband then contracted a bigamous marriage, but the wife did not institute proceedings for two years after she knew all the facts.

Held, this was unreasonable delay; and, further, that her refusal to allow the marriage to be consummated was misconduct on her part which had directly conduced to the adultery of her husband, and was a discretional bar to her suit for divorce; but that she was entitled to a judicial separation, the above circumstances constituting no bar to such relief.—*Dixon* v. *Dixon*, P.D. & A.D.—67 L. T. 394.

13. *Nullity—Domicil—Collusion—English marriage—Scotch divorce.*—A petition by a husband for divorce in England was dismissed. An arrangement was then made between the petitioner and the co-respondent that the respondent and co-respondent should cohabit in Scotland, and that an office should be taken for the petitioner there also, in order to found proceedings in Scotland for divorce. All possible steps were taken to conceal the real facts from the Court of Session, and a decree of divorce was pronounced. The respondent and co-respondent then went through a ceremony of marriage in the Isle of Man. Upon a petition to declare this marriage invalid,

Held, that the Court of Session had no jurisdiction to dissolve the first marriage, and that the second marriage was null and void.—*Bonaparte* v. *Bonaparte*, P.D. & A.D.—[1892] P. 402; 62 L. J. P. D. & A. 1; 67 L. T. 531.

14. *Practice—Costs—Wife's petition—Order for costs—Writ of* elegit—*Motion to set aside.*—The husband, respondent in divorce proceedings, obtained in the Queen's Bench Division a *mandamus* directing his wife to deliver up certain title deeds. The property comprised in these deeds constituted, practically, his whole means. Upon the husband failing to comply with an order of this court for costs of the divorce suit, the wife sued out a writ of *elegit*, and the sheriff took possession of the property in virtue thereof.

Upon motion by the husband to set aside the writ of *elegit* until the wife should comply with the *mandamus* and deliver up the deeds of the property, which he had meanwhile agreed to sell, the court refused to set aside the writ of *elegit*, but put the wife upon terms as to the receipts arising from the property.—*Kippax* v. *Kippax*, P.D. & A.D.—67 L. T. 382.

15. *Practice—Costs—Dismissal of wife's petition—Unnecessary charges of cruelty—Rule* 159.—In a petition by a wife for divorce, on the ground of adultery and cruelty, the petitioner, in addition to charging the respondent with the communication of venereal disease to her, which was the only evidence of adultery, made general charges of cruelty, as to which the respondent pleaded condonation. At the trial the jury found all the issues in favour of the respondent, and the petition was dismissed.

Held, on an application to allow the petitioner the full costs of the suit, that she was entitled to the costs of the main charge of cruelty and adultery contained in it; but that, inasmuch as the other acts of cruelty charged had been obviously condoned, the charges in respect of them were equally unnecessary whether the main charge failed or succeeded, and that she was not entitled to the costs in regard to such charges.—*Ash* v. *Ash*, P.D. & A.D.—[1893] P. 222; 68 L. T. 500.

16. *Practice—Evidence—Wife's petition—Motion for leave to prove bigamous marriage, adultery, and identity by affidavits—Witnesses living in America—Order.*—Where the witnesses in a divorce suit were all resident in America and the expenses of a commission would be beyond the petitioner's means, the court, upon motion by the petitioner, made an order that the bigamous marriage, the subsequent adultery, and the identity might be proved by affidavit.—*Burslem* v. *Burslem*, P.D. & A.D.—67 L. T. 719.

17. *Practice — Evidence — Marriage in India — Register in custody of Secretary of State for India—* 14 & 15 *Vict. c.* 40.—The court admitted as evidence, in proof of a marriage which had been performed by a Roman Catholic priest in India, a register of marriages compiled by the Secretary of State for India from periodical reports sent to him from India by clergymen of various denominations.—*Regan* v. *Regan*, P.D. & A.D.—67 L. T. 720.

18. *Practice—Husband's petition—Counter-charges of adultery and cruelty—Admission of adultery—Condonation—Discretional bar—Right of petitioner to place whole case before court and jury, notwithstanding intimation that decree must be refused.*—Upon a husband's petition for dissolution of marriage, the wife, in her answer, made counter-charges of cruelty and adultery against her husband, who denied the alleged cruelty, but admitted that, while living apart from his wife, he had, for a considerable

period, lived and cohabited with another woman, but the adultery had been condoned. The condonation was admitted.

At the trial, upon the opening by counsel for the petitioner, the court intimated that relief would be refused, upon the ground of the petitioner's adultery.

The petitioner, notwithstanding this intimation, insisted upon putting all the facts of the case before the jury.

Held, that he could not be precluded from doing so.—*Boucher* v. *Boucher and Judd*, P.D. & A.D.—67 L. T. 720.

19. *Practice—Order to pay and secure wife's costs—No indorsement—R. S. C.*, 1883, *ord.* 41, *r.* 5—*Attachment—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 52—*Leave to husband to file defence.*—The court declined to attach a husband for disobeying an order as to his wife's costs, where the order upon which the wife sought to attach him was not indorsed in terms of ord. 41, r. 5. But the court refused the husband leave to file a defence to his wife's petition for divorce unless the order as to costs was first complied with.—*Pace* v. *Pace*, P.D. & A.D.—61 L. J. P. D. & A. 114; 67 L. T. 383.

20. *Practice—Undefended suit by husband—Decree in absence of petitioner.*—The court pronounced a decree *nisi* for divorce upon a husband's petition without requiring his evidence.—*Nicolson* v. *Nicolson and Fairley*, P.D. & A.D.—68 L. T. 28.

21. *Queen's Proctor—Intervention—Previous findings of adultery, cruelty, and collusion against the petitioner*—Res judicata—*Estoppel—Discretion*—20 & 21 *Vict. c.* 85, *s.* 30.—Upon an intervention by the Queen's Proctor for the purpose of showing cause against a decree *nisi* obtained by a husband in a petition for a divorce on the ground of his wife's adultery, it appeared that, at a trial of cross-petitions previously presented by the husband and wife against each other, it had been arranged that the husband should submit to a decree *nisi* being pronounced on the ground of his adultery and cruelty, and should withdraw his petition against his wife. It also appeared that, on an intervention by the Queen's Proctor to rescind such decree *nisi* on the ground of collusion, suppression of material facts, and the wife's adultery, the jury had found that there had been collusion and suppression of material facts, but were unable to agree as to the wife's adultery, whereupon the decree *nisi* was rescinded and the petition dismissed.

The Queen's Proctor in the present intervention pleaded that the findings of the juries at the former trials operated as an estoppel against the husband in the present petition, and that the adultery, cruelty, and collusion found against him were *res judicata*, which disentitled him to relief.

Held, on motion of the Queen's Proctor to dismiss the petition, that, though the previous findings must be taken as conclusive evidence that the petitioner had been guilty of adultery, cruelty, and collusion, they did not amount to an estoppel, and that it would be open to the petitioner at the trial of the issues raised by the present intervention to show that the collusion was not in regard to the present petition, and that the circumstances were such as to induce the court to grant relief notwithstanding the findings of adultery and cruelty.—*Butler* v. *Butler*, P.D. & A.D.—[1893] P. 185.

22. *Settlement—Guilty wife—Leasehold property of wife—Restraint on anticipation—Amount settled variable or fixed—Allowance to children for life—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 45.—On a husband's petition, under section 45 of the Matrimonial Causes Act, 1857, for settlement of property to which the wife, who had been found guilty of adultery, was entitled, the registrar reported that the husband's annual income was £350, derived from his business, whilst the wife's income was £1,140, principally arising from leasehold property, but settled without power of anticipation. The registrar recommended that during the respondent's life £250 a year should be settled on the husband, and £60 on each of five children in the custody of the husband, the sixth child, an infant, having been left in the custody of the respondent.

The court confirmed the registrar's report, and refused to make the allowance variable to meet a possible fall in the respondent's income, or to limit the husband's receipt of his allowance to such time as he should be unmarried, or to limit the allowance to the children to the time when they should be under sixteen years of age.

The settlement was executed by the respondent on a subsequent day immediately after the decree for dissolution of the marriage was made absolute.—*Midwinter* v. *Midwinter*, P.D. & A.D. 560—[1893] P. 93; 62 L. J. P. D. & A. 77; 68 L. T. 262.

23. *Settlement—Variation—Children—Registrar's report—Recommendation that costs be paid out of settled property—Consent of all parties.*—The court sanctioned the payment, out of the *corpus* of the settled property, of costs of the petition for variation of settlements, in a case where a yearly allowance was to be made for each of the children during their lives, and where all parties, including the trustees of the settlement, consented.—*Hamilton* v. *Hamilton*, P.D. & A.D.—68 L. T. 467.

24. *Settlement—Variation—Assignment of property during cohabitation not a "settlement"*—22 & 23 *Vict. c.* 61, *s.* 5—*Dismissal of petition for variation—Order to secure property as maintenance.*—The wife obtained a decree dissolving her marriage, and she thereupon petitioned for variation of settlements, or, in the alternative, for maintenance. Some twenty years before the date of the decree she assigned to her husband certain property of which she then stood possessed subject to mortgages. This she now sought to have reassigned to her, subject to all valid mortgages.

Held, that the assignment was not a "settlement" within the meaning of the Act, but that, upon a petition by the wife for maintenance, the court could order, and did order, the respondent to secure to the petitioner, by way of maintenance, the property which she had formerly assigned to him, subject to outstanding mortgages.—*Chalmers* v. *Chalmers*, P.D. & A.D.—68 L. T. 28.

See also MARRIED WOMAN, 2, 4, 7.

DIVORCE (IRELAND):—

Costs—Motion for new trial—Application to stay issue of certificate of taxation—Ord. 70, *r.* 92.—A wife having obtained a decree for a divorce *a mensâ et thoro*, the husband served notice of motion for a new trial, and the time allowed for moving had expired. The petitioner afterwards lodged her costs for taxation, and the respondent, without lodging money in court or offering security, applied that the taxing master should not issue his certificate of taxation until the new trial motion should be disposed of.

The court refused the application.—*Riordan* v. *Riordan*, P. & M.D. (Ir.)—31 L. R. Ir. 222.

DOMICIL:—

Marriage of Scotchman with Englishwoman—Domicil of origin—Residence—Animus revertendi et manendi—*Evidence—Scotch law—Wife's property*—Jus mariti—*Ante-nuptial contract.*—The domicil of a

person is that place or country in which his habitation is fixed without any present intention of removing therefrom.

The plaintiff, a son of Scotch parents, his domicil of origin being Scotch, brought an action to establish his title, *jure mariti*, according to the Scotch law, to one-half of the property of his deceased wife, an English lady, alleging that during the marriage his own domicil, and consequently his wife's also, was Scotch.

Held, upon the evidence, that the plaintiff had, during the marriage, acquired by choice a domicil in England, and that the domicil so acquired continued until his wife's death.

Judgment of Chitty, J., affirmed.

Per Chitty, J.—Upon the marriage of a Scotchman with an Englishwoman upon whom property has already been settled, it is desirable that an antenuptial contract should be entered into by them confirming the wife in her rights according to English law, so as to preclude the husband, in the event of the wife's death, from setting up any claim, *jure mariti*, to her property under the Scotch law.

Where the domicil of birth is changed during infancy by a change of domicil of the father,

Semble, that the altered domicil cannot be regarded as the infant's domicil of origin.—*In re Craignish, Craignish* v. *Hewitt*, C.A.—[1892] 3 Ch. 180; 67 L. T. 689.

See also DIVORCE, 11, 13; WILL, 9.

DRAINAGE ACTS (IRELAND):—

Charge—Final award of Public Works Commissioners—Proprietor therein named grantee under fee-farm grant—Eviction for non-payment of rent—Liability of grantor's estate.—A drainage district having been duly constituted, the final award of the Commissioners of Public Works named as the proprietor of part of the lands the grantee under a fee-farm grant. The grantor evicted the lands for non-payment of the fee-farm rent. The drainage charge having fallen into arrear,

Held, that the drainage charge affected only the estate of the grantee in the fee-farm grant, and that the grantor's estate was not liable thereto.—*Attorney-General* v. *Wilson*, C.A. (Ir.)—31 L. R. Ir. 28.

EASEMENT.—See LIGHT; LIMITATIONS, STATUTE OF, 11; WAY.

ECCLESIASTICAL LAW:—

1. *Burial—Cremation—Faculty for removal of dead body to be cremated.*—Faculty for the removal of a dead body from its place of burial in a mausoleum for the purpose of its being cremated and the ashes deposited in the mausoleum refused.

The court is accustomed in proper cases to grant faculties for the removal of remains buried in consecrated ground for the sole purpose of such remains being re-interred in other consecrated ground, and would not be justified in granting a faculty for the removal of remains after burial for cremation; but,

Semble, where a body has been cremated, there is no legal objection to the ashes being buried in consecrated ground, accompanied with the use of the burial service.—*In re Dixon*, CONSIST. CT.—[1892] P. 386.

2. *Burial—Order in Council directing bodies under a parish church to be removed—Faculty.*—An Order in Council was made under section 23 of the Burial Act, 1857, directing the churchwardens of a parish church in the City of London to cause to be removed all human remains found beneath the floor of the church and buried in some consecrated burial ground, the work to be carried on under the supervision of the medical officer of health. The rector and churchwardens applied for a faculty for the removal of the remains to a certain consecrated site in a cemetery.

Held, that the petitioners had taken the proper course, and that it was the duty of the court to issue a faculty with provisions for preserving the fabric of the church, and for authorizing the families of persons buried in the vaults to remove the remains to any consecrated burial-ground they might select.—*Rector and Churchwardens of St. Mary-at-Hill* v. *Parishioners of same*, CONSIST. CT.—[1892] P. 394.

3. *Ceremonies — Bishop — Communion service — Lighted candles—Administration of mixed chalice—Eastward position—Singing of hymn "Agnus Dei"—Rule as to evidence of historical facts—Finality of Privy Council judgments.*—Where it is important to ascertain ancient facts of a public nature, the law permits historical works to be referred to as evidence thereof.

The rule of finality applicable to decisions of the Privy Council in relation to rights of property is not equally binding as regards decisions which relate to ritual and ecclesiastical practice, and depend, to some extent, upon the accuracy of historical investigation.

Held, affirming the judgment of the Archbishop, that, although the mixing of wine with water in and as part of the Communion service is against the law of the Church, yet that the use of a cup mixed beforehand does not constitute an ecclesiastical offence;

Held, that the choir's singing of the hymn "The Agnus" before and during the reception of the elements is not illegal;

Held, that the priest's standing at the northern end of the west side of the table during the whole of that part of the Communion service which intervenes between its commencement and the ordering of the bread and wine before the Prayer of Consecration is not illegal.

It being admitted that two candles, not required for the purpose of giving light, were alight throughout the celebration on the holy table without objection on the part of the respondent, who was officiating as bishop, but there being no evidence either of a ceremonial use of the lights or that the respondent had introduced them as unlawful ornaments,

Held, that the respondent was not responsible therefor, and that his making no objection thereto was not an ecclesiastical offence.

Held, that where promoters have established the commission of an ecclesiastical offence, they are not entitled as of right to a monition; but that the Archbishop was entitled, on being satisfied that the offence would not be repeated, to accept the assurance of future submission.—*Read* v. *Bishop of Lincoln*, P.C.—[1892] A. C. 644; 62 L. J. P. C. 1; 67 L. T. 128.

4. *Churchwarden—Qualification—Residence within parish—1 & 2 Will. 4, c. 38, s. 16.*—It is provided by 1 & 2 Will. 4, c. 38 that where the population of a parish exceeds a certain number, and a new church is built within such parish, a district may be assigned to such new church; and it is enacted by section 16 that two fit and proper persons shall be appointed to act as churchwardens for every church built under the provisions of this Act at the usual period of appointing parish officers in every year, and shall be chosen one by the incumbent of the church for the time being, and the other by the renters of the pews in such church.

Held, that a person not resident within the parish was not qualified to be elected as churchwarden of a church built under the provisions of the abovementioned Act.—*Reg.* v. *Cree*, Q.B.D.—67 L. T. 556.

5. *Clergy Discipline Act*, 1892 (55 & 56 *Vict. c.* 32), *ss.* 2, 12—*Complaint against clergyman for immorality—Offence of occasioning scandal by immoral conduct not justiciable by Chancellor of diocese sitting with elected assessors—Amendment of complaint—Charge of habitual drunkenness—Practice.*—The complaint in a criminal suit tried before the Chancellor of the Diocese of Rochester sitting with assessors, under the Clergy Discipline Act, 1892, after charging the defendant, a clergyman holding preferment within the diocese of Rochester, with certain specified offences against morality, further charged him with "occasioning grave scandal and offence in the parish of which he was incumbent by his scandalous conduct in the several preceding charges set forth."

Held, that the ecclesiastical offence of "occasioning scandal and evil report" was not an offence which could be legally tried under the Clergy Discipline Act, 1892, and that all reference to any such charge must be struck out of the complaint.

Practice of the Consistory Court of Rochester as to admitting to proof in a criminal suit charges of habitual drunkenness and of acts of drunkenness, the precise dates of which the prosecutor cannot specify.—*Bishop of Rochester* v. *Harris*, CONSIST. CT. —[1893] P. 137.

6. *Faculty—Jurisdiction—Closed churchyard—Act vesting churchyard in corporation—Excavation of chamber for electric light.*—In two cases of faculty it appeared that for the purpose of lighting two districts in the City of London with electric light it was necessary that underground chambers should be constructed in two closed churchyards in the districts, there being no other places suitable for their construction, and that it was in the interest of the parishioners and public that electric light should be introduced in the districts.

Held, that the court had jurisdiction in its discretion to decree a faculty in each case authorizing the construction of such a chamber in the churchyard, and the use of the same as a transformer chamber for twenty-one years, subject to the payment of a rent to the rector and churchwardens.

Held, also, that the court was not precluded by a local Act, which vested the churchyard in the Corporation of the City of London, to be unappropriated to any purpose except ornamental purposes, from granting the faculty.—*In re St. Nicholas Cole Abbey, In re St. Benetfink Churchyard*, CONSIST. CT.—[1893] P. 58.

7. *Faculty—Stained glass window in chancel—Opposition of majority of parishioners—Discretion of ordinary—Memorials not admissible in evidence.*—The rector and churchwardens of a parish petitioned the ordinary for a faculty to enable them to place stained glass in the east window of the chancel. The faculty was opposed, upon the grounds that the majority of the parishioners desired the existing window to remain unaltered, though no objection was raised to the design of the proposed window, and that the ventilation of the church would suffer, and the chancel be darkened. The judge of the consistory court found that the last two grounds of objection were not borne out by the evidence, and decreed the faculty to issue, and condemned the opponents in costs.

Held, on appeal, that the discretion of the ordinary as to granting or refusing the faculty was the same as if it had been proposed to place the window in any other part of the church; that, assuming that the majority of the parishioners desired the existing window to remain, that in no way fettered the discretion of the ordinary; that the court below had come to a right conclusion on the evidence, and that the decree must be affirmed, except that each of the parties must bear their own costs.

In a contested cause of faculty memorials signed by parishioners asking that a faculty prayed for be not granted are inadmissible in evidence.—*Nickalls* v. *Briscoe*, ARCH. CT.—[1892] P. 269.

8. *Nomination to benefice by Roman Catholic patron—Void presentation*—13 *Anne*, *c.* 13.—Held, that a presentation to a benefice made by a college on the nomination of a Roman Catholic patron, and appearing on the face of it to have been made, not in right of the college, but in trust for the Roman Catholic, was absolutely void under 13 Anne, c. 13. —*Boyer* v. *Bishop of Norwich*, P.C.—[1892] A. C. 417; 61 L. J. P. C. 76; 67 L. T. 30.

9. *Pew—Chapel—Long user—Acts of ownership—Presumption of legal origin—Faculty—Prescription.*—In the year 1782 a chapel upon the first floor of a building the ground floor of which was occupied by a school-house was licensed by the bishop of a diocese, and was constituted a perpetual cure and benefice under 1 Geo. 1, stat. 2, c. 10, s. 4, pews being allotted to the subscribers. These pewholders sold and transferred their seats by entries in the chapel-book. In 1846 the chapel was removed, and a new chapel was erected upon the site of the school-house, which had then been demolished. The circumstances under which the new chapel was erected were such as to warrant the presumption of a conveyance of the site of the school-house for the purposes of the benefice. On the 12th of February, 1848, pews in the new chapel were allotted to the holders of pews in the old chapel, and on the 22nd of February, 1848, the new chapel was consecrated. These pews, and others which were substituted for them upon the re-pewing and repairing of the chapel under a faculty granted in 1867, were exclusively enjoyed by the persons to whom they were allotted and their successors in title down to the commencement of this action, and were dealt with by them by way of assignment and devise. There was no evidence of the pews having been repaired by these persons. The plaintiff, in whom the rights of the previous holders of three of these pews were vested, brought an action against the vicar and churchwardens of the parish, claiming a declaration that he was entitled to the pews and an injunction to restrain interference by the defendants.

Held, that the evidence did not justify the presumption of a legal origin for the user of the pews, and that the plaintiff could not maintain the action. —*Proud* v. *Price*, Q.B.D. 650—68 L. T. 682.

EDUCATION ACTS:—

Punishment—Board school master—Authority to inflict punishment—Offence committed by pupil off the school premises.—The authority of the master of a board school to punish pupils attending the school is not limited to acts of misconduct committed by them on the school premises.—*Cleary* v. *Booth*, Q.B.D. 391—[1893] 1 Q. B. 465; 62 L. J. M. C. 87; 68 L. T. 349.

ELECTION LAW.—See PARLIAMENT, 1-5.

EMPLOYERS' LIABILITY ACT.—See MASTER AND SERVANT, 2, 3.

ESTOPPEL:—

1. *Deed—Sale—Mortgage—Fraud—Innocent mis-*

representation—Covenant for title—Averment of legal estate.—By indenture of the 4th of December, 1875, the defendants, being seised in fee of certain real estate, conveyed a plot of ground, part thereof, to the use of T., his heirs and assigns, by way of sale. By indenture of the 25th of May, 1876, T. conveyed the plot by way of mortgage to the A. Society. By an indenture of the 4th of April, 1877, after reciting that the testator, of whose real estate the defendants were the trustees, being at the date of his will, and so continuing till the time of his death, seised in fee simple, free from incumbrances, of certain real estate, of which the plot thereby granted formed part, made his will, and thereby devised his real estate unto the defendants, their heirs and assigns, upon certain trusts, and also reciting that the testator died without having revoked or altered his will, and also reciting that the defendants, in exercise of a power in the will, had agreed with T. for the absolute sale to him of the plot of land and premises intended to be thereby granted, and the inheritance thereof, in fee simple in possession, free from incumbrances, at a certain price, and also reciting that H. S., one of the defendants, as beneficial owner of the plot of ground subject to the power of sale, had agreed to concur in the indenture, it was witnessed that the defendants did grant and convey, and the defendant, H. S., did grant and confirm, the plot of ground unto and to the use of T., his heirs and assigns, for ever. The identure contained a covenant that the defendants and the defendant H. S. respectively had not incumbered; and also a covenant that the defendant H. S., together with the defendants, had good right to convey. By an indenture of the 22nd of September, 1877, T. purported to convey the plot of ground and premises comprised in the indenture of the 4th of April, 1877, to the plaintiffs by way of mortgage to secure certain moneys. The plot of ground comprised in the indentures of the 4th of April, 1877, and the 22nd of September, 1877, was comprised in, and had been already conveyed by way of sale and by way of mortgage by, the indentures of the 4th of December, 1875, and the 25th of March, 1876, respectively. The indenture of the 4th of April, 1877, was innocently executed by the defendants at the request of T., who was employed by them in the development of the testator's estate, and who enjoyed their confidence, and upon a representation made by him, which they accepted in good faith, that the plot of ground had not already been sold. The plaintiffs innocently advanced their money upon the faith of the representations made through T. to them by the defendants in the indenture of the 4th of April 1877. In an action for breach of covenant for title,

Held, that the statements as to title in the deed of the 4th of April, 1877, were not sufficiently precise to raise an estoppel against the defendants so as to prevent them from denying that in fact they had no title to convey, and from setting up the true facts.

Held, by Lindley, L.J., that the defendants were not liable to the plaintiffs for the loss sustained by them on the mortgage of the 22nd of September, 1877, on the further grounds—(1) that the plaintiffs were in no better position as against the defendants than T., from whom they took the mortgage, and (2) that the misrepresentation of the defendants, by which the plaintiffs had been misled, was an innocent one.

Decision of Kekewich, J., reversed.

Quære, whether, supposing there had been an estate created by estoppel as against the defendants, a plea of fraud would be well answered by the reply of purchase for value without notice.—*Onward Building Society* v. *Smithson*, C.A. 53—[1893] 1 Ch. 1; 62 L. J. Ch. 138; 68 L. T. 125.

2. *Detention of goods under £15 value within Metropolitan Police District—Order of magistrate for delivery up of goods—Action for special damage arising out of detention—Metropolitan Police (Courts) Act*, 1839 (2 & 3 *Vict. c.* 71), *s.* 40.—A person who obtains an order from a police magistrate under section 40 of the Metropolitan Police (Courts) Act, 1839, for the delivery up of goods improperly detained is not thereby precluded from subsequently bringing an action for special damage arising out of the same detention.—*Midland Railway Co.* v. *Martin & Co.*, Q.B.D.—[1893] 2 Q. B. 172.

See also BANKER, 3-5; BANKRUPTCY, 5; DIVORCE, 21; LANDLORD AND TENANT, 8.

EVIDENCE:—

Bankers' Books Evidence Act, 1879 (42 & 43 *Vict. c.* 11), *ss.* 3-7—*Libel action—Plea of justification—Application by defendants for order to inspect plaintiff's bank accounts under section 7—Discretion.*—In an action of libel the defendants pleaded that the defamatory statements complained of were true, and in order to establish this plea they desired to put in evidence the plaintiff's banking account. They therefore asked for an order under section 7 of the Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), that they might be at liberty to inspect and take copies of the entries in the books of the plaintiff's bankers relating to his affairs. On their behalf it was contended that they were entitled to the order, as the immunity granted to the banker by section 6 of the Act of 1879 shut out all other means of procuring the desired evidence.

The order having been successively refused by the master and the learned judge, it was now

Held (dismissing the defendants' appeal), that section 6 of the Act must be construed in the light of the sections which precede it, and that it means that no banker shall be compellable to produce his books only so long as he avails himself of the course provided by the Act for his convenience; and that the issue of such an order as was here asked for was in the discretion of the judge, and that that discretion had been rightly exercised.—*Emmott* v. *Star Newspaper Co.*, Q.B.D.—62 L. J. Q. B. 77; 67 L. T. 829.

See also CRIMINAL LAW, 2; DIVORCE, 16, 17.

EXECUTION.—See SHERIFF.

EXECUTOR:—

1. *Action by—Breach of contract causing testator's death—Damage to personal estate—Previous action under Lord Campbell's Act.*—A passenger on a railway was injured by an accident, and after an interval died in consequence. The executrix recovered £750 in an action under Lord Campbell's Act. She now sued for damage to his personal estate caused during his lifetime by medical expenses and loss from inability to attend to business.

Held (affirming the judgment of the Queen's Bench Division), that the former action was no bar to the present one.

Bradshaw v. *Lancashire and Yorkshire Railway Co.*, L. R. 10 C. P. 189, approved.—*Daly* v. *Dublin, Wicklow, and Wexford Railway Co.*, C.A. (Ir.)—30 L. R. Ir. 514.

2. *Renunciation of probate—Intermeddling—Consent of parties interested.*—There is no absolute rule that an executor who has intermeddled with the assets of a testator will not be allowed to renounce

in a proper case. Thus, where an executor had only intermeddled so far as was necessary to protect the assets, and desired to renounce on the ground of his relationship with the next of kin, who were opposing the will, and the parties interested under the will consented, the court gave liberty to renounce.

Carberry v. *Cody*, Ir. Rep. 1 Eq. 76, distinguished. —*In the Goods of Fitzpatrick*, P. & M.D. (Ir.)—29 L. R. Ir. 328.

3. *Statute of Limitations—Statute-barred debts—Administration summons by creditor dismissed—Subsequent payment of the debt by one executor against wish of his co-executor*—Res judicata—Devastavit.—An executor who pays a statute-barred debt after a judicial decision that the debt is not recoverable out of the testator's estate by reason of its being statute-barred, commits a *devastavit;* and the creditor who receives payment of such debt, with knowledge of the circumstances, is also liable to the testator's estate for its repayment.—*Midgley* v. *Midgley*, C.A. 659.

See COMPANIES CLAUSES ACT; LANDLORD AND TENANT (IRELAND), 1; MORTGAGE, 9; WILL, 24.

FACTOR:—

Pledge of goods—Goods entrusted for sale—Mercantile agent—Ordinary course of business—Factors Act, 1889 (52 & 53 *Vict. c.* 45), *ss.* 1, 2.—Where a person entrusted with goods for the purpose of sale only pledges them with a pawnbroker, he is not a mercantile agent "acting in the ordinary course of business of a mercantile agent" within the meaning of section 2 of the Factors Act, 1889, and the pawnbroker is not protected by that section from an action by the owner to recover the value of the goods.—*Hastings* (*Limited*) v. *Pearson*, Q.B.D. 127—[1893] 1 Q. B. 62; 62 L. J. Q. B. 75; 67 L. T. 553.

FAIRS:—

"*Fair,*" *meaning of—Occupier allowing on his land swings, roundabouts, and other contrivances for amusement—No buying or selling on land—No payment to occupier—Walsall Corporation Act*, 1890 (53 & 54 *Vict. c. cxxx.*), *s.* 126.—Section 126 of the Walsall Corporation Act, 1890, imposes a penalty upon any occupier of land within the borough who "holds or permits to be held any market or fair" thereon, without the licence of the corporation.

The defendant, being the occupier of certain land within the borough of Walsall, on certain days (one being a regular fair day) without the licence of the corporation, brought on to his land and used certain swing boats, roundabouts, shooting galleries, and many other contrivances for the amusement of the people. These contrivances were the property of different persons, and it was not proved that such persons made any payment to the defendant for the use of the land, or that there was any buying or selling of goods, or exposing the same for sale thereon.

The defendant was convicted under the section of permitting the holding of a "fair" on his land.

Held, by Bruce, J., that he ought not to have been convicted, as the word "fair" in the section is used in its proper sense as a mart or gathering for the selling of goods, and would not include gatherings where amusements only were provided.

Held, (by Lawrance, J.), that the defendant was properly convicted, as the word "fair" has a wider meaning than that of a fair in the ordinary sense as a place for buying and selling, and that, although buying and selling are the chief idea in the word, yet that it would include places where amusements of the kind in question were provided, although there was no buying and selling.

The junior judge (Bruce, J.) having withdrawn his judgment, the conviction stood.—*Collins* v. *Cooper*, Q.B.D.—68 L. T. 450.

FALSE REPRESENTATION:—

Negligence—Misrepresentation — Mortgage—Building agreement—Certificate of surveyer—Liability of surveyor for misstatements without fraud on contract —Action of deceit.—A builder who was engaged in erecting houses upon certain land under a building agreement mortgaged his interest under the agreement. The mortgagees advanced the mortgage money to him upon the faith of certain certificates given by a surveyor, that certain specified stages in the buildings had been completed. The surveyor was appointed, not by the mortgagees, but by a third party, namely, the vendor under the building agreement, to whom the certificates were made out; there was no contract between him and the mortgagees, and he was unaware of the terms of the mortgage deed. The certificates contained untrue statements, the result of the negligence of the surveyor; but there was no fraud on his part.

Held, that, in the absence of fraud or a contractual relationship between him and the mortgagees, the surveyor owed no duty to them to exercise care in giving the certificates, and that an action would not lie against him at the suit of the mortgagees for negligence.

Cann v. *Wilson*, 37 W. R. 23, 39 Ch. D. 39, overruled.

Heaven v. *Pender*, 11 Q. B. D. 503, distinguished.

Derry v. *Peek*, 38 W. R. 33, 14 App. Cas. 337, followed.—*Le Lievre* v. *Gould*, C.A. 468—[1893] 1 Q. B. 491; 62 L. J. Q. B. 353; 68 L. T. 626.

See also COMPANY, 14, 15, 44; ESTOPPEL, 1.

FEE-FARM GRANT:—

1. *Redemption of Rent* (*Ireland*) *Act*, 1891 (54 & 55 *Vict. c.* 57), *s.* 1—*Amount of redemption price—Fee-farm grant — Buildings erected by grantee.* — In determining the amount to be paid to the grantor for the redemption of a fee-farm rent regard should be had to the buildings on the holding as increasing the security for the rent, although they have been erected by the grantee.—*O'Hea* v. *Morrison*, LAND COM. (Ir.)—30 L. R. Ir. 651.

2. *Redemption of Rent* (*Ireland*) *Act*, 1891 (54 & 55 *Vict. c.* 57)—*Application of Act.*—The Redemption of Rent (Ireland) Act, 1891, deals only with the rights of parties standing in the relation of landlord and tenant. The rent created by a fee-farm grant dated the 9th of February, 1846, which did not create this relation, cannot be redeemed, nor can the fair rent of the lands on which it is charged be fixed under the said Act.—*Kelly* v. *Rattey*, C.A. (Ir.)—32 L. R. Ir. 445.

3. *Redemption of Rent* (*Ireland*) *Act*, 1891 (54 & 55 *Vict. c.* 57)—*Demesne lands—Subletting—Land Law* (*Ireland*) *Acts*, 1881, 1887.—A fee-farm rent reserved in respect of demesne lands cannot be redeemed under the Redemption of Rent (Ireland) Act, 1891. If the grantee in fee-farm of such lands serve an originating notice claiming to redeem the fee-farm rent, the court will set aside the notice on motion.

If the demesne lands held in fee-farm be sublet by the grantee, his subtenants cannot fix a fair rent against him.

Demesne lands are not undemesned by the mere fact of their having been granted or demised for so long a period as to negative any intention in the

grantor or lessor of resuming possession at some future time.—*Spencer* v. *Tedcastle*, C.A. (Ir.)—32 L. R. Ir. 411.

4. *Redemption of Rent (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 57), *s.* 1—"*Grantee under a fee-farm grant*"—*Conveyance in fee subject to a rent-charge.*—A. granted certain lands to B., his heirs and assigns, to the use that A., his heirs and assigns, should for ever receive out of the lands granted the yearly rent of £45. The deed contained powers of distress and entry, and an ultimate limitation to the use of B., his heirs and assigns, for ever; also a power to redeem the rent wholly or in part. B., being in occupation of the lands, served an originating notice to redeem the rent under the Redemption of Rent (Ireland) Act, 1891.

Held, that B. was not a "grantee under a fee-farm grant" within the meaning of the Act, and had not the status necessary to entitle him to maintain his originating notice.—*Christie* v. *Peacocke*, LAND COM. (Ir.)—30 L. R. Ir. 646.

FIJI, LAW of:—

Boundaries of town—Construction of proclamation—High-water mark on the seashore.—Where by proclamation the limits of a town, and therefore of rateable property within a town, were fixed, the western boundary to be the sea coast at high-water mark, the eastern boundary to be at a specified distance therefrom, the northern and southern boundaries to connect the eastern by lines of specified length with certain points on the high-water mark, and it appeared that the appellants had been rated in respect of lands reclaimed by them beyond the western boundary or high-water mark, as it existed at the date of the proclamation, but within that mark as it existed when the rates were imposed.

Held, that the appellants were liable. The true construction was that the eastern boundary was absolutely, and the northern and southern sufficiently fixed in reference to the high-water mark as it existed when proclaimed, but that the western boundary varied from time to time with the high-water mark as it shifted.—*Smart & Co.* v. *Town Board of Suva*, P.C.—[1893] A. C. 301; 68 L. T. 774.

FIRE INSURANCE.—See INSURANCE (FIRE).

FISHERY ACTS:—

1. *Fishery district—Definition of limits—River—Tributary—Reservoir formed by embankment across tributary.*—The River Severn Fishery District included that river and all its tributaries. Under the provisions of the Liverpool Corporation Waterworks Act, 1880, an embankment was constructed across the River Vyrnwy, a tributary of the River Severn, and a reservoir was formed for the purpose of supplying water to the town of Liverpool. The Act provided for a daily and monthly supply of "compensation" water from the reservoir into the part of the River Vyrnwy below the embankment.

Held, that so much of the River Vyrnwy as was above the embankment had ceased to be a tributary of the River Severn, and therefore was not within the jurisdiction of the conservators of the Severn Fishery District.

Harbottle v. *Terry*, 31 W. R. 289, 10 Q. B. D. 131, followed.—*George* v. *Carpenter*, Q.B.D. 366—[1893] 1 Q. B. 505; 68 L. T. 714.

2. *Oysters—Sale during close season—Exemption of oysters "taken within the waters of some foreign State"—Oysters taken in French waters and relaid in English waters—Fisheries (Oyster, Crab, and Lobster) Act*, 1877 (40 & 41 *Vict. c.* 42), *s.* 4.—Oysters imported alive from foreign oyster-beds and relaid for purposes of storage in English waters, although remaining in the English waters for several months, are oysters "taken within the waters of a foreign State" within the proviso to section 4 of the Fisheries (Oyster, Crab, and Lobster) Act, 1877, and a person who has lifted them from the English waters and sold them during the close season cannot be convicted of an offence under that section.—*Robertson* v. *Johnson*, Q.B.D. 223—[1893] 1 Q. B. 129; 62 L. J. M. C. 1; 67 L. T. 560.

FRAUDS, STATUTE of:—

1. *Agreement in consideration of marriage—Parol promise to give lease of house—Possession—Part performance—Incumbrances—Freedom from—Statute of Frauds* (29 *Car.* 2, *c.* 3) *s.* 4.—In 1889 the defendant was married to the plaintiff's son, and the plaintiff gave to his son as a marriage present, but only by word of mouth, a certain business carried on at a certain house, and also (as the defendant contended but the plaintiff denied) the lease of that house. Directly after the marriage possession of the house was given up by the plaintiff and was held by the son, and he carried on the business there for his own benefit till his death, which occurred in April, 1891. Soon after that event a family disagreement arose, and the plaintiff brought an action of ejectment to recover possession of the house.

Held, that the possession of the house given up to the son, equivalent to part performance, dispensed with the necessity of a writing; and that, as nothing was said to the contrary, the gift was free from incumbrances.

Ungley v. *Ungley*, 5 Ch. D. 887, followed.—*Sharman* v. *Sharman*, C.A.—67 L. T. 834.

2. *Interest in land—Contract for purchase of debentures—Company—Charge on undertaking and property—Floating security—Statute of Frauds*, *s.* 4.—A company issued debentures whereby it charged its undertaking and all its property whatsoever and wheresoever, both present and future. One of the conditions indorsed on the debentures provided that the charge thereby created should be a floating security; and another condition provided that the moneys secured by the debentures should become payable if the company created any specific charge on any of its freehold or leasehold property in priority to the debentures. The company was possessed of certain leasehold property.

Held, that a contract for the purchase of such debentures was a contract for an interest in land within section 4 of the Statute of Frauds.

Judgment of Mathew, J., 41 W. R. 415, affirmed.—*Driver* v. *Broad*, C.A. 483—[1893] 1 Q. B. 744.

3. *Memorandum in writing—Interest in land—Mortgage—Description of mortgagee—Solicitors to "proposing lender"*—29 *Car.* 2, *c.* 3, *s.* 4.—Upon a contract for a mortgage of land, the solicitor for the intending mortgagor wrote a letter in which he said that he had called on "the solicitors to the proposing lender and had arranged the proposed loan as follows."

Held, that this was not a sufficient description of the intending mortgagee to satisfy section 4 of the Statute of Frauds.—*Pattle* v. *Anstruther*, C.A. 625.

See also LANDLORD AND TENANT, 15.

FRIENDLY SOCIETY:—

1. *Arbitration—Validity of award—Evidence given in absence of applicant—Jurisdiction of justices—Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *s.* 22 (d).—A member of a friendly society, who made a claim for sick pay, attended before the Arbitration Committee, who excluded him from the room

during the examination of witnesses called on behalf of the society. The Arbitration Committee decided that he was not entitled to sick pay.

Held, that the reception of evidence in the member's absence rendered the decision invalid, and, there being no decision within forty days after the application, the justices had jurisdiction to entertain the application.—*Bache* v. *Billingham*, Q.B.D.—62 L. J. M. C. 117.

2. *Bankruptcy of officer—Debt due to society—Preferential payment—Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *s.* 15, *sub-section* 7—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 40—*Preferential Payments in Bankruptcy Act*, 1888 (51 & 52 *Vict. c.* 62), *s.* 2 (1).—By the Friendly Societies Act, 1875, it is provided that "registered societies shall be entitled to the following privileges": Section 15, sub-section 7, "Upon the death or bankruptcy or insolvency of any officer of a society having in his possession, by virtue of his office, any money or property belonging to the society, or if any execution, attachment, or other process be issued or action or diligence raised against such officer or against his property, his heirs, executors, or administrators, or trustee in bankruptcy or insolvency, or the sheriff or other person executing such process, or the party using such action or diligence respectively, shall, upon demand in writing of the trustees of the society, or any two of them, or any person authorized, by the society or by the committee of management of the same, to make such demand, pay such money and deliver over such property to the trustees of the society in preference to any other debts or claims against the estate of such officer."

The treasurer of a friendly society, who carried on business as a publican, became bankrupt. He was at the time indebted to the society in the sum of £100 6s. 7d., which he had received by virtue of his office. The money did not exist in any specific or traceable form, but his property realized in the bankruptcy some £290. Upon a claim by the trustees of the friendly society to be paid in preference to the other creditors,

Held (affirming the Divisional Court), that it was not the intention of the above section of the Act of 1875 to repeal then existing privileges of friendly societies; that its application was not restricted to specific moneys, or to such as could be specifically traced; that the bankrupt had in his possession, by virtue of his office, £100 6s. 7d. belonging to the society; and that the trustees of the society were entitled, therefore, to be paid that sum in preference to any other claim upon the bankrupt's estate.

Ex parte Edmonds, In re Atkins, 30 W. R. 432, approved.—*In re Miller, Ex parte Official Receiver*, C.A. 243—[1893] 1 Q. B. 327; 62 L. J. Q. B. 324; 68 L. T. 367.

3. *Dispute—Member—Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *s.* 22.—A dispute does not come within the rules of a friendly society as to the settlement of disputes between members and the society if the dispute relates to a claim made by a party to be a member of the society, which claim is denied by the trustees of the society.—*Willis* v. *Wells*, Q.B.D. 64—[1892] 2 Q. B. 225; 61 L. J. Q. B. 606.

4. *Sum paid for funeral expenses of child under ten years of age—Production of certificate of death—Industrial assurance company—Persons "who issue, or are liable upon, policies of assurance upon human life"—Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *ss.* 4, 28—*Life Assurance Companies Act*, 1870 (33 & 34 *Vict. c.* 61), *s.* 2.—By section 28 of the Friendly Societies Act, 1875, it is made an offence for any "society" to pay any sum on the death of a child under ten years of age, except upon the production by the parent of the child of a certificate of death issued by the registrar of deaths; and (sub-section 7) "society" is defined to include "industrial assurance companies assuring the payment of money on the death of children under the age of ten years."

By section 4, "industrial assurance company" is defined to mean (if not inconsistent with the context) "any company as defined by the Life Assurance Companies Act, 1870, which grants assurances on any one life for a less sum than twenty pounds, and which receives contributions . . . by means of collectors at less periodical intervals than two months."

By section 2 of the Life Assurance Companies Act, 1870, "company" is defined to mean "any person or persons, corporate or unincorporate, not being registered under the Acts relating to friendly societies, who issue, or are liable under, policies of assurance upon human life."

A society, whose registration under the Friendly Societies Acts had been cancelled, and which was registered under the Companies Acts, did not issue policies of assurance, but collected and entered upon a contribution card fortnightly contributions from its members, and was liable to pay sums of money upon the death of a member for funeral expenses. The society was convicted under section 28 of the Friendly Societies Act, 1875, for having paid such a sum on the death of a child under the age of ten years without the production of a certificate of death.

Held, that the words in section 2 of the Life Assurance Companies Act, 1870, "who issue, or are liable under, policies of assurance upon human life," must be excluded from the definition of "society" in section 28 of the Friendly Societies Act, 1875, as being inconsistent with the context; and that the society fell within that definition, and the conviction was right.—*Newbold Friendly Society* v. *Barlow*, Q.B.D. 543—[1893] 2 Q. B. 128; 62 L. J. M. C. 124; 68 L. T. 798.

GAME:—

Licence to deal in game—Exposing for sale and selling hare and black game killed in Russia—Game Act, 1831 (1 & 2 *Will.* 4, *c.* 32)—2 & 3 *Vict. c.* 35—23 & 24 *Vict. c.* 90, *ss.* 13, 14—24 & 25 *Vict. c.* 91, *s.* 17.—A person who did not hold an excise licence under 23 & 24 Vict. c. 90, s. 14, exposed for sale in his shop and sold a hare and a brace of black game which had been killed in Russia and imported into this country for sale.

Held, that, the hare and black game having been killed abroad, it was not necessary to hold the excise licence.—*Pudney* v. *Eccles*, Q.B.D. 125—[1893] 1 Q. B. 52; 62 L. J. M. C. 27; 67 L. T. 713.

GAMING:—

1. *Betting—Employment of agent to bet—Gaming Act*, 1892 (55 & 56 *Vict. c.* 9)—*Bet made and paid before passing of Act—Action brought after passing of Act—Whether Act retrospective.*—The Gaming Act, 1892, does not apply to a promise made before the Act came into operation.

Before the Act came into operation a betting agent made certain bets at the request of and for a principal.

Before the Act came into operation the betting agent received the winnings and paid the losses in respect of such bets. The result of these trans-

actions was that there was a balance against the principal.

After the Act came into operation the agent brought an action against the principal to recover the balance.

Held, that he was entitled to recover.—*Knight* v. *Lee*, Q.B.D. 125—[1893] 1 Q. B. 41; 62 L. J. Q. B. 28; 67 L. T. 688.

2. *Betting—Money paid by plaintiff at defendant's request for lost bets—Plaintiff no party to the betting—Right of plaintiff to recover money so paid*—8 & 9 *Vict. c.* 109—*Gaming Act*, 1892 (55 & 56 *Vict. c.* 9), *s.* 1.—Section 1 of the Gaming Act, 1892, enacts that "any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by 8 & 9 Vict. c. 109 . . . shall be null and void, and no action shall be brought or maintained to recover any such sum of money."

Held, that money paid by the plaintiff at the request of the defendant, in settlement of sums which were in fact bets made and lost by the defendant, the plaintiff himself being no party to the betting, comes within this section as money paid "in respect of" contracts rendered null and void by 8 & 9 Vict. c. 109, and that, therefore, the plaintiff is not entitled to recover the money so paid by him.—*Tatam* v. *Reeve*, Q.B.D. 174—[1893] 1 Q. B. 44; 62 L. J. Q. B. 30; 67 L. T. 683.

3. *Lottery—Wager—"Missing word" competition—Illegal contract—Right of competitors to return of their contributions—Lottery Act*, 1802 (42 *Geo.* 3, *c.* 119), *s.* 1.—The defendant, who was the proprietor of a newspaper, carried on in connection therewith a competition under the following conditions:—He published in his paper a paragraph, omitting the last word. In the same paper he printed a coupon with a direction that persons wishing to enter the competition must cut out the coupon, fill in the word missing from the paragraph, together with their names and addresses, and send it, with a postal order for 1s., to the office of the paper. It was further stated in the paper that the missing word was in the hands of a chartered accountant, enclosed in a sealed envelope; that his statement with regard to it would appear, with the result of the competition, in a subsequent issue of the paper; and that the whole of the money received in entrance fees would be divided equally amongst those competitors who filled in the missing word correctly. In an action by the successful competitors against the defendant and the unsuccessful competitors, seeking administration of the trusts of the moneys in the hands of the defendant for the purposes of the competition and distribution among the persons entitled thereto,

Held, (1) that the competition constituted a lottery within the meaning of 42 Geo. 3, c. 119, and was illegal; (2) that so far as the money in the hands of the defendant was impressed with any trust, it was one which had arisen out of an illegal transaction, and the court would not render any assistance in its administration; and, *semble*, (3) that, notwithstanding the illegality of the competition, the competitors had a legal right, enforceable by action of law, to the return of their contributions, at all events, provided that they gave notice of their claim before the money had been distributed by the defendant.—*Barclay* v. *Pearson*, CH.D. STI., J.—[1893] 2 Ch. 154; 62 L. J. Ch. 636; 68 L. T. 709.

See also CONTRACT, 1; CRIMINAL LAW, 7.

GAS COMPANY.—See BANKRUPTCY, 13; GASWORKS.

GASWORKS:—

Statutory liability—Fixed price—Failure of supply—Unavoidable occurrence—Liability to abatement of price—Gasworks Clauses Act, 1871 (34 & 35 *Vict. c.* 41), *ss.* 24, 36—*Richmond Gas Act*, 1881 (44 & 45 *Vict. c. xxxv.*), *s.* 25.—A gas company who are under a statutory obligation to supply a fixed quantity of gas to the public lamps in a district at a fixed price during a certain period are not liable to a reduction in that price if, by reason of an occurrence over which they had no control (such as a frost of exceptional severity), the fixed amount of gas has not been supplied during a part of that period.—*In re Richmond Gas Co. and Mayor, &c., of Richmond*, Q.B.D. 41.—[1893] 1 Q. B. 56; 62 L. J. Q. B. 172; 67 L. T. 554.

HABEAS CORPUS.—See PRACTICE, 1.

HARBOURS and DOCKS:—

Bye-laws—Regulations—Statutory powers—Ultra vires—*Harbours, Docks, and Piers Clauses Act*, 1847 (10 & 11 *Vict. c.* 27), *ss.* 23, 33, 83, 85—*Practice—Action by individual—Special damage—Public injury—Ord.* 25, *r.* 5.—A dock company, having, under its special Act and section 83 of the Harbours, &c., Act, 1847, power to make regulations and bye-laws, issued a compulsory code of regulations for shipowners using the docks, but these regulations were not confirmed as "bye-laws" in manner provided by section 85 of the general Act. Certain accommodation provided for by the regulations was in excess of what was required by statute to be provided by the company, and certain rates and charges imposed by them were beyond their statutory powers. A firm of shipowners, which, prior to the regulations, had been in the habit of using the docks and having particular berths appropriated for their ships, finding that the regulations caused them inconvenience and increased expense, brought an action against the dock company for a declaration that the regulations were invalid and for an injunction, a shipowners' trade protection association, which itself owned no ships, being made co-plaintiffs.

Held (affirming the judgment of A. L. Smith, J., dismissing the action), that the association, not being shipowners, and not being entitled to sue as agent for their members, had no *locus standi*; and that the plaintiff firm, suing as individuals and not by the Attorney-General, were bound to prove special damage by the issue of the regulations, and this they had failed to do, inasmuch as any accommodation provided beyond the statutory requirements must be a matter of agreement between the firm and the dock company; but, under ord. 25, r. 5, a declaration was made that the regulations, not having been confirmed as bye-laws, were not binding on the plaintiff firm save so far as they agreed to be bound by them; and that they were not entitled to have berths appropriated to their ships, or any other special accommodation, except by agreement with the dock company.—*London Association of Shipowners* v. *London and India Docks Joint Committee*, C.A.—[1892] 3 Ch. 242; 62 L. J. Ch. 294; 67 L. T. 238.

HIGHWAY:—

1. *Access to—Mandatory injunction—Esplanade—Adjoining landowner.*—An owner of land which runs right up to a public highway is entitled to access to that highway from his land, and that is so whether he is the presumptive owner of the soil of the highway or not. Where, therefore, a landowner, whose land adjoined a public promenade which had been also for many years used as a public

highway for foot passengers, was deprived of his access to the promenade by a fence erected by a local board in whom the promenade had been vested,

Held, that a mandatory injunction must issue to compel the removal of the fence, and an inquiry as to damages be directed.—*Ramuz* v. *Southend Local Board*, CH.D. ROM., J.—67 L. T. 169.

2. *Repair—Extraordinary traffic—Excessive weight—Power of road authority to recover expenses—Death of person liable*—"Actio personalis moritur cum persona"—*Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23.—Proceedings under section 23 of the Highways and Locomotives (Amendment) Act, 1878, to recover the amount of extraordinary expenses incurred in the repair of a highway by reason of damage caused by excessive weight passing along the same or extraordinary traffic thereon cannot be maintained against the legal personal representatives of a deceased person by whose order the excessive weight or extraordinary traffic was put upon the road, such proceedings being founded in tort, and the maxim "*Actio personalis moritur cum persona*" applying.—*Story* v. *Sheard*, Q.B.D. 31—[1892] 2 Q. B. 515; 61 L. J. M. C. 178; 67 L. T. 423.

3. *Repair—Extraordinary traffic—Unusual purpose—Highways and Locomotives Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23.—The carriage of building materials for the construction of a Government fort over a road in an agricultural district, where the weights are neither individually nor collectively excessive, does not amount to "extraordinary" traffic within section 23 of the Highways and Locomotives Act, 1878, merely because the building of the fort is unusual.—*Hill* v. *Thomas*, Q.B.D.—62 L. J. M. C. 89. [Reversed in C.A. Aug. 10, 1893.]

4. *Repair—Urban authority—Surveyors of highway—Non-repair—Breach of statutory duty—Liability—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 144, 149.—A highway was by virtue of the Public Health Act, 1875, vested in and under the control of a local board as urban authority. Sections 144 and 149 provide that the urban authority shall have and be subject to all the powers, duties, and liabilities of surveyors of highways, and shall from time to time level, alter, and repair the highways vested in them. An owner of land adjoining the highway in making an approach to his land, without the sanction or authority of the local board, made a drop in the level of the highway and left it in a dangerous condition. The appellant, walking along the highway, fell down the drop and was injured. In an action by him against the local board for allowing the highway to be out of repair and in a dangerous condition, it appeared that the local board were chargeable only with nonfeasance.

Held, that the action would not lie.

Gibson v. *Mayor, &c., of Preston*, L. R. 5 Q. B. 218, approved.—*Cowley* v. *Newmarket Local Board*, H.L. (E.)—[1892] A. C. 345; 62 L. J. Q. B. 65; 67 L. T. 486.

5. *Surveyor—Limitation of action—Urban authority—Highway Act*, 1835 (5 & 6 *Will.* 4, *c.* 50), *ss.* 26, 109—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 144, 264.—By section 109 of the Highway Act, 1835, no action shall be commenced against any person for anything done in pursuance of or under the authority of the Act after three months next after the fact committed for which such action is brought. By section 144 of the Public Health Act, 1875, urban authorities (including, by section 6, corporations of boroughs) are made surveyors of highways within their district, and are subject to all the powers, duties, and liabilities of surveyors of highways under the law for the time being in force. By section 264 every action against any local authority for anything done, or intended to be done, or omitted to be done, under the provisions of the Act shall be commenced within six months after the cause of action accrued.

In an action to recover damages for negligence on the part of the defendants as surveyors of highways,

Held, that the defendants were entitled to the protection of section 109 of the Highway Act, 1835, and that the action must be commenced within three months after the cause of action accrued.

Taylor v. *Meltham Local Board*, 47 L. J. C. P. 12, 26 W. R. Dig. 95, and *Kay* v. *Atherton Local Board*, 42 J. P. 792, overruled.

Burton v. *Mayor, &c., of Salford*, 31 W. R. 815, 11 Q. B. D. 286, followed.—*Graham and Wife* v. *Mayor of Newcastle-upon-Tyne*, C.A. 424—[1893] 1 Q. B. 643; 62 L. J. Q. B. 315; 69 L. T. 6.

6. *Trespass—Right of owner of soil of highway—Right of public—Interference with owner's right of shooting.*—The defendant was the owner of certain moors across which a public road ran. While the defendant and his friends were engaged in shooting over the moors, the plaintiff went upon the road for the purpose of preventing, and acted so as to prevent, the grouse, which were being driven, from flying across the road towards the place where the defendant and his friends were. The defendant's keepers thereupon seized hold of the plaintiff and held him down upon the road until the drive was over. In an action to recover damages for assault and false imprisonment,

Held, that, as the soil of the road was vested in the defendant as owner of the adjoining land, subject only to the right of the public to pass and repass along it, the plaintiff, not being upon the road in the exercise of the right of way, but for another purpose, was a trespasser.—*Harrison* v. *Duke of Rutland and others*, C.A. 322—[1893] 1 Q. B. 142; 62 L. J. Q. B. 117; 68 L. T. 35.

See also LIMITATIONS, STATUTE OF, 11; LOCAL GOVERNMENT, 4.

IMPROVEMENT of LAND (IRELAND) ACT:—

Loan from Board of Works—Personal liability of borrower after eviction—10 & 11 *Vict. c.* 32.—The defendant, being entitled under lease for ever to lands in Ireland, obtained in 1880 from the Board of Works (under 10 & 11 Vict. c. 32 and amending Acts) a loan of £300, secured by an order creating an annual rent-charge payable for a term of thirty-five years. In 1888 the defendant was evicted for non-payment of rent.

Held (Gibson, J., dissenting), that the rent-charge so created was a security merely, and that the defendant was personally liable to repay the amount due upon the advance, the liability under the order being to repay the amount at the periods and by the sums fixed thereby, and that therefore the defendant was liable for the instalments accruing due after the eviction.—*Attorney-General* v. *Fetherstonhaugh*, Q.B.D. (Ir.)—30 L. R. Ir. 585.

INCLOSURE ACTS:—

1. *Highway—Pasturage—Presumption of ownership—Lord of manor—Annual letting of pasturage by vestry—Long user—Presumption of grant to trustees for parishioners—Churchwardens and overseers*—59 *Geo.* 3, *c.* 12, *s.* 17—*Enrolment—Charitable Uses Act* (9 *Geo.* 2, *c.* 36), *s.* 3—*Statute of Limitations.*—In

pursuance of an Inclosure Act passed in 1774 the commissioners thereby appointed set out a lane as a public way over certain land in the manor of T. Since 1778 this lane had been let by the vestry of the parish every Easter to persons who paid for the hire of it and depastured it. There was no evidence to show to whom the soil of the lane belonged before the passing of the Inclosure Act. Nor was there evidence of any grant thereof at any time to any trustee for the parishioners. The defendant, to whom the lane was so let by the vestry for a year, used it for grazing sheep thereon, though one of the terms of his lease was that he should not turn sheep into it. An action was brought by the lord of the manor of T. asking for a declaration that the soil of the lane belonged to him, and an injunction to restrain the defendant from grazing sheep thereon.

Held (affirming the judgment of Charles, J.), first, that the true presumption was that the soil of the lane was not in the lord of the manor, but, notwithstanding 9 Geo. 2, c. 36, s. 3, and the absence of any enrolled grant, was vested in some persons as trustees for the parishioners, and that, by virtue of 59 Geo. 3, c. 12, s. 17, the churchwardens and overseers of the parish were such trustees; secondly, that apart from all presumptions the parish had gained a title to the lane by the Statute of Limitations, subject to the public right of way; and, thirdly, that the fact that the defendant had broken one of the conditions of his lease by putting sheep into the lane did not entitle the lord of the manor to treat him as a trespasser.—*Haigh* v. *West*, C.A.—[1893] 2 Q. B. 19.

2. *Norfolk Broad—Allotment—Fen—Injunction—Sporting rights—Public right of way—Tidal waters.*—A landowner who claimed to be owner of part of one of the Norfolk Broads, brought an action for an injunction to restrain a person, claiming (*inter alia*) as one of the public, from shooting or fishing over the plaintiff's part of the broad, and from boating over such part, except within certain limits comprising what was called "the channel." The plaintiff claimed to be owner under an award made in 1808 by commissioners under a local inclosure Act of 1801, and which award purported to allot the part of the broad so claimed to one of his predecessors in title. The defendant impeached the validity of the award, and challenged the claim to ownership on various grounds, alleging (*inter alia*) that the broad was a tidal water, and therefore Crown property, and open to the public for all purposes.

Held, upon the evidence, that the broad was not tidal, that the defendant's other contentions against the plaintiff's claim to the ownership and exclusive right of shooting and fishing failed, and that an injunction must be granted accordingly; but that the plaintiff had not made out his claim to restrict the public right of way and boating to the so-called "channel."—*Micklethwait* v. *Vincent*, CH.D. ROM., J.—67 L. T. 225.

See also LANDS CLAUSES ACTS, 5.

INCOME TAX.—See REVENUE, 1, 2.

INFANT:—

1. *Accumulations — Maintenance — Vested gift to infant for life—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.—Property comprising, in part, a share of residue, was devised and bequeathed to trustees in trust to pay the income to an infant for life, remainder to such of her children as should attain twenty-one, and in default of such issue, then over. There was no express maintenance or accumulation clause.

The trustees, until the marriage of the infant, made an annual allowance out of the income of the said property for the infant's maintenance and education, and accumulated the balance.

Held, that the infant took a vested interest in the property; and as the income of the property had been expressly given to the infant by the instrument under which the infant's interest arose, that the infant was entitled to the accumulations of income accrued prior to her marriage; and that the case came under sub-section 3 of section 43 of the Conveyancing Act, 1881, by which the section is only to apply if and as far as a contrary intention is not expressed in the instrument under which the infant's interest arises.—*In re Humphrys, Humphrys* v. *Levett*, C.A. 519—62 L. J. Ch. 498; 68 L. T. 729.

2. *Contract for service—Beneficial contract.*—An infant, in consideration of being employed as a milk carrier, agreed not to compete in business within a radius of five miles for two years after leaving. He left shortly after attaining majority.

An injunction was granted to restrain breach of the agreement by the servant.—*Evans* v. *Ware*, CH.D. NOR., J.—[1892] 3 Ch. 502; 62 L. J. Ch. 256; 67 L. T. 285.

3. *Contract not to solicit customers—Majority—Implied new contract—Injunction.*—In September, 1886, the defendant agreed to serve the plaintiffs (a firm of law accountants) at a weekly salary of 30s., or such other sum as might be agreed upon, and at the expiration of the agreement not to seek employment from or do work for persons who might at any time up to the expiration of the agreement have employed the plaintiffs. At the time of the execution of the agreement the defendant was a minor. After attaining twenty-one he continued in the plaintiff's service for over four years, and his wages were raised from time to time. He left in April, 1892, and sought and obtained employment from persons who, prior to that date, were customers of the plaintiffs.

Held, that it ought to be inferred from the conduct of the parties that a new contract between them, containing a stipulation by the defendant in the terms of the agreement of September, 1886, not to seek employment or do work for former customers of the plaintiffs, had been entered into after the defendant attained twenty-one, and that an injunction ought to be granted to restrain the breach of such stipulation.—*Brown* v. *Harper*, CH.D. STI., J.—68 L. T. 488.

4. *Custody of children—Husband and wife—Paternal authority controlled by external considerations.*—On the application of a husband against his wife for a writ of *habeas corpus* in respect of their three children, two of them being above twelve years of age, and, therefore, not within the discretion as to custody given by a local statute framed on the principle of Talfourd's Act, it appeared that the wife had twice left him, taking her children with her, on account of his habitual drunkenness; that on each occasion he agreed that she should maintain and educate the children apart from him; that after the second separation he publicly and falsely alleged on oath against his wife charges so injurious that she could not be expected ever to live with him again; that the wife had ample means, while the husband had only a narrow income.

Held, that the courts below exercised a right discretion in discharging the writ and remanding the children to the custody of their mother.

The father's legal power was controlled, as to the youngest child, by a statute which gave absolute

authority to the court; it was materially affected as regards the other two by breach of marital duty, by considerations with respect to their welfare, and the objection to separating them from each other.—*Smart* v. *Smart*, P.C.—[1892] A. C. 425; 61 L. J. P. C. 38; 67 L. T. 510.

5. *Guardian—Jurisdiction where no property—Religious education—Wishes of deceased father—Welfare of infant—Guardianship of Infants Act*, 1886 (49 & 50 *Vict. c.* 27), *ss.* 6, 13.—The court has jurisdiction to interfere with and to remove a guardian of a child who has no property, on proof of misconduct of the guardian towards the child, or on proof that it is for the welfare of the child that the guardian should be removed.

But the duty of the court towards a penniless child under the care of a legal guardian who is able and willing to maintain the child is to leave the child alone, unless the court is satisfied that it is for the welfare of the child that some other course should be taken. The welfare of the child—religious, moral, and social, as well as physical and pecuniary—is the paramount consideration for the court.

Notwithstanding the Guardianship of Infants Act, 1886, the wishes of the father, expressed or implied, will be the guide of, and followed by, the court, for the religious education of the child, unless there is very strong reason for disregarding his wishes. Ordinarily, where such wishes are not expressed, the court must infer, in the absence of evidence to the contrary, that the wishes of the father were that his child should be brought up in the religion which the father professed; and that inference practically amounts to a rule of law that a child shall be brought up in the father's religion. But the welfare of the child is the ultimate guide of the court, and where the father has been himself indifferent to religion, and it is not for the welfare of the child that the ordinary rule should be enforced, the court will make an exception, and will not direct the child to be brought up in the religion nominally professed by the father.

Decision of North, J. (40 W. R. 683), affirmed.—*In re McGrath*, C.A. 97—[1893] 1 Ch. 143; 62 L. J. Ch. 208; 67 L. T. 636.

6. *Maintenance—Contingent interest—Intermediate income—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.—Infant contingently entitled to a share of residue can be allowed maintenance out of the income thereof until one of them attains a vested interest.

In re Jeffery, 39 W. R. 234, [1891] 1 Ch. 671, and *In re Burton, Banks* v. *Heaven*, [1892] 2 Ch. 38, 40 W. R. Dig. 97, considered.—*In re Adams, Adams* v. *Adams*, CH.D. NOR., J. 329—[1893] 1 Ch. 329; 62 L. J. Ch. 266; 68 L. T. 376.

7. *Marriage settlement—Repudiation after full age—Reasonable time.*—A female infant, upon her marriage in 1857, at the age of eighteen, executed, without the sanction of the court, a settlement of her reversionary interest (subject to a prior tenancy for life) in a share of real estate, upon trust to pay the income to the wife for life for her separate use without power of anticipation, then to the husband for life, then to the children. The husband in 1865 deserted his wife, and in 1869 she obtained a protection order. She had not heard of him since. The reversion fell into possession in 1890, and since then the income had been paid to the wife, but she was entitled to receive that income whether the settlement was binding on her or not. She had done nothing else to confirm the settlement. There were two children of the marriage. In an action for partition of the real estate,

Held, that the wife was still entitled to repudiate the settlement.—*In re Jones, Farrington* v. *Forrester*, CH.D. NOR., J.—[1893] 2 Ch. 461; 69 L. T. 45.

See also DIVORCE, 9; MASTER AND SERVANT, 1; PROBATE, 1.

INJUNCTION.—See ARBITRATION, 1; DEFAMATION, 1; LIGHT, 1; PRACTICE, 30-33.

INSURANCE (ACCIDENT):—

1. "*Injury caused by violent, accidental, external, and visible means*"—*Dislocation of knee.*—By a policy of insurance against accident the defendants agreed to pay the plaintiff compensation if he should sustain "any bodily injury caused by violent, accidental, external, and visible means." The policy contained a proviso that the insurance should not cover injury arising from natural disease or weakness. The plaintiff sustained injury by breaking a ligament in his knee while he was in the act of stooping.

Held, that such injury was covered by the policy.—*Hamlyn* v. *Crown Accident Insurance Co.*, C.A. 531—[1893] 1 Q. B. 750; 62 L. J. Q. B. 409; 68 L. T. 701.

2. *Principal and agent—Knowledge of agent imputed to principal—Misstatement in proposal.*—B. effected an insurance with the defendant company through their agent against accidental injury. The proposal for the insurance contained a statement by the assured that he had no physical infirmity, and that there were no circumstances that rendered him peculiarly liable to accidents, and it was agreed that the proposal should form the basis of the contract between him and the company. By the terms of the policy the company agreed to pay the insured £500 on permanent total disablement, and £250 on permanent partial disablement—the policy stating that by permanent total disablement was meant, *inter alia*, "the complete and irrecoverable loss of sight to both eyes," and by permanent partial disablement was meant, *inter alia*, "the complete and irrecoverable loss of sight in one eye."

At the time when he signed the proposal for the insurance the assured had lost the sight of one eye, a fact of which the defendants' agent was aware, though he did not communicate it to the defendants.

The assured during the currency of the policy met with an accident which resulted in the complete loss of sight in his other eye, so that he became permanently blind.

Held, that it must be taken, first, that the assured had sustained a complete loss of sight to both eyes within the meaning of the policy; secondly, that the knowledge of the agent was the knowledge of the defendants, and that they were liable on the policy for £500.—*Bawden* v. *The London, Edinburgh, and Glasgow Assurance Co.*, C.A.—[1892] 2 Q. B. 534; 61 L. J. Q. B. 792.

INSURANCE (FIRE):—

Condition in policy—Lloyd's policy—"To be on same rate, terms, and identical interest" as specified assurance companies, "and to follow their settlements"—Warranty.—The plaintiff effected with the defendant, a Lloyd's underwriter, a policy of fire insurance, containing the following clause:—"Warranted to be on same rate, terms, and identical interest as the U. Assurance Co. £800, and the G. Assurance Co. £700, and to follow their settlements." The rate at which the plaintiff had

insured with the U. Co. was not, in fact, the same as the rate specified in the Lloyd's policy.

Held (reversing Wright, J.), that the clause, on its true construction, constituted a stipulation by the plaintiff with the defendant that the plaintiff had insured in the two other companies on the same terms as to risk, the same rate, and identical interest, as was thereby undertaken by Lloyd's underwriters; that such stipulation was one going to the root of the transaction, and therefore a condition precedent to any liability under the Lloyd's policy on the part of the defendant; and, as the condition had not been fulfilled, that the defendant was not liable.

Semble, that the construction of the clause would have been the same, even if the word "warranted" had not been used.—*Barnard* v. *Faber*, C.A. 193 —[1893] 1 Q. B. 340; 62 L. J. Q. 159; 68 L. T. 179.

See also ARBITRATION, 3; INSURANCE (MARINE), 5.

INSURANCE (LIFE):—

Power of nomination—Disposition or charge—Will —Residuary bequest.—Testator effected a policy of insurance upon his life. The rules of the insurance society provided that, in default of any nomination by the assurer, the sum insured should be paid to his assigns under any disposition or charge made by the assurer specifically affecting the said sum, either by express reference thereto or by reference generally to sums due upon assurance, and, in default of any nomination or disposition, the sum should be paid to the assurer's widow if she survived him, and, if not, to his children living at his death. Testator, by his will, gave three-fourths of his residue to his three daughters, and the remaining one-fourth to the widow and children of his deceased son. Testator made no nomination or disposition of the sum unless by the above residuary bequest. Testator's wife predeceased him. Three daughters were living at his death.

Held, that testator had not by his will disposed of the policy-money, and that the contract was legal by which, in the events which happened, the policy-moneys should go to his three daughters.—*In re Davies, Davies* v. *Davies*, CH.D. NOR., J. 13—[1892] 3 Ch. 63; 61 L. J. Ch. 595; 67 L. T. 548.

See also FRIENDLY SOCIETY, 4; MARRIED WOMAN, 3.

INSURANCE (MARINE):—

1. *Chartered freight—Cessation of hire in consequence of working of vessel being delayed for more than twenty-four hours owing to damage occasioned by perils insured against.*—By the charter-party of a vessel, the chartered freight of which was insured against (*inter alia*) "fire," it was provided that the vessel should be hired by the charterer at a stipulated sum per month, and that, in the event of loss of time from collision, stranding, want of repairs, breakdown of machinery, or any cause appertaining to the duties of the owner, preventing the working of the vessel for more than twenty-four hours, the payment of hire should cease from the hour when detention began until the ship should be again in a sufficient state to resume her service.

During the continuation of the charter-party, and at a time when the chartered freight was covered by the policy, the vessel was damaged by fire to such an extent as necessitated her being repaired. During the time the repairs were being done—for more than twenty-four hours—the hire of the vessel "ceased" within the meaning of the charter-party, and a loss of chartered freight, amounting to £179 6s. 6d., thereby accrued to the shipowner. In an action by the shipowner on the policy to recover from the underwriters the portion of this amount for which they were liable,

Held, that there had been a loss of chartered freight by the perils assured against, and that the plaintiffs were entitled to judgment.—*The Alpe*, P.D. & A.D. 527—[1893] P. 109; 62 L. J. P. D. & A. 59; 68 L. T. 624.

1a. *Chartered freight—General average—Foreign statement clause.*—The plaintiffs, who were owners of a ship chartered to proceed to a port in the United States, as ordered at port of call, and there load a cargo for the United Kingdom or Continent, and deliver the same, effected with the defendants an insurance on "chartered homeward freight," the voyage being described in the policy as from Liverpool to Delaware breakwater, and thence to New York or one other named port, and thence to any port in the United Kingdom or Continent within named limits, and general average was to be payable "as per foreign statement if required." The plaintiffs' ship left Liverpool in ballast, under the above charter, and two days afterwards, in consequence of heavy weather causing her tanks to leak, put into Holyhead without incurring expense in so doing; but at that place some expense was incurred, and three days later she returned to Liverpool, where further expenses were incurred in repairs, but none of the items of expenditure at Holyhead or Liverpool were incurred for the preservation of ship and freight. The ship then sailed for Delaware breakwater, where she received orders for Baltimore, to which port she proceeded, and there loaded, under the charter, a cargo which she delivered at Barrow. By an average statement, prepared in London according to the alleged provisions of American law, general average charges in respect of the expenses incurred in Holyhead and Liverpool were shown amounting to £186, including a sum of £154 for wages and victualling of the crew whilst the ship was at Holyhead and Liverpool. By the statement the ship was made to bear £164 of these charges, and the chartered freight was made to bear £21. In respect of the defendants' proportion (£11) of this latter sum the plaintiffs brought their action, alleging that a general average loss had arisen, which had been properly adjusted according to American law, and that the plaintiffs must be treated as having contributed to the loss on the basis of the statement.

Held, that, as the ship was under charter bound in ballast to load for the return voyage, and the only persons interested in the ship and chartered freight were the shipowners, the expenses in question were not a general average loss for which the defendants could be liable under the policy on chartered homeward freight, and, as there was no necessity for any foreign adjustment, the "foreign statement" clause had no effect.—*The Brigella*, P.D. & A.D.—[1893] P. 189.

2. *Voyage — Risk — Distinction between insured voyage and risks insured—Deviation clause.*—In construing an open policy of marine insurance in order to ascertain what risks are covered by the policy, it must first be ascertained what the voyage insured is. If the goods lost never were upon the insured voyage, then the policy never attached; and the fact that the policy contains a deviation clause is immaterial.

Consignors, at Bradford, of the goods in question, effected, through their agents at Liverpool, a marine policy of insurance from the Mersey to any port in Portugal or Spain "this side Gibraltar,

and (or) at and from thence to any place in the interior, including all risks by any conveyance whatsoever from the time of leaving the warehouse in the United Kingdom until on board . . . and all risks of every kind until safely delivered at the warehouse of the consignees." The policy contained the following marginal clause:—"Deviation and (or) change of voyage . . . not included in the policy, to be held covered at a premium to be arranged." The consignees were merchants at Madrid, and the consignors intended that the goods should be shipped at Liverpool for Seville and carried thence by land to Madrid. By the blunder of the consignors' agents the goods were in fact declared and shipped at Liverpool on board a vessel bound only for Carril and Huelva, on the west coast of Spain, and for Carthagena and other ports on the east coast of Spain. The bills of lading of the goods in question were made out for Carthagena. The consignors only discovered the mistake after the vessel had sailed. The vessel was lost between Liverpool and Carril, a part of the voyage common to vessels bound either for the west or the east coast of Spain.

Held, that the goods in question never were upon the insured voyage; that, consequently, the policy never attached; and that the underwriters were not liable to pay the consignors the amount of the goods in question.—*Simon & Co.* v. *Sedgwick,* C.A. 163—[1893] 1 Q. B. 303; 62 L. J. Q. B. 163; 67 L. T. 785.

3. *Warranty—Stranding—Liability of insurer—Goods insured in ship and in craft—Valuation stated—"Included" advance on freight.*—By a policy of insurance certain maize was insured, as to part, from San Nicolas, and, as to the remainder, from Buenos Ayres, for a voyage to the United Kingdom, free from particular average unless the ship or craft should be stranded, sunk, or burned.

The policy included all risks of steam navigation, and in craft, transhipment, or while waiting transit. The maize was valued in the policy at £7,940 "(included £1,361 6s. 6d. for advance on freight)." Between San Nicolas and Buenos Ayres the ship stranded, and a portion of the cargo was discharged into lighters, and part was wetted, and part lost. The ship got off, and at Buenos Ayres was surveyed, and was admitted by both parties to be seaworthy to continue her voyage, and thereupon the discharged cargo was reshipped, together with the Buenos Ayres portion of the maize, which had been awaiting the ship in lighters. On the voyage to Europe a large part of the cargo was lost and the remainder damaged owing to perils of the seas. In an action raising the question as to the amount of damage recoverable by the assured under the policy,

Held, that, the stranding having occurred before the Buenos Ayres portion of the maize was on board, the assured were not entitled to recover for particular average loss in respect of it, but only in respect of the maize shipped at San Nicolas.

Held, also, that the assured were entitled to have the particular average loss calculated on the valuation stated in the policy, without deduction of the amount of the freight advanced.—*Thames and Mersey Marine Insurance Co.* v. *Pitt, Son, & King,* Q.B.D. 346—[1893] 1 Q. B. 476; 68 L. T. 524.

4. *Warranty—Stranding—"Free from particular average unless the ship be stranded"—Cargo not on board at time of stranding.*—The plaintiffs effected with the defendants an insurance on some rice on a voyage from Calcutta to Demerara or Barbadoes in a named ship. By the policy the rice was warranted free from average, unless general or the ship be stranded, and there was a special memorandum by which the rice was "warranted free from particular average unless the ship be stranded." The ship, which was chartered by the plaintiffs, was of French nationality. She encountered heavy weather, obliging her master to jettison some of the rice, and subsequently to put into the Mauritius for repairs. To effect these repairs the cargo was discharged, and part of it, including some of the rice in question, being damaged, was condemned as unfit to be forwarded and was sold. Whilst the ship was being repaired and whilst the whole of the cargo was on shore, a cyclone burst over the island, during which the ship stranded, and was abandoned. The remainder of her cargo was subsequently shipped on a British vessel, and after a portion of it, including some of the rice in question, had been damaged by sea perils on the voyage, it was finally delivered at Barbadoes. The defendants paid their proportion of general average loss and forwarding charges, but disputed the plaintiff's claim for particular average loss on the rice sold at Mauritius and on that damaged in the British vessel.

Held, that the defendants were not liable, as the stranding took place when the insured goods were not on board the ship, and therefore the warranty against particular average remained in force.—*The Alsace Lorraine,* P.D. & A.D.—[1893] P. 209.

5. *Warranty—"Free from average under three per cent., unless general or the ship be burnt"—Meaning of "burnt" in memorandum of policy.*—Where a ship has sustained damage by reason of fire, she is not "burnt" within the meaning of the memorandum in a marine insurance policy unless the injury resulting from the fire is sufficient to cause some interruption of the voyage so that the ship is thereby temporarily unnavigable, that is, for the time incapable of being properly used for the purposes of her voyage.—*The Glenlivet,* P.D. & A.D. 671—[1893] P. 164; 62 L. J. P. D. & A. 65; 68 L. T. 860.

INTEREST:—

Legacy—Interest on legacy—Infant executor.—Testatrix by her will appointed an infant one of her executors, and gave to him, as such executor, a legacy of £1,000.

Held, that the legacy would not carry interest until the infant should attain twenty-one years and agree to act as executor.—*In re Gardner, Long* v. *Gardner,* CH.D. NOR., J. 203—67 L. T. 552.

INTERNATIONAL LAW:—

International law—Penal and private actions—Foreign judgment.—No proceeding which has for its object the enforcement by the State of punishment for breaches of its laws will be enforced by a foreign tribunal when the penalties attached to them are recoverable at the instance of the State, or of a member of the public as a common informer; but it is otherwise where an individual as such has a remedy for an infraction of the municipal law. It is, moreover, the duty of the tribunal, when a penalty of this nature is sought to be enforced through its instrumentality, to decide whether the foreign judgment which imposes the fine or other obligation is or is not penal in the sense of international law above stated.—*Huntington* v. *Antrill,* P.C. 574—[1893] A. C. 150; 62 L. J. P. C. 44; 68 L. T. 326.

IRISH CHURCH ACT, 1869:—

Register of marriages—Return to Registrar-General—Duty of rector to make.—A clergyman of the Church of Ireland is bound to fulfil the duty (imposed by

7 & 8 Vict. c. 81 upon rectors, vicars, and curates of the then United Church of England and Ireland) of making quarterly returns to the Registrar-General of all marriages entered upon the register of his church.—*Reg.* v. *Magee*, Q.B.D. (Ir.)—32 L. R. Ir. 87.

JACTITATION of MARRIAGE.—See DIVORCE, 8.

JAMAICA, LAW of:—

Yearly or half-yearly bonds—Accounts.—Where, by agreement between the appellant company and the local Government, second mortgage bonds were to be issued with the interest (non-cumulative) dependent on the yearly earnings; then, by a law passed to give effect thereto, the bonds were treated as half-yearly bonds with interest contingent on half-yearly profits; then bonds were issued in terms of the agreement and not of the law; and then, by a certificate of the local Government, the bonds were erroneously certified to be according to the law.

Held, in a suit by the holders of the said bonds to expunge certain items debited against the half-year's income to the prejudice of the claim for half-yearly interest, that, reading the agreement and the law together, the intention was that the account should be taken at the end of each year, and not upon the footing that there was to be a rest at the end of ever half-year.

Held, further, that costs of issuing the bonds could not be charged against income to the prejudice of their holders; and that, with regard to the expenditure on stores, the amount chargeable to any one year must be regulated by what is fair in the interest of all concerned.—*Jamaica Railway Co.* v. *Attorney-General of Jamaica*, P.C.—[1893] A. C. 127.

JERSEY, LAW of:—

Alienation in mortmain of seigneurial lands—Rights of seigneur—Indemnity.—Where land in Jersey held of the Queen as lady of the seigneurie thereof is brought into mortmain, held that the purchaser is bound to pay to the Crown the indemnity due by law in respect of the consequent loss or diminution in value of the seigneurial rights. But the Crown is not also entitled by the custom of the island to preserve its seigneurial rights by interposing a nominal vassal called "*homme vivant mourant et confisquant*" between itself and the holders in mortmain in order to pay duties and service in respect of the property.

To ascertain the amount of indemnity, the court should not refer it generally to experts, but should itself fix the percentage to be paid by the purchasers, and refer it to experts to ascertain the true value of the property.—*Attorney-General and Receiver-General for Jersey* v. *Turner* (*Solicitor-General for Jersey*), P.C.—[1893] A. C. 326.

JOINT TENANCY.—See MARRIED WOMAN, 2.

JUDGMENT:—

1. *Attachment—Jurisdiction—Judgment debt—"Execution"—Irish judgment registered in England—Judgments Extension Act*, 1868 (31 & 32 *Vict. c.* 56), *ss.* 1, 4—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5.—The Judgments Extension Act, 1868, gives no jurisdiction to commit a judgment debtor to prison under the Debtors Act upon the certificate of a judgment obtained in Ireland and registered in England under the former Act, inasmuch as such committal is not a process of "execution," and the general words of section 1 of the Judgments Extension Act, giving jurisdiction to the English courts upon such a judgment, are controlled by section 4, and limited to "execution" under that Act.—*In re Watson, Ex parte Johnson*, C.A. 34—[1893] 1 Q. B. 21; 62 L. J. Q. B. 85; 67 L. T. 519.

2. *Debtor's reversionary interest in personalty—Creditor appointed receiver—Equitable execution—Declaration of charge—Sale—Jurisdiction.*—The court has no jurisdiction to make a declaration of charge upon a judgment debtor's reversionary personalty in favour of a judgment creditor who has got himself appointed receiver of such property.—*Flegg* v. *Prentis*, CH.D. STI., J.—[1892] 2 Ch. 428; 61 L. J. Ch. 705; 67 L. T. 107.

See also CONFLICT OF LAWS; LIMITATIONS, STATUTE OF, 5; PRACTICE, 38.

JUDICIAL SEPARATION.—See DIVORCE, 9, 10.

JUSTICES:—

1. *Appeal—Appeal to quarter sessions on ground of excessive punishment—Respondent not appearing—Jurisdiction of justices to quash conviction.*—A person was convicted and sentenced by a magistrate for ill-treating a horse. Upon his appealing in due form to the court of quarter sessions upon the ground only of excessive punishment, the prosecutor failed to appear, and the justices quashed the conviction altogether.

Held, that, since the prosecutor failed in his duty to adduce evidence upon the appeal in order to justify the sentence, the justices had no materials before them to enable them to decide that any punishment was proper, and that they were bound to quash the sentence; and that, as, upon the authority of *R.* v. *Vipont*, 2 Burr. 1163, a conviction without a sentence was bad, the justices had jurisdiction to quash the whole conviction.—*Reg.* v. *Justices of Surrey*, Q.B.D. 79—[1892] 2 Q. B. 719; 61 L. J. M. C. 200; 67 L. T. 266.

2. *Appeal—Notice of appeal—Serve upon solicitor who had appeared for respondent at petty sessions—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 31.—The appellant, against whom a bastardy order had been made at petty sessions, served notice of appeal to quarter sessions upon the solicitor who had been retained to appear for the respondent at petty sessions, and the solicitor accepted service on her behalf. The quarter sessions declined to hear the appeal, upon the ground that the service of the notice of appeal was bad.

Held, affirming the decision of the Queen's Bench Division, that the solicitor upon whom the notice of appeal was served had ceased to be the respondent's solicitor when the proceedings at petty sessions had determined, and that the service was bad.—*Reg.* v. *Justices of Oxfordshire*, C.A. 615—[1893] 2 Q. B. 149.

3. *Assault—Complaint by or on behalf of party aggrieved—Conviction*—24 & 25 *Vict. c.* 100, *s.* 42—25 & 26 *Vict. c.* 50, *s.* 9.—A police officer who appears as complainant on a charge of assault at petty sessions is not a party acting on behalf of the person aggrieved within the meaning of 24 & 25 Vict. c. 100, s. 42.

A complaint by or on behalf of a person aggrieved by a common assault, or affirmative evidence that the aggrieved person has declined or refused to prefer a complaint, is necessary to found the jurisdiction of justices at petty sessions to summarily convict an offender under 24 & 25 Vict. c. 100, s. 42, and 25 & 26 Vict. c. 50, s. 9.—*Reg.* v. *Justices of Wicklow*, Q.B.D. (Ir.)—30 L. R. Ir. 633.

4. *Case stated—Justices acting under private Act—"Court of summary jurisdiction"—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 33—*Inter-*

pretation Act, 1889 (52 & 53 *Vict. c.* 63), *s.* 13, *sub-section* 11—*Construction of private Act enlarging the ambit of a borough.*—By a private Act of 1845 (8 & 9 Vict. c. vi.) provisions were made for the benefit of the freemen of the borough of Leicester, and certain lands were vested in "deputies" in trust for the freemen, to whom they were to be let out in allotments.

An appeal was given by the Act from the decision of the deputies to the justices of the peace for the borough, whose decision was to be "final and conclusive upon all parties concerned, and not to be removable by *certiorari* or any other writ or process whatsoever into any of Her Majesty's courts of record."

By the Leicester Extension Act, 1891 (54 & 55 Vict. c. c.), the limits of the borough were extended, and certain adjoining parishes and places, in the Act called "the added area," were taken in. The respondent, a freeman of the borough, but resident in this "added area," made application for an allotment, which was refused by the deputies on the ground that he was not resident in the borough within the Act of 1845. This decision was reversed on appeal to the justices, who stated a case for the opinion of the High Court, on the hearing of which it was

Held, (1) that the justices were sitting as a court of summary jurisdiction, within the meaning of section 13, sub-section 11, of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), and that section 33 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), conferring on any person aggrieved the right to appeal by special case, applied to this case, notwithstanding the express provision of the private Act; and (2) that the effect of enlarging the ambit of the borough was to increase the number of freemen to be benefited by the Act of 1845, and that the respondent, as a freeman resident within the "added area," was entitled to the allotment for which he had applied.—*Deputies of the Freemen of the Borough of Leicester* v. *Lewitt*, Q.B.D.—62 L. J. M. C. 51; 68 L. T. 201.

5. *Case stated—Vagrancy—"Behaving in riotous or indecent manner"—Acquittal by quarter sessions—Right of appeal to High Court by case stated—Question of fact—Vagrant Act* (5 *Geo.* 4, *c.* 83), *s.* 3.—Section 3 of the Vagrant Act (5 Geo. 4, c. 83) enables a justice of the peace to impose a term of imprisonment upon (amongst others) every common prostitute wandering in the public streets and "behaving in a riotous or indecent manner."

Held, that the question whether a person has been guilty of behaving in a riotous or indecent manner within the meaning of this section is a question of fact for the justice or justices to determine, and from such determination no appeal lies to the High Court by case stated.—*Bonner* v. *Lushington*, Q.B.D.—68 L. T. 91.

6. *Conviction—Following a person with a view to compel him to abstain from doing acts which he has a legal right to do—Defective statement of offence in summons and conviction*—Certiorari—*Conspiracy and Protection of Property Act*, 1875 (38 & 39 *Vict. c.* 86), *s.* 7—*Bias of justices—Remote interest.*—A summons and conviction under section 7 of the Conspiracy and Protection of Property Act, 1875, for following a person with a view to compel him to abstain from doing any act which he has a legal right to do, ought to state what was the act which the defendant, by following the informant, endeavoured to compel him to abstain from doing.

A conviction which did not contain such a statement held to be bad, and an amendment refused, it not appearing that evidence was given at the trial before the justices as to what was the act which the informant was prevented by the conduct of the defendant from doing.—*Reg.* v. *Mackenzie and others*, Q.B.D. 144—[1892] 2 Q. B. 519; 61 L. J. M. C. 181; 67 L. T. 201.

7. *Costs—Dismissal of information—Order against complainant to pay costs—Enforcement by commital—Summary Jurisdiction Acts*, 1848 *and* 1879 (11 & 12 *Vict. c.* 43, *s.* 22; 42 & 43 *Vict. c.* 49, *ss.* 35, 47).—Where an information is dismissed by justices, and an order for costs is made against the complainant, if no sufficient distress is found, and it is proved that the complainant has, or has had since the date of the order, means to pay, such order may be enforced by committal.—*Reg.* v. *Lord Mayor of London, Ex parte Boaler*, Q.B.D.—[1893] 2 Q. B. 146.

See also FRIENDLY SOCIETY, 1; LICENSING ACTS, 2-7; LOCAL GOVERNMENT, 3, 10, 13; MARRIED WOMAN, 4; POOR RATE, 4.

JUSTICES (IRELAND):—

Appeal to quarter sessions—Notice of appeal—Seven days' notice of intention to prosecute appeal—Stamp—Petty Sessions (Ireland) Act, 1851 (14 & 15 *Vict. c.* 93), *ss.* 12, 24—*Clerk of Petty Sessions (Ireland) Act*, 1858 (21 & 22 *Vict. c.* 100), *ss.* 8 (6), 14.—In appeals from petty sessions under 14 & 15 Vict. c. 93, s. 24, the notice in writing to be given by the appellant to the opposite party at least seven clear days before the commencement of the sessions to which the appeal is made of his intention to prosecute his appeal is not a "notice of appeal" within 21 & 22 Vict. c. 100, s. 14, and schedule C., so as to require a stamp.—*Reg.* v. *Justices of Cork*, Q.B.D. (Ir.)—30 L. R. Ir. 679.

LAND SOCIETY:—

Rules—Construction.—A land society was formed for the purchase of an estate to be sold in lots to the members, each of whom covenanted to abide by the rules of the society. The estate was purchased by trustees for the society, and the purchase-money was secured by mortgages, on which the trustees were liable. The estate was divided into numbered allotments, and a price set opposite each number to be paid by monthly instalments, and such allotments were to be allotted at that price unless previously sold by auction. By rule 35 members were required, in addition to the price of their allotments, to pay a proportionate part of the price, expenses, and interest payable in respect of allotments held from time to time by the trustees. The rules further provided for the forfeiture of allotments in case of default, and declared that the rights of the defaulting member in respect of such allotments should absolutely cease; they empowered the trustees to sell such forfeited allotments, and required them in the event of a sale, after deducting all moneys payable under the rules by the defaulting member, to pay him the surplus of the proceeds.

Held, that unallotted and forfeited allotments were allotments held from time to time by the trustees within rule 35, and that members were liable for contributions in respect thereof.—*Hill* v. *Crank*, C.A.—62 L. J. Q. B. 145; 68 L. T. 551.

LANDED ESTATES COURT (IRELAND):—

1. *Conversion—Petition for sale by owner—Married woman—Incumbered and unincumbered estate.*—Upon the petition for sale of an unincumbered estate by a *feme coverte* owner a conversion of realty into personalty is not worked by (*a*) the presentation of the petition, (*b*) the consent of the *feme coverte* under rule 12, or (*c*) a conditional

order for sale where the *feme coverte* dies before the order is made absolute, nothwithstanding that an actual sale is subsequently had on the petition. For such purpose the absolute order for sale does not relate back to the conditional order.

An absolute order for sale made on the petition of the owner of an incumbered estate works a conversion when from the circumstances of the estate (*e.g.*, a small fee-farm rent) it must be assumed that the petitioning owner intended the whole estate to be sold.

In re Beamish's Estate, 27 L. R. Ir. 326, discussed.—*In re Henry's Estate*, L.J. (Ir.)—31 L. R. Ir. 158.

2. *Practice—Petition for sale by incumbrancer—Persons wrongly described as owners—Landed Estates Court (Ireland) Act*, 1858 (21 & 22 *Vict. c.* 72), *s.* 1.—A. appointed two persons trustees of his will, and D. executrix thereof. He thereby devised certain lands to the trustees upon trust to permit D. to receive the rents and profits thereof during her life, and after her decease to them "absolutely to sell and dispose of the same at their discretion." He also appointed D. residuary devisee and legatee. One of the trustees died before the testator, and the other disclaimed the trust. D. survived and appointed by her will E. and F. as her executors. After D.'s death an action was brought in the Chancery Division to administer the estate of A. An incumbrancer filed a petition in the Land Judge's Court for the sale of the lands so devised, naming therein E. and F. as owners. On motion to dismiss the petition as against E. and F.,

Held, that E. and F. were neither trustees for sale nor owners within the meaning of section 1 of the Landed Estates Court (Ireland) Act, 1858.

Semble, the course for the incumbrancer to adopt would be to apply in the administration action for the appointment of new trustees of the will of A.—*In re Weir's Estate*, L.J. (Ir.)—29 L. R. Ir. 381.

3. *Practice—Receiver over tenant's interest—Application by landlord for leave to commence action to recover possession for non-payment of rent—Jurisdiction to impose terms — Disobedience — Contempt of court.*—Where a receiver has been appointed over lands held at a rent, the landlord must obtain the leave of the court before he can commence an action to recover possession for non-payment of rent; and in granting such application the court has jurisdiction to impose terms, such as that the proceedings shall not be commenced for a specified time.

In disposing of such applications the court will be slow to interfere with the rights of the landlord, and will only impose conditions when necessary for the benefit of the estate for sale, and not likely to occasion the landlord appreciable injury.

The disobedience of an order, even though improvidently made, is a contempt of court.—*In re Battersby's Estate*, L.J. (Ir.)—31 L. R. Ir. 73.

4. *Sale—Tithe rent-charge—Rental and conditions—Compensation.*—Notwithstanding the gradual extinction of tithe rent-charge since the Irish Church Act, 1869, the court, adhering to the practice uniformly followed since the decision in *In re Barnewall's Estate*, Ir. R. 1 Eq. 304, declined to give compensation to a purchaser at a sale in May, 1890, on a rental published in 1889 for tithe rent-charge, of which no mention was made in the rental or conditions of sale, and of the existence of which the purchaser was ignorant when purchasing. In future, where sales take place on rentals in which the particulars of tithe rent-charge are not specifically stated, and where the purchaser is not, by such rental, debarred from claiming compensation, the court will entertain a claim for compensation by the purchaser in respect of tithe rent-charge unknown to him at the date of his purchase. *In re Bailie's Estate*, L.J. (Ir.)—31 L. R. Ir. 98.

5. *Sale at a sacrifice—Jurisdiction to postpone sale—Right to have estate offered for sale.*—Although the court, in analogy to its undoubted power to refuse to sell at a sacrifice, has jurisdiction to postpone offering an incumbered estate for sale, such jurisdiction should be only exercised under very peculiar circumstances, and in general the court will recognize the right of an incumbrancer to insist upon having the property put up at least once to public competition, unless the owner or incumbrancers, disapproving of an attempted sale, are willing to pay him off.

Semble, a judgment for administration before the filing of a petition is not in itself sufficient cause against a conditional order for sale.—*In re Irvine's Estate*, L.J. (Ir.)—31 L. R. Ir. 168.

6. *Sale of hotel and restaurant in possession of receiver—Delay in completing purchase—Premises vacant—Duties as to preservation of licence—Compensation.*—Premises, including an hotel and restaurant, were sold in July, 1891, the particulars stating that a retail spirit licence was attached, that the premises were in the possession of a receiver, and that the licence would be handed to the purchaser. The purchase-money was not lodged till March, 1892, and the conveyance was not taken out till May, 1892. The purchasers in the meantime failed to let the hotel and restaurant, which remained vacant. The receiver informed the purchasers that he had no funds to pay the duty for the licence at the October sessions, 1891, but offered to advance it, if necessary, to keep the licence alive. In consequence, however, of a statement by the local officer of Inland Revenue that it would be time enough to pay the duty when a tenant was obtained, it was not paid in October, and no renewal was obtained. An application by the purchasers for a new licence in September, 1892, was refused, on the ground that the premises still remained unoccupied.

Held, that there was no failure of duty on the part of the receiver, and that the purchasers could not sustain a claim for compensation for the loss of the licence.

Semble, either on making a letting to a suitable tenant, or undertaking to carry on the business themselves, the purchasers would be entitled to obtain a licence.—*In re Hoy's Estate*, L.J. (Ir.)—31 L. R. Ir. 66.

LANDLORD and TENANT:—

1. *Agreement for lease—"Usual" covenants—Public-house—Covenant against assignment without consent—Proviso for re-entry—Date of commencement of term—Parol evidence—Option to renew—Specific performance—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78), *s.* 9.—An agreement for the lease of a public-house, dated the 1st of April, provided for a term of three years, with an option to renew for another seven years, and for possession to be given, "within one month from this date," but contained no reference as to the covenants to be inserted in the lease. The lessor insisted upon covenants by the lessee (1) to reside on the premises and personally conduct the business; (2) not to assign without consent, and that the proviso for re-entry should extend to the breach of any covenant. The lessee objected that these were not "usual" clauses.

Held, that covenants (1) and (2) could not be insisted upon as usual covenants; and on this point the fact that the subject-matter of the lease was a

public-house made no difference, and that the proviso for re-entry must be limited to the case of non-payment of rent.

Henderson v. *Hay*, 3 Bro. C. C. 632, followed.

Held, also, that the commencement of the term could be collected from the agreement as a whole, and that the day possession was given—a fact on which evidence was admitted—was the date from which the lease was to commence, and consequently that there was a valid contract.

Marshall v. *Berridge*, 19 Ch. D. 233, discussed and applied.

Where, on a summons under the Vendor and Purchaser Act, 1874, objection is taken that the contract, if valid, is not one of which specific performance can be obtained, the court will express an opinion upon the construction of the contract, and will decide any question raised at the hearing of the summons which, if left undecided, could be raised again in an action for damages.

Quære, whether there is any difference between a lease for three years, with an option to renew for another seven years, and a lease for ten years, with an option to determine at the end of the first three. —*In re Lander and Bagley's Contract*, CH.D. CHI., J. —[1892] 3 Ch. 41; 61 L. J. Ch. 707; 67 L. T. 521.

2. *Covenant not to assign without consent—Breach —Measure of damages.*—A lease contained a covenant that the lessee would not assign or sublet the premises without the consent in writing of the lessor, such consent not to be unreasonably withheld to a responsible assignee or sub-tenant. The lessee, without asking the lessor's consent, sublet the premises to a person who, he knew, was going to use them as a distillery. The premises were burnt down by a fire arising from the use of the premises as a distillery. In an action for breach of covenant.

Held, that the loss caused by the fire was the natural consequence of the breach, and was recoverable as damages in the action.—*Lepla* v. *Rogers*, Q.B.D.—[1893] 1 Q. B. 31; 68 L. T. 584.

3. *Covenant to pay charges—Nuisance arising from condition of drains—"Charges charged on the lessor in respect of the premises"—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76).—In the lease of a house by the plaintiff to the defendant, the defendant covenanted to "pay, bear, and discharge all land tax, sewers rate, main drainage rate, and all other rates, taxes, assessments, charges, or impositions whatever, parliamentary, parochial, or otherwise, which now are, or at any time during the continuance of this demise may be, taxed, charged, assessed, or imposed upon the said demised premises or any part thereof, or on the said yearly rent hereby reserved, or any part thereof, or on the lessor, his executors, administrators, and assigns for or in respect of the said premises."

The plaintiff, having incurred expenses under the Public Health (London) Act, 1891, in remedying a nuisance arising from an escape of sewer gas from the drains of the house into the basement, brought an action against the defendant to recover these expenses from him under the foregoing covenant.

Held, that the action was maintainable.—*Smith* v. *Robinson*, Q.B.D. 588—[1893] 2 Q. B. 53.

4. *Covenant to repair—Breach of covenants to keep premises in repair and deliver up in repair—Actions by landlord during continuance of term and at end of term—Method of assessing damages in second action.*—Two years before the determination of a lease a landlord brought an action against his tenant for breach of covenant to keep the premises in repair. The tenant denied liability, but paid a sum into court, which the landlord accepted in satisfaction of his claim, and the action was stayed. After the determination of the lease the landlord brought another action for breach of covenant to keep the premises in repair and for breach of covenant to deliver up in repair. No repairs were done to the premises between the date of the first action and the end of the lease, and the particulars in the second action included all matters which had been claimed for in the first action as well as some additional items of non-repair. The official referee, in assessing the damages, ascertained what sum was required to put the premises into repair, from which he deducted the sum paid into court and accepted in the first action, and gave judgment for the plaintiff for the balance.

Held, that the official referee had assessed the damages in the right manner.—*Henderson* v. *Thorn*, Q.B.D. 509—[1893] 2 Q. B. 164.

5. *Covenant to repair—Defects due to age and character of demised premises.*—In determining whether there has been a breach of a covenant to repair, regard must be had to the age and character of the demised premises; and if the premises through their own inherent defects fall in the course of time into a particular condition, the results of their being in that condition are not breaches of a covenant to repair.—*Lister* v. *Lane & Nesham*, C.A. 626—[1893] 2 Q. B. 212.

6. *Distress—Breaking open outer door—Main door of warehouse within demised premises—Right of distrainer being lawfully within demised premises to break door of warehouse.*—A landlord's broker entered upon demised premises to distrain for rent. Being already peaceably and lawfully in a courtyard which formed part of the demised premises, he then broke the main and outer door of a warehouse abutting on the courtyard, also part of the demised premises, and there distrained upon certain goods. In an action by the plaintiff, who was the tenant and occupier of the courtyard and warehouse, for trespass for breaking the door of the warehouse,

Held (by Bowen, L.J.), and affirmed by the Court of Appeal, that the door of the warehouse was an "outer door" within the meaning of the principle that outer doors may not be broken, and that the fact that the broker was already lawfully within the demised premises did not give him the right to break open the door of the warehouse.—*American Concentrated Must Co.* v. *Hendry*, C.A.—62 L. J. Q. B. 388; 68 L. T. 742.

7. *Distress—Rent payable in advance if required—Reasonable notice of demand.*—The effect of the words "rent payable quarterly, and always, if required, a quarter in advance," in an agreement of tenancy is to make the rent payable a quarter in advance throughout, and the landlord is entitled to payment, or, in default, to distrain for the rent of the current quarter at any time during the currency of the quarter on giving reasonable notice of his demand. The question of the reasonableness of the notice is one of fact, and must depend upon the particular circumstances of the case.—*London and Westminster Loan Co.* v. *London and North-Western Railway Co.*, Q.B.D. 670—[1893] 2 Q. B. 49; 62 L. J. Q. B. 370

8. *Distress—Want of title in lessor—Estoppel—Right to distrain goods of stranger.*—Although a tenant who has been let into possession of land by a lessor is estopped from disputing his lessor's title, third persons, not claiming possession of the land under the tenant, are not so estopped.

A person, therefore, who lets premises to which he

has no title to a tenant cannot distrain for arrears of rent due from the tenant the goods of a third person which have been brought upon the premises by the tenant's licence.—*Tadman* v. *Henman*, Q.B.D. —[1893] 2 Q. B. 168.

9. *Forfeiture—Breach of covenant—Notice to remedy breach—Compensation—Application for relief —Originating summons—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14, *sub-sections* 1, 2.—An application by a lessee, under section 14, sub-section 2, of the Conveyancing Act, 1881, for relief against forfeiture by reason of a breach of covenant cannot be made by originating summons. If must be made either in the lessor's action to enforce the forfeiture, or in an action brought by the lessee.

A notice by the lessor under section 14, sub-section 1, specifying the breach complained of, and requiring the lessee to remedy it, is not invalid because it does not contain a claim for compensation in money for the breach.

Decision of North, J., 40 W. R. 508, [1892] 2 Ch. 328, affirmed.—*Lock* v. *Pearce*, C.A. 369—[1893] 2 Ch. 271; 62 L. J. Ch. 582; 68 L. T. 569.

10. *Forfeiture—Relief against forfeiture after judgment in ejectment action—Application by mortgagee by sub-demise—Parties—Original lessee*—23 & 24 *Vict. c.* 126 (*Common Law Procedure Act*, 1860), *s.* 1.—In an application under section 1 of the Common Law Procedure Act, 1860, made (after judgment in an action of ejectment for non-payment of rent) by a mortgagee of land by sub-demise, for relief against forfeiture of the lease, the original lessee must be made a party to the proceedings.

Semble (*per* Collins, J.), that such an application may be made by an underlessee.

Berney v. *Moore*, 2 Ridgeway, 310, explained.

Doe d. Whitfield v. *Roe*, 3 Taunt. 402, distinguished.—*Hare* v. *Elms*, Q.B.D. 297—[1893] 1 Q. B. 604; 62 L. J. Q. B. 187; 68 L. T. 223.

11. *Forfeiture—Relief against forfeiture—Bankruptcy of lessee—Application by underlessee for vesting order—Mode of application—Defence and counterclaim in lessor's action of ejectment—Conveyancing and Law of Property Acts*, 1881 (44 & 45 *Vict. c.* 41), *ss.* 14, 69, *and* 1892 (55 & 56 *Vict. c.* 13), *ss.* 2, 4.—Where a lessor has brought an action against the lessee and his underlessees claiming possession of the demised premises under a proviso for re-entry upon the bankruptcy of the lessee, it is competent for the underlessees to set up by way of defence and counterclaim in that action a claim for an order vesting in them the property in question for the remainder of their lease under section 4 of the Conveyancing and Law of Property Act, 1892. It is not necessary that the application for such an order should be made by summons at chambers.—*Warden and Governors of Highgate School* v. *Sewell*, Q.B.D. 637—[1893] 2 Q. B. 254.

12. *Holding over—Lease for a year—Tenant remaining in possession at end of year—Consent—Tenant from year to year—Terms of original lease—Implication of law.*—Where, on the expiration of a lease for a year, the tenant remains in possession with the consent of the landlord, and nothing is said or done inconsistent with his holding on under the terms of the lease, the implication of law is that a tenancy from year to year has been created on the same terms in so far as they are not inconsistent with a tenancy from year to year.—*Dougal* v. *McCarthy*, C.A. 484—[1893] 1 Q. B. 736; 68 L. T. 512.

13. *Notice to determine tenancy—Surrender by operation of law—Settled Estates Act*, 1877 (40 & 41 *Vict. c.* 18), *s.* 56—*Settled Land Act*, 1882—*Licence of lord.*—A testator, being entitled to a customary freehold held of a manor, according to the custom of which tenants could not grant leases longer than a year and a day without the licence of the lord, devised the tenement by will to trustees upon trust for his widow for life, with remainder to his son. The testator died in December, 1877, having on the 15th of June, 1877, with the licence of the lord, let the premises in question to the two defendants, T. P. and T. S. P., on a repairing lease for twenty-one years from the 25th of December, 1876, at a yearly rent of £130, determinable at the end of fourteen years by one year's notice to the lessor, his representatives or assigns, expiring with that year.

On the 21st of December, 1889, T. S. P., one of the defendants, gave the testator's widow, who had been permitted by the trustees to receive the rents directly, notice of the defendant's intention to quit the premises on the 25th of December, 1890; and on the 13th of August, 1890, the widow purported to lease the premises for a term of seven years to the defendants, but without the licence of the lord, at a rent of £100, and with less onerous covenants. The widow died, and the trustees of the will brought this action, claiming that the original lease of the 15th of June, 1877, had never been duly determined, and that the new lease of the 13th of August, 1890, was inoperative.

Held, that the notice of the 21st of December, 1889, was bad, not having been served on the "representatives or assigns" of the lessor, and that the widow, the life tenant, had not in any way been constituted the agent of the trustees to receive such notice.

Held, also, that there had been no surrender of the old lease by operation of law by the purported grant of the new lease, the rule as to surrender not applying where the new lease is void or voidable; and that neither the Settled Estates Act, 1877, nor the Settled Land Act, 1882, applied, as no trustees had been appointed to perfect the transaction under the latter Act; and, lastly, that, in any event, section 56 of the Settled Estates Act rendered necessary the licence of the lord to the grant of a new lease.—*Easton* v. *Penny*, CH.D. ROM., J. 72—67 L. T. 290.

13a. *Receipt for consideration moneys—Lease—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 55.—A building lease was expressed to be granted "in consideration of the moneys which have been expended by the lessee in construction of the dwelling-house and erections hereby demised, and in consideration of the rent hereinafter reserved, and the covenants by the lessee hereinafter contained." The plaintiff contended that there was a sufficient receipt in the body of the lease to entitle him to the benefit of section 55 of the Conveyancing Act, 1881.

Held, that to constitute a receipt in the body of a deed within the meaning of section 55, after the statement of consideration, express words acknowledging the receipt of such consideration were necessary; that the lease did not contain such a receipt; and that, therefore, the plaintiff was not entitled to rely on the section.—*Renner* v. *Tolley*, CH.D. STI., J.—68 L. T. 815.

14. *Sub-lease—Right of sub-lessee to inspect lessee's title Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *ss.* 3 (1), 13 (1).—On the grant of a sub-lease by a lessee, the intending sub-lessee has a right to inspect the lessee's lease.—*Gosling* v. *Woolf*, Q.B.D. 106—[1893] 1 Q. B. 39; 68 L. T. 39.

15. *Surrender by act and operation of law—Change*

of possession—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 3—*Covenant for quiet enjoyment*—Interesse termini—*Action for damages.*—There is no surrender by operation of law of a lease in possession on the grant of a new lease purporting to be a lease in possession, unless the old tenant gives up possession to the new tenant at or about the time of the grant of the new lease to which he assents.

The foundation of the doctrine that the acceptance of a new lease by an existing tenant operates as a surrender in law is estoppel by act *in pais.* The grant of a new lease to a stranger, with the tenant's assent, and change of possession preceding or following the lease, brings such a case within the scope of the same doctrine.

Secus, where there is mere oral assent of the tenant and no change of possession.

An *interesse termini* is not an interest that will support an action on a covenant for quiet enjoyment in a lease, the essence of a breach of such a covenant being a disturbance of the lessee's possession, nor will it support an action for trespass or for damages.

Davison v. *Gent*, 5 W. R. 229, 1 H. & N. 744, considered and applied.

Dictum of Stirling, J., in *Baring* v. *Abingdon*, [1892] 2 Ch. 374, at p. 381, explained.

Locke v. *Furze*, 14 W. R. 403, L. R. 1 C. P. 441, and *Gillard* v. *Cheshire Lines Committee*, 32 W. R. 943, distinguished.—*Wallis* v. *Hands and others*, CH.D. CHI., J. 471—[1893] 2 Ch. 75; 62 L. J. Ch. 586; 68 L. T. 428.

See also LIGHT, 3; NEGLIGENCE, 1; SPECIFIC PERFORMANCE.

LANDLORD and TENANT (IRELAND):—

1. *Assignment of lease—Clause against assigning—Executor—Rules of the Supreme Court* (*Ireland*), 1891, *ord.* 3, *r.* 4.—A lease contained a clause rendering it unlawful for the lessee to assign, sublet, dispose of, or part with the possession of the demised premises, or any part thereof, during the term, or to devise or bequeath the same other than to two of his children without the previous licence or consent in writing of the lessor.

Held, that an assignment by deed to a child of the lessee without the consent of the lessor was void.

The executor of a termor can sustain an action to recover possession of the lands comprised in the term, though not suing in his representative capacity.—*Mahony* v. *Mahony*, Q.B.D. (Ir.)—30 L. R. Ir. 475.

2. *Covenant—Lease reserving rent "over and above all taxes, charges, and impositions whatsoever"—Grand jury cess—Owner accepting lease from receiver judge—Landlord and Tenant* (*Ireland*) *Act*, 1870 (33 *&* 34 *Vict. c.* 46), *s.* 65.—Lease reserving a yearly rent "over and above all taxes, charges, and impositions whatsoever."

Held, that the lessee was not entitled to deduct half grand jury cess.

A lessee entitled to make such a deduction, if he voluntarily pays gales of rent without doing so, cannot deduct the half of the grand jury cess paid during the accrual of such gales from rent afterwards becoming due.

An owner, who had been in occupation prior to 1870 of part of his estate, over which a receiver was appointed, accepted after that year a lease from the receiver judge.

Held, that he did not become the occupier under the lease, and was not, therefore, within the terms of section 65 of the Landlord and Tenant Act, 1870.—*In re Bradford's Estate*, L.J. (Ir.)—31 L. R. Ir. 364.

3. *Covenant to pay rent over and above all taxes, charges, and impositions—Grand jury cess.*—A lease of premises used as an undustrial school reserved the rent over and above all taxes, charges, and impositions whatsoever, quit rent and landlord's proportion of poor rate and income tax only excepted, and the lessee covenanted to pay the rent over all taxes as aforesaid. The lessor having been compelled to pay grand jury cess in respect of half the rent,

Held, that the lessee was bound to recoup the lessor the grand jury cess so paid by him.

Greene v. *Thornton*, 16 L. R. Ir. 381, 390, followed.—*Morrogh* v. *Hall*, EX.D. (Ir.)—32 L. R. Ir. 216.

4. *Drainage charge—"Increased rent"—Statutory tenancy—Drainage* (*Ireland*) *Acts*, 1863 *and* 1872—*Land Law* (*Ireland*) *Act*, 1881 (44 *&* 45 *Vict. c.* 49), *s.* 5.—"Increased rent," assessed by the Commissioners of Public Works upon occupiers of land in respect of drainage works, is not contract rent as between landlord and tenant, but a contribution by the occupier, in respect of the benefit derived by him from such drainage, to the proprietor upon whom the primary liability is cast.

The provisions of the Drainage Acts relating thereto are not affected by section 5 of the Land Law (Ireland) Act, 1881, which enacts that a tenant shall not, during the continuance of a statutory term, be compelled to pay a higher rent than the rent payable at the commencement of such term.

Quære, Has the Land Commission jurisdiction, in fixing a fair rent, to assess the amount of such increased rent or drainage charge?—*Earl of Enniskillen* v. *Reilly*, Q.B.D. (Ir.)—32 L. R. Ir. 372.

5. *Ejectment for non-payment of rent—Monthly tenancy*—23 & 24 *Vict. c.* 154, *s.* 52.—An action of ejectment for non-payment of rent does not lie in respect of tenancies less than from year to year.

Dale v. *Conolly*, 22 Ir. L. T. Rep. 53, overruled.—*O'Sullivan* v. *Ambrose*, Q.B.D. (Ir.)—32 L. R. Ir. 102.

6. *Improvements—Compensation for disturbance—Decree of county court judge—Appeal—Execution—Landlord and Tenant* (*Ireland*) *Act*, 1870 (33 *&* 34 *Vict. c.* 46), *s.* 23—*Land Law* (*Ireland*) *Act*, 1881 (44 & 45 *Vict. c.* 49), *s.* 47.—Where a decree of a county court judge, awarding a sum of money to a tenant for compensation for improvements, has been simply affirmed by the Land Commission, the mode of recovering the amount awarded is by executing the original decree; and the costs of the appeal are obtained by a writ of *fi. fa.* from the Land Commission.—*O'Brien* v. *Leader*, LAND COM. (Ir.)—30 L. R. Ir. 531.

7. *Quarrying — Right of landlord to enter for purpose of quarrying — Land Law* (*Ireland*) *Act*, 1881 (44 & 45 *Vict. c.* 49), *s.* 5, *sub-section* 5.—Section 5, sub-section 5, of the Land Law (Ireland) Act, 1881, confers upon the landlord and his licensees the right during the continuance of a statutory term in a tenancy to enter upon the holding for the purposes enumerated in that section, including taking minerals, stone, &c., from mines or quarries, whether already open or then first worked, and whether such right was reserved to the landlord under the terms of the formerly subsisting contract of tenancy or not. The proviso that the landlord or his licensees shall make "reasonable amends and satisfaction for any damage to be done or occasioned thereby," is not a condition precedent to such right of entry.

Townshend v. *Cotter*, 29 L. R. Ir. 243, applied.—*Dolan* v. *Davis*, Q.B.D. (Ir.)—32 L. R. Ir. 384.

8. *Redemption of rent (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 57)—"*Adequacy of the security*"—*Dwelling-house in excess of requirements of holding—Redemption price — Advance.* — The erection of a dwelling-house in excess of the requirements of a holding for merely farming purposes is not enough to deprive the holding of its original agricultural character.

In fixing the redemption price of a rent redeemed under the Redemption of Rent (Ireland) Act, 1891, the court may have regard to the circumstance that the possession of large real property by the lessee renders the remedy of the lessor under the covenant for payment of rent more secure, and so increases the saleable value of the rent.

The court will not sanction the advance of the whole of the redemption price unless it is satisfied that the security is sufficient, but will leave the tenant to make up the difference by a cash payment.—*O'Donnell* v. *Chearnley*, LAND COM. (Ir.)—32 L. R. Ir. 185.

9. *Redemption of Rent (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 57), *ss.* 1, 2—*Amount of redemption price*—"*Full agricultural rent*"—"*Regard being had to the adequacy of the security.*"—The words "regard being had to the adequacy of the security" in the Redemption of Rent (Ireland) Act, 1891, s. 1, refer to the security for the rent, and not to security for an advance by the Land Commission; and the effect of the clause in section 1 is that, though the Land Commission are to determine the price in like manner as if it were a head rent under the Land Law (Ireland) Act, 1887, s. 16, they are not to treat it necessarily as a mere head rent, but are to see how far it is secured and to regulate the price accordingly.

If the rent to be redeemed is in excess of the full agricultural rent of the holding—*i.e.*, its full letting value—it cannot be regarded as a perfectly well-secured rent.—*Warren* v. *Richardson*, LAND COM. (Ir.)—30 L. R. Ir. 639.

10. *Redemption of Rent (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 57)—*Arrears of rent—Provisional sanction of advance—Rights of landlord—Practice—Proceedings in lieu of demurrer—Right to begin—Order* 25. —Where no delay or wilful default about the completion of a sale in the Land Purchase Department of the Irish Land Commission is alleged against a tenant, and a reasonable time for the completion of the same has not elapsed, an order of the Land Purchase Commissioners provisionally sanctioning an advance operates to suspend the rights of the landlord to recover arrears of rent due at the date of the execution of the agreement to purchase, and to recover money as rent from the tenant in respect of any period subsequent to the execution of such agreement.

Semble, such rights are wholly released and discharged on the completion of the sale. They would be restored in the event of the proceedings for the sale proving abortive.—*Vickery* v. *Deane*, Q.B.D. (Ir.) —32 L. R. Ir. 36.

11. *Redemption of Rent (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 57)—*Lands taken as adjunct to demesne—Holding not agricultural or pastoral.*—Lands taken for a long term of years, not to make profit by farming, but as an adjunct to a demesne, are not agricultural or pastoral in their character, so as to entitle the lessee thereof to redeem his rent under the Redemption of Rent (Ireland) Act, 1891.—*Allen* v. *Grogan*, LAND COM. (Ir.)—32 L. R. Ir. 179.

12. *Rent—Fair rent—Drainage improvement works—Additional rent imposed in respect thereof by Commissioners of Public Works—Power to fix judicial rent—Irish Drainage Acts—Land Law (Ireland) Act*, 1881, *s.* 8.—Where the Commissioners of Public Works, under the Irish Drainage Acts, imposed an additional rent on a yearly tenant in respect of the improvement of his land effected by certain drainage works, and the tenant subsequently served an originating notice to have a fair rent fixed, the Land Commission reduced the existing aggregate rent, and declared that the fair rent was fixed on the basis of the drainage and maintenance charges being payable by the landlord without power to cast any on the tenant,

Held, that the Land Commission had jurisdiction to make the reduction, as the reduced rent was not less than the increment imposed by the Commissioners of Public Works.—*Gabbett* v. *M'Carthy*, C.A. (Ir.)—30 L. R. Ir. 720.

13. *Rent—Fair rent—Jurisdiction of Land Commission—Surrender by middleman.*—Case in which it was held (1) that an order purporting to fix a fair rent as between C. and D. was void as against A., because C. had no interest in the premises, and the lease was not of an agricultural or pastoral holding; (2) that as no valid order fixing a fair rent had been made, the notice of surrender and the deed of surrender to A. was inoperative; and (3) that it was not necessary for A. to apply to the Land Commission under section 8 of the Land Act, 1887, to restrain the surrender, that sub-section being only applicable to cases where there is jurisdiction to fix a fair rent, but reasons exist to make it inequitable to permit the surrender to take place. —*In re Todd-Thornton's Estate*, L.J. (Ir.)—29 L. R. Ir. 453.

14. *Rent—Fair rent—Allowance for lime and seed—Proviso in lease.*—A lease for years at a yearly rent of £86 contained a proviso that the lessor would allow the lessee £3 yearly during the term out of the annual rent of £86, provided the lessee laid out on the land each year lime and seed for green crops of the value of £3. On the application of the lessee an order was made under the Land Law (Ireland) Acts, 1881, 1887, fixing the rent of the holding at £55 yearly.

Held, that the landlord was not bound to make the allowance out of the reduced rent.—*Nettles* v. *Murphy*, EX.D. (Ir.)—30 L. R. Ir. 564.

15. *Rent—Fair rent—Lease by tenant for life in consideration of a premium—No power of leasing—Land Law (Ireland) Acts*, 1881 (44 & 45 *Vict. c.* 49), *s.* 21; 1887 (50 & 51 *Vict. c.* 33), *s.* 1.—A tenant for life under a will, which contained no power of leasing, in consideration of a fine, executed a lease for thirty-five years.

Held, that the lessor could not prevent the lessee from applying to have a fair rent fixed.—*Looby* v. *Finch*, C.A. (Ir.)—30 L. R. Ir. 568.

16. *Rent—Fair rent—Holding let to be used mainly for purpose of pasture—Restrictions in lease as to tillage—Lessee not to break up more than two acres out of seventy-five.*—In 1840 a farm of seventy-five acres in Meath was let for sixty-one years at a rent. The lease contained a covenant by the tenant not to break up more than two acres, but did not contain any covenant against meadowing, and hay could be produced on the holding; but with few exceptions the holding had been uniformly used for grazing. The farm consisted of grazing land in a grazing district. The sub-commissioners reported that the holding was a good grazing holding, and was being used in manner best suited to its productive power.

Held, reversing the decision of the Land Commission, that the farm was let to be used mainly for

the purpose of pasture.—*Byrne* v. *Hill*, C.A. (Ir.)—30 L. R. Ir. 603.

17. *Rent—Fair rent—Agricultural or pastoral land—Mill—Land Law (Ireland) Act*, 1881.—By lease in 1866 sixty-two acres of land were demised for thirty-one years at a rent of £260. The premises consisted of a farm with dwelling-house, and a mill and kilns. The mill itself and the mill-race occupied but a small part of the holding, the rest being agricultural land. The lease contained a proviso that in case the mill was burnt the rent should be reduced by £80 a year until the mill was restored by the lessor.

Held, reversing the decision of the Land Commission, that, a substantial part of the premises being outside the provisions of the Land Law (Ireland) Act, a fair rent could not be fixed for the holding. —*Boyle* v. *Foster*, C.A. (Ir.)—30 L. R. Ir. 623.

18. *Rent—Fair rent—Sale of tenancy under a* fi. fa. *for rent—Sale "in consequence of a breach of a statutory condition"—Right of purchaser to have fair rent fixed—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49), *s.* 20.—If a landlord recovers judgment against a tenant for rent, and the sheriff sells the tenancy under a *fi. fa.*, this is not a sale "in consequence of a breach of a statutory condition," so as to debar the purchaser from applying to the court to fix a judicial rent. The sale contemplated by section 20 is a sale by the tenant pursuant to section 13, sub-section 1, where the landlord has brought an ejectment for non-payment of rent or upon notice to quit.—*Reddy* v. *Elliott*, LAND COM. (Ir.)—30 L. R. Ir. 653.

19. *Rent—Fair rent—"Town park"—"Let and used as an ordinary agricultural farm"—Land Law (Ireland) Acts*, 1881, *s.* 58; 1887, *s.* 9.—A., a stationer and mail cart proprietor, was tenant from year to year of lands adjoining a town in which he lived for the first twenty years of the tenancy. He subsequently removed to a house at a distance from the town, and continued to live there till his death, nine years afterwards. During all this A., in alternate years, cropped the land with wheat, and let them in conacre to persons living in the town, who took a potato crop out of the lands after manuring them. B., who was a solicitor residing near the town, subsequently acquired A.'s interest in the holding, and used the lands for sheep feeding.

Held, that neither A. nor B. had used the lands as an ordinary agricultural farm within the meaning of section 9 of the Land Law (Ireland) Act, 1887, so as to take the holding outside the definition of a town park in section 58 of the Land Law (Ireland) Act, 1881.—*Macnamara* v. *Macnamara*, C.A. (Ir.)—32 L. R. Ir. 1.

20. *Rent—Fair rent—"Town park"—"Let and used as an ordinary agricultural farm"—Onus of proof—Land Law (Ireland) Acts*, 1881, *s.* 58; 1887, *s.* 9.—In construing the words "let and used as an ordinary agricultural farm," the court is not limited to the user at any particular date, but must look to the substantial user of the lands during the whole term.

If the holding be within the definition of "town parks" in section 58 of the Land Law (Ireland) Act, 1881, the *onus* of proving that it comes within the exception created by section 9 of the Land Law (Ireland) Act, 1887, rests upon the tenant.—*Daly* v. *Wright*, C.A. (Ir.)—32 L. R. Ir. 9.

21. *Rent—Fair rent—Letting for agricultural purposes—Power to resume portion of holding for building or other purposes—Land Law (Ireland) Acts*, 1881, *s.* 58, *sub-section* 7; 1887, *s.* 1.—By lease, in 1874, seventy-two acres of agricultural land were demised for thirty-two years at a rent of £162. The lease contained a proviso for resumption of possession by the landlord during the lease of so much of the land as might be required for building or ornamental purposes, or for making a railway, road, or drain, fair compensation being made therefor. The landlord never resumed possession of any portion of the lands.

Held, that the tenant was entitled to serve an originating notice to fix a fair rent.—*Hughes* v. *Doyne*, LAND COM. (Ir.)—32 L. R. Ir. 31.

22. *Rent—Fair rent—Demesne lands—Land Law (Ireland) Act*, 1881, *s.* 58.—By lease a mansion-house, demesne, and farm, containing 152 acres, were let to a tenant. The lease contained covenants to repair the mansion-house, &c., but no covenants restrictive of cultivation, and the lands had been used as an agricultural holding. The lessor occupied a residence, which was surrounded by a large demesne, about one and a half miles away from the lands let.

Held (reversing the decision of the Land Commission), that the lands were demesne lands at the date of the lease, and had not ceased to retain that character.—*Moore* v. *Batt*, C.A. (Ir.)—32 L. R. Ir. 68.

23. *Rent—Fair rent—Demesne lands—Land Law (Ireland) Act*, 1881, *s.* 58.—It is not essential to the definition of demesne lands, within the meaning of the Land Law (Ireland) Acts, that they should be held in fee by the landlord.—*Magner* v. *Hawkes*, C.A. (Ir.)—32 L. R. Ir. 285.

24. *Rent — Fair rent—Subletting — Consent of landlord—Land Law (Ireland) Act*, 1881, *s.* 57.—Previous to 1860 R. had been tenant under a lease for a term of years then expired and the lives of R. and J. then in being. While tenant under this lease R. made two subleases of portions of the holding for the residue of his own term, and had created a yearly tenancy in another portion of the lands. In 1860 he was granted a new lease for three lives of the same lands. The new lease contained a covenant against subletting, and the lands were described in it as being lately in possession of R. and his undertenants. Prior to the execution of the new lease the lessor executed an agreement in writing that the covenant against subletting should only take effect as to the parts of the demised premises then in the occupation of subtenants from the death of R. and J. After the death of R., who survived J., the person entitled to R.'s interest in the new lease served an originating notice, claiming to fix a fair rent of the holding. There were then on the lands three subtenants, two of whom held the portions demised by the two subleases made by R., and one of whom held the portion of the lands comprised in the yearly tenancy. All the subtenants had acquired their title prior to 1860.

Held, that the form of the lease and the collateral agreement did not prove that the landlord had consented to the sublettings.

Flannery v. *Nolan*, 20 L. R. Ir. 537, discussed.—*Thomson* v. *Lord Rosemore*, C.A. (Ir.)—32 L. R. Ir. 431.

25. *Resumption of holding by landlord—Lessee—Notice to fix a fair rent—Land Law (Ireland) Acts*, 1881, *s.* 21; 1887, *s.* 1.—Where a lessee serves an originating notice to fix a fair rent under the Land Law (Ireland) Act, 1887, s. 1, the landlord cannot resume possession under that section until the end of fifteen years after the lessee has so become a

present tenant.—*Connolly* v *Tyrrell*, C.A. (Ir.)—32 L. R. Ir. 97.

26. *Sale of holding—Lessee—Notice to fix fair rent—Agreement to sell holding—Status of tenant—Land Law (Ireland) Act*, 1887, *s.* 1.—By a lease in December, 1871, the lessor demised a farm to S. for twenty-one years. S. died in 1891, having by his will appointed his sons executors, and having left them the farm. In July, 1891, the sons served notice on the lessor that it was their intention to sell the tenancy. In August, 1891, the sons served notice on the lessor to have a fair rent fixed under section 1 of the Land Law (Ireland) Act, 1887. On the 1st of September, 1891, the sons agreed to sell the tenancy to D., without having obtained the lessor's consent, and served the lessor with notice thereof. The lessor objected, and upon a case stated by the Land Commission,

Held, that the tenants had not acquired the status of present tenants by the mere service of an originating notice to fix a fair rent prior to an adjudication by the Land Commission thereon.—*Smyth* v. *Moore*, C.A. (Ir.)—32 L. R. Ir. 129.

27. *Subletting—Covenant against—Landlord's consent—Presumption of lost deed—Trivial sublettings—Subletting Act* (7 *Geo.* 4, *c.* 29)—*Land Law (Ireland) Acts*, 1881, *ss.* 2, 5, 15, 21, 57; 1887, *s.* 4.—The interest in a lease comprising fifty-four acres, made in 1828, was assigned to the tenant in 1878 by a deed describing the premises as "now in possession of W. (the assignor) and his undertenants." At this date portions of the holding were sublet to A., B., C., D., E., and F. The landlord's agent indorsed on the deed his assent to this assignment.

Held, that there was evidence of a consent by the landlord to the sublettings in existence at the date of the assignment.

The tenant subsequently got the portions of land held by A., B., and C. into his hands, and relet them to X., Y., and Z. without any fresh consent on the part of the landlord. The tenant also made a new subletting to G. of two acres.

Held, that these several sublettings should be taken together, and were not trivial.

The landlord's predecessor had authorized the lessee to make sublettings, and neither the landlord's predecessor nor the landlord had ever availed themselves of a condition in the lease giving a penalty for subletting, nor of the provisions of the Subletting Act, though it was proved that they knew of the sublettings.

Held, that the court would not presume a lost deed waiving the benefit of the Subletting Act.—*Robinson* v. *Wakefield*, C.A. (Ir.)—30 L. R. Ir. 547.

28. *Tithe rent-charge—Lessee liable to pay—Determination of liability by fixing fair rent—Land Law (Ireland) Act*, 1887.—Where a lessee, who from the nature of his tenure was liable to tithe rent-charge, has a fair rent fixed under the Land Law (Ireland) Act, 1887, his liability to tithe rent-charge ceases.—*Moroney* v. *Ambrose*, EX.D. (Ir.)—32 L. R. Ir. 63.

29. *Turf-bog on holding—Right of landlord to enter and take turf—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49), *ss.* 5 (5), 8.—The decision of the Vice-Chancellor (29 L. R. Ir. 243), granting an injunction to restrain the defendant from cutting and taking turf and mould from the lands in the occupation of the defendant as tenant to the plaintiff, affirmed.—*Townshend* v. *Cotter*, C.A. (Ir.)—31 L. R. Ir. 86.

30. *Writ of restitution—Ejectment for non-payment of rent—Tender—Lodgment in court.*—Case in which it was held that there had been neither tender by the tenant to the landlord nor lodgment in court of the amount due under a judgment for recovery of the land for non-payment of rent, the last day for redeeming having passed, and that the defendant was not entitled to a writ of restitution.

Quære, whether tender of the rent due, without acceptance by the landlord, is equivalent to payment within section 71 of the Landlord and Tenant Act, 1860.

Holmes v. *Flaherty*, 18 L. R. Ir. 310, questioned.

Kenmare v. *Supple*, Vern. & Scr. 1, approved.—*Hogg* v. *Smyth*, C.A. (Ir.)—32 L. R. Ir. 191.

LANDS CLAUSES ACTS:—

1. *Compensation—Compulsory taking of land—Notice to treat—No steps taken under notice—Possession taken—Tenant's interest in land taken—At what date interest is to be calculated—Lands Clauses Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 121.—A notice to treat was given by a railway company for a strip of land which formed part of lands held by the tenant under a lease. Nothing was done under this notice to treat, but about a year afterwards the company required and took possession of the strip under section 85 of the Lands Clauses Act, 1845. At the time the notice to treat was given the tenant had an interest for more than a year, but at the time the strip was taken he had an interest for less than a year in the strip taken. The tenant claimed compensation for the strip taken, and for severance damage.

Held, that the time at which the tenant's interest was to be considered was the time when the strip was taken under section 85, and not the time when notice to treat was given, under which nothing was done, and as at the former time the tenant had an interest in the strip of land less than for a year, a magistrate had jurisdiction to assess the compensation under section 121 of the Lands Clauses Act, 1845.—*Reg.* v. *Kennedy*, Q.B.D. 380—[1893] 1 Q. B. 533; 68 L. T. 454.

2. *Compensation—Reversionary interest in licensed premises—Admissibility of evidence to prove the present market value of the claimant's interest in the premises as licensed premises.* — In estimating the amount of compensation under the Lands Clauses Acts to be paid to the reversioner of licensed premises, let on lease with twenty-six years unexpired, required by a public body under compulsory powers, the arbitrator ought to admit evidence to prove the present market value of the claimant's reversionary interest in the premises as licensed premises, and need not confine the evidence to the estimated rental value of the premises as a house and shop apart from the question of whether, when the reversion falls in, they would then be licensed premises.—*Belton* v. *London County Council*, C.A. 315—62 L. J. Q. B. 222; 68 L. T. 411.

3. *Costs—Order for payment of dividends to tenant for life — Person absolutely entitled — Subsequent motion for payment of* corpus *out of court—Lands Clauses Act*, 1845, *ss.* 69, 80.—Notwithstanding previous orders for payment to a tenant for life of dividends on purchase-money of lands compulsorily taken, the costs of which have been borne by the company, the court will order the company to pay the costs of an application by the tenant for life for payment out of court of the *corpus* to trustees under the provisions of the Settled Land Act, 1882.

Secus, where the applicant was absolutely entitled to the fund at the time when the application for payment of dividends only was made.

Ex parte Richards, 25 L. R. Ir. 175, not followed.—*In re Belfast Corporation, Ex parte Harkerton*, V.C. (Ir.)—31 L. R. Ir. 258.

4. *Costs—Payment of money into court—Admini-*

tration obtained for purpose of making title to same.—Money was paid into court by a railway company under the Land Clauses Act, 1845, in respect of leasehold premises. Persons claiming under the marriage settlement of their father, then deceased, applied for payment, but the court decided that other children, then dead, and of whom there were no personal representatives, had taken vested interests, and declined to pay out the fund until administration had been taken out to their estates. One of the applicants thereupon took out administration to the deceased children, and obtained payment of the fund.

Held, that the company should pay the costs of obtaining these administrations.—*Ex parte Kelly*, V.C. (Ir.)—31 L. R. Ir. 137.

5. *Inclosure Act—Commonable lands purchased by railway company—Rights of turbary—Allotment of waste lands to lord of manor in trust—Trust for benefit of occupiers of cottages—Rights of lord of manor as owner of the soil.*—Prior to 1802 the occupiers of certain cottages were accustomed to cut turf on large tracts of commonable and waste lands of a manor. In that year an Inclosure Act was passed by which commissioners were empowered to allot to the lord in trust for the occupiers of the cottages, in lieu of their rights or pretended rights of cutting turf, portions of the waste for a turf common, to be managed as the lord and the churchwardens and overseers should order, and not to be depastured. The commissioners by their award, made in 1806, allotted to the lord, in trust for the occupiers for the time being of the cottages, several acres of waste for a turf common.

A railway company took for the purposes of their undertaking part of the land allotted as a turf common, and the purchase-money was paid into court. On a petition as to the distribution of the fund,

Held, affirming the decision of the Court of Appeal (38 Ch. D. 520), that upon the true construction of the Act the lord of the manor was not deprived of his rights as owner of the soil in the turf common, but was entitled to so much of the purchase-money as represented the value of those rights.—*Attorney-General* v. *Meyrick*, H.L. (E.)—[1893] A. C. 1; 62 L. J. Ch. 313; 68 L. T. 174.

6. *Notice to treat—Two tenements—Lands Clauses Act*, 1845 (8 & 9 *Vict.* c. 18), *s.* 92.

Held, by Mathew, J., that under the circumstances there was only one notice to treat, and that the plaintiff was not entitled to treat the notice as two notices applicable to one tenement and to part of the other; and that the award (which had been made *ex parte*) was not binding on the defendants.—*Thompson* v. *Tottenham and Forest Gate Railway Co.*, Q.B.D.—67 L. T. 416.

LICENSING ACTS:—

1. *Club—Proprietary club—Sale of intoxicating liquors to members without a licence*—6 *Geo.* 4. *c.* 81, *s.* 26; 4 & 5 *Will.* 4, *c.* 85, *s.* 17; 23 & 24 *Vict. c.* 27, *s.* 19; 35 & 36 *Vict. c.* 94, *s.* 3.—The respondents, a registered company, were the proprietors of a club. The appellant applied to become a member of the club, and, having paid a subscription, was elected an honorary member pending inquiries, and was then supplied with spirits, &c., for which he paid. The respondents did not hold any licence for the sale of intoxicating liquors.

Held, that the respondents might be convicted for selling spirits, &c., without a licence.—*Bowyer* v. *Percy Supper Club*, Q.B.D.—[1893] 2 Q. B. 154.

2. *Licence—Beerhouse—Application for certificate of justices—Notice—Time, computation of—Wine and Beerhouse Act*, 1869 (32 & 33 *Vict. c.* 27), *s.* 7—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *ss.* 40, 43, 50.—By section 7 of the Wine and Beerhouse Act, 1869, "every person intending to apply to the justices for a certificate under this Act shall, twenty-one days at least before he applies, give notice in writing of his intention to one of the overseers of the parish," &c.

Held, that the twenty-one days are to be computed, not from the first day of the general annual licensing meeting at which the application is made, but from the day upon which the application is actually heard.—*Reg.* v. *Pownall*, Q.B.D.—[1893] 2 Q. B. 158.

3. *Licence—Beerhouse licensed on May 1st*, 1869—*Lapsed licence — Discretion of justices to refuse transfer—Licensing Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 14—*Wine and Beerhouse Act*, 1869 (32 & 33 *Vict. c.* 27), *ss.* 8, 19—*Wine and Beerhouse Act Amendment Act*, 1870 (33 & 34 *Vict. c.* 29), *s.* 7.—At the general annual licensing meeting in August, 1891, the justices refused to renew the licence of the tenant of a beerhouse on account of his having been convicted for permitting drunkenness on the premises. The beerhouse had been continuously licensed for the sale of beer to be consumed on the premises from a date prior to the 1st of May, 1869. In consequence of the refusal to renew, the licence expired on the 10th of October, 1891. On the 5th of October, 1891, the tenant gave up possession of the house to the respondent, who applied, on the 17th of November, 1891, to the justices in special sessions for a transfer of the licence.

Held (reversing the decision of Pollock, B., and Vaughan Williams, J.), that at the date of the application by the respondent the licence was not in force within the meaning of section 19 of the Wine and Beerhouse Act, 1869, and that the justices' power of refusing the transfer was, therefore, not limited to the four grounds mentioned in section 8 of that Act.—*Murray* v. *Freer*, C.A. 450—[1893] 1 Q. B. 635; 62 L. J. M. C. 100; 68 L. T. 507.

4. *Licence—Notice of intention to oppose—Temporary authority — "Licensed person" — Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 42—5 & 6 *Vict. c.* 44, *s.* 1—9 *Geo.* 4, *c.* 61, *s.* 14—*Special case stated by licensing justices—Respondent—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 33—20 & 21 *Vict. c.* 43, *s.* 2.—The occupier of certain licensed premises being about to leave them, the appellant obtained a temporary authority under 5 & 6 Vict. c. 44, s. 1, to carry on the business until the next special session for transfer of licences. Such session and the general annual licensing meeting being held simultaneously, the appellant applied for a transfer of the licence under 9 Geo. 4, c. 61, s. 14, and also for a renewal of the licence. Both applications were refused by the justices, because the appellant did not produce satisfactory evidence of good character. Notice of intention to oppose the renewal of the licence had been served on the former occupier, but not upon the appellant.

Held, that the appellant was not a "licensed person" applying for a renewal of "his licence" within the meaning of section 42 of the Licensing Act, 1872, and, therefore, was not entitled to notice of opposition to the renewal of the licence.

The superintendent of police of the division appeared to oppose the licence before the justices, and notice in writing of the appeal was given him by the appellant in accordance with 20 & 21 Vict. c. 43, s. 2.

Held, that, the case being stated under section 33 of the Summary Jurisdiction Act, 1879, the super-

intendent of police was rightly made respondent.—*Price* v. *James*, C.A. 57—[1892] 2 Q. B. 428; 61 L. J. M. C. 203; 67 L. T. 543.

5. *Licence—Renewal—Change of occupation—Refusal of renewal to new tenant—Expiration of licence—Subsequent application for licence by second new tenant—Jurisdiction of justices—9 Geo. 4, c. 61, s. 14.*—By 9 Geo. 4, c. 61, s. 14, "If any person duly licensed under this Act shall, before the expiration of such licence, . . . remove from or yield up the possession of the house specified in such licence; or if the occupier of any such house, being about to quit the same, shall have wilfully omitted or shall have neglected to apply at the general annual licensing meeting or at any adjournment thereof for a licence to continue to sell excisable liquors by retail, to be drunk or consumed in such house, it shall be lawful for the justices assembled as aforesaid at a special session . . . to grant to . . . any new tenant or occupier of any house having so become unoccupied . . . a licence to sell excisable liquors by retail."

The licence-holder of an inn yielded up possession of the premises in December, 1890; at a special session in May, 1891, a new tenant unsuccessfully applied for a transfer of the licence; at the adjourned general annual licensing meeting in September, 1891, another new tenant unsuccessfully applied for a renewal of the licence; neither of the applicants appealed to quarter sessions. The then current licence expired on the 10th of October, 1891. In March, 1892, the appellant, who had become tenant of the house, applied, under 9 Geo. 4, c. 61, s. 14, for a licence.

Held, that the justices had jurisdiction to grant the application.

Reg. v. *Justices of Liverpool*, 11 Q. B. D. 638, considered and followed.—*Baldwin* v. *Justices of Dover*, Q.B.D.—[1892] 2 Q. B. 421; 61 L. J. M. C. 215.

6. *Licence—Renewal—Grounds of objection—"Disorderly character"—Evidence—Justices' discretion—Licensing Acts*, 1872 (35 & 36 *Vict. c.* 94), *s.* 42; *and* 1874 (37 & 38 *Vict. c.* 49), *s.* 26.—Upon an application for the renewal of a licence, the notice of objection pursuant to section 26 of the Licensing Act, 1874, stated three grounds of objection, one of which was, "That your house is of a disorderly character." Upon the hearing of the application the justices admitted evidence of three convictions against previous holders of the licence, but it was admitted that the applicant bore a good character.

Held, that the evidence was properly admitted, inasmuch as it was not necessary that evidence directed to the disorderly character of a licensed house should be confined to such matters only as affected the personal character of the applicant by showing that he himself had contributed to the disorderly character of the house.—*Reg.* v. *Justices of Miskin Higher*, Q.B.D. 252—[1893] 1 Q. B. 275; 67 L. T. 680.

7. *Licence—Renewal—Refusal to renew—Appeal to quarter sessions—Notice of appeal—Service on "the other party"—Superintendent of police opposing renewal—Summary Jurisdiction Act*, 1879 (42 & 42 *Vict. c.* 49), *s.* 31.—Where a superintendent of police has served notice of opposition to the renewal of a licence, and has appeared before the licensing justices in support of his opposition, he is "the other party" to the proceedings within the meaning of section 31 of the Summary Jurisdiction Act, 1879, and a person aggrieved by the refusal of the justices to renew the licence must, as a condition precedent to the hearing of his appeal to quarter sessions, serve upon the superintendent notice of his intention to appeal.

Reg. v. *Justices of Glamorganshire*, 40 W. R. 436, [1892] 1 Q. B. 621, and *Price* v. *James*, 41 W. R. 57, [1892] 2 Q. B. 428, followed.—*Reg.* v. *Justices of Gloucestershire; Reg.* v. *Justices of Bristol*, Q.B.D. 379—68 L. T. 225.

8. *Offence — "Illegally dealing in intoxicating liquor"—Penalty—Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 17.—The provision in section 17 of the Licensing Act, 1874, that persons found upon suspected premises entered by a constable in pursuance of a warrant to search for liquors sold or kept for sale contrary to law shall be presumed to be guilty of "illegally dealing in intoxicating liquor" until the contrary be shown, is not confined to a seller, but applies also to a buyer, of such liquors.—*McKenzie* v. *Day*, Q.B.D. 384—[1893] 1 Q. B. 289; 62 L. J. M. C. 49; 68 L. T. 345.

9. *Offence—Sale during prohibited hours—"Bonâ fide traveller"—Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 10.—A man left his home on a Sunday morning and walked three-quarters of a mile to a railway station, and thence took the train to another station about two and a half miles off, where he was employed as a porter. He afterwards left the station and walked to certain licensed premises, where he was served with beer. The licensed premises were less than a mile from the station where he was employed, but more than three miles from his residence.

Held, that he was a *bonâ fide* traveller within section 10 of the Licensing Act, 1874.—*Cowap* v. *Atherton*, Q.B.D. 158—[1893] 1 Q. B. 49; 68 L. T. 88.

10. *Offence—Sale during prohibited hours—"Bonâ fide traveller"—Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 9.—The appellant, a licensed victualler, was charged with permitting his licensed premises to be open for the sale of refreshment during prohibited hours—namely, on a Sunday morning before 12.30 p.m. The justices found that many of the persons served by the appellant were residents in, and had come from, a neighbouring town a little more than three miles distant, in order to obtain beer at the appellant's premises; that they were not *bonâ fide* travellers within section 9 of the Licensing Act, 1874, and that the appellant did not truly believe them be *bonâ fide* travellers; and the appellant was convicted and fined.

Held, by Lord Coleridge, C.J., and Hawkins, Day, and Collins, JJ. (Cave, J., dissenting), that, on the evidence in the case, the conviction was right.—*Penn* v. *Alexander*, Q.B.D. 392—[1893] 1 Q. B. 522; 62 L. J. M. C. 65; 68 L. T. 355.

LICENSING ACTS (IRELAND):—

1. *Beer licence and spirit grocer's licence—Composite application to licensing justices—Mandamus to hear application for spirit grocer's licence.*—M. applied at petty sessions for a magistrate's certificate for a beer retailer's licence and a spirit grocer's licence. The application was refused, and the refusal affirmed at quarter sessions. M. then applied for a *mandamus* to enable him to obtain a spirit grocer's licence.

Held, that, as M. had not severed the two branches of his composite application when it was before the justices, a *mandamus* should not issue commanding them to do what they had never been asked to do, and had not, in fact, refused to do.

Quære, is "suitability of the premises" structural suitability merely, or does it include suitability of situation?—*Reg.* v. *Justices of Tyrone*, C.A. (Ir.)—32 L. R. Ir. 201.

2. *Notice of appeal—Services on justices' clerk—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 52—*Petty Sessions Act*, 1851 (14 & 15 *Vict. c.* 93).—A licensed person was convicted at petty sessions of an offence under the Licensing Act, 1872, and served notice of appeal from such conviction by delivering to the clerk of the petty sessions court a notice of appeal addressed to each of the convicting justices by name.

Held (Gibson, J., *diss.*), that the service was sufficient.

Reg. v. *Justices of Glamorganshire*, 40 W. R. 436, [1892] 1 Q. B. 621, discussed.—*Reg.* v. *Justices of Wicklow*, Q.B.D. (Ir.)—30 L. R. Ir. 465.

LIFE INSURANCE.—See INSURANCE (LIFE).

LIGHT:—

1. *Implied grant—Right to extraordinary amount of light—Injunction.*—Where the owner of land grants part of the land with a house upon it, which is to be used for business purposes, the intention to be imputed to the parties, in the absence of a special bargain, is that the house is to be granted with light sufficient for all ordinary purposes of business in the locality.

In considering the effect of such a grant the court must look back to the time when the contract between the parties was entered into, and cannot impute an intention that the premises should be used for a special purpose not shown to be in the mind of either of the parties at that time.

Held, applying the above principles, that the lessees of a building used for business purposes in the City of London were not entitled to an injunction to restrain the defendant, who claimed under a subsequent conveyance of the adjoining land from the same owner, from erecting a building which would interfere with the use of their rooms for wool-sorting purposes (which required a strong light), but which would leave the rooms in the enjoyment of a good and sufficient light for all the ordinary purposes of business, the court not being able to impute to the parties to the lease an intention that the demised building should be used for wool-sorting purposes.—*Corbett* v. *Jonas*, CH.D. KEK., J.—[1892] 3 Ch. 137; 62 L. J. Ch. 43; 67 L. T. 191.

2. *Prescription—Enjoyment against lessee of the Crown—Surrender of lease—New lease—Presumption of lost grant—Inference of enjoyment from time immemorial—Limited easement for residue of term—"Absolute and indefeasible"—Prescription Act* (2 & 3 *Will.* 4, *c.* 71), *ss.* 2, 3.—Section 2 of the Prescription Act does not apply to easements of light, which are governed by section 3 and the subsequent sections, which have to be read with it.

The Crown, not being named in section 3, is not bound by it.

Limited and qualified easements are not within the scope of the Prescription Act; accordingly, an easement of light cannot arise under section 3 as against a lessee of the Crown, to exist only during the continuance of the lease.

M., being assignee of a lease of Crown land for a term of ninety-nine years from 1815, surrendered it in 1892 and agreed to take a new lease, under which agreement he proceeded to erect a building so as to interfere with the access of light which W. had enjoyed to a house on contiguous land without interruption ever since 1852, when such house was built. In 1893 W. commenced an action to restrain M. from so building.

Held, that there was no ground for presuming a lost grant, or for inferring immemorial prescription, in favour of W.; that no easement of light had arisen under the Prescription Act, and that W.'s claim therefore failed.

Decision of Kekewich, J., reversed.

Principle of *Bright* v. *Walker*, 1 C. M. & R. 211, followed.

Perry v. *Eames*, 39 W. R. 602, [1891] 1 Ch. 658, approved.—*Wheaton* v. *Maple & Co.*, C.A. 677.

3. *Prescription—Landlord and tenant—Same landlord—Adjoining tenements—Prescription Act* (2 & 3 *Will.* 4, *c.* 71), *s.* 3.—Plaintiff, having obtained the assignment of a twenty-one years' lease, which had been granted in 1862, of certain houses, just before its expiration, in 1882, agreed with his landlord for a further lease of twelve years, under which he was in possession, no formal lease having been executed. In 1887 the same landlord granted a lease of adjoining premises, which was assigned to the defendant. On motion to restrain interference by the defendant with the plaintiff's lights,

Held, that the fact that the plaintiff's houses had not been continuously occupied by the same tenant was immaterial, and that an absolute and indefeasible right to light had attached to the houses in 1882 by virtue of the Prescription Act, s. 3.

Held, also, that the fact that the plaintiff was in possession under agreement only was not material. —*Robson* v. *Edwardes*, CH.D. NOR., J. 569—[1893] 2 Ch. 146; 62 L. J. Ch. 378; 68 L. T. 195.

4. *Prescription—User for more than nineteen and less than twenty years—Inchoate right—Injunction—Prescription Act* (2 & 3 *Will.* 4, *c.* 71), *s.* 3.—The plaintiffs were owners and lessees of buildings having windows the access of light to which over adjoining land was claimed to have been enjoyed for more than nineteen and less than twenty years. The defendants, the owners of the adjoining land, were proceeding to erect thereon buildings of a permanent character, which, if completed, would obstruct the plaintiffs' light.

The plaintiffs brought this action, and now moved to restrain the further erection of the defendants' building. They contended that they were entitled to an injunction by way of protection to their inchoate right, which in a few months would, under section 3 of the Prescription Act, ripen into an absolute and indefeasible right.

Held, that, there being no precedent for granting such an injunction, and the case not being one in which the property would be destroyed if an injunction was not granted, the motion must be refused.

Held, that, if the defendants ran up their buildings, these at the end of twenty years would constitute an interference with the plaintiffs' ancient lights, and would be amenable to the jurisdiction of the court, but the court would not intervene to protect this inchoate right.—*Governors of Bridewell Hospital* v. *Ward, Lock, & Co.*, CH.D. KEK., J.—62 L. J. Ch. 270; 68 L. T. 212.

LIMITATION of ACTION.—See HIGHWAY, 5.

LIMITATIONS, STATUTE of:—

1. *Administration action—Incumbrancer—Arrears of interest—Petition for sale in Landed Estates Court.* —Where an incumbrancer, who has proved his demand in an administration action, presents a petition for sale in pursuance of the judgment in that action, and carries on the proceedings to a sale, the Statute of Limitations does not run against his demand after the commencement of the administration action.—*In re Ebbs' Estate*, L.J. (Ir.) —31 L. R. Ir. 95.

2. *Concealed fraud—Continuous adverse possession—* 3 & 4 *Will.* 4, *c.* 27, *s.* 26—*Practice—Pleadings—*

Striking out — Frivolous and vexatious action — R. S. C., 1883, *ord.* 25, *r.* 4.—The plaintiff, by his statement of claim in an action of ejectment brought in 1892, alleged that he was the heir-at-law of W. J., who died intestate in 1798, and that, on the death of W. J., his real estate was wrongfully taken possession of by the mother of G. C., in the name of G. C., as the heir-at-law—as the mother falsely alleged—of W. J.; that G. C. died an infant in 1805, whereupon G. C.'s mother continued to hold possession in the name of a supposititious child, R. C., on the false pretence that such child was a brother of G. C., and as such was heir-at-law of W. J.; that both R. C., and afterwards the defendant, who claimed as a volunteer under R. C., remained in possession knowing the above facts, and fraudulently concealed the same from the true heir of W. J.; that the plaintiff and his predecessors had been deprived of the estate by the said concealed fraud, which had not, and could not with reasonable diligence have, been discovered until 1879; and that the plaintiff, at the time of such discovery, was an infant, and only attained twenty-one in 1887. The defendant moved to have the statement of claim struck out and the action dismissed as frivolous or vexatious; and, in support of his application, adduced evidence to show that the allegation that R. C. was a supposititious child had been publicly made in 1853, and had been the foundation of other actions of ejectment against the defendant and his predecessors by other claimants, and that such actions had all been dismissed.

Held (affirming Kekewich, J.), (1) that the allegations in the statement of claim as to the entry in 1798 on behalf of G. C. did not show a case of concealed fraud within section 26 of 3 & 4 Will. 4, c. 27, but only a wrongful entry under a false claim as heir-at-law; (2) that the statute began to run as against the plaintiff and his predecessors in 1790, and that, as possession adverse to the plaintiff and his predecessors had been held ever since, the operation of the statute was not suspended by what was alleged to have been done in 1805; (3) that the plaintiff or his predecessors knew, or might with reasonable diligence have known, the alleged concealed fraud more than twelve years before action brought; and, accordingly, that the action should be dismissed as frivolous or vexatious.

Lawrance v. *Lord Norreys*, 38 W. R. 753, 15 App. Cas. 210, followed.

Trustees, Executors, and Agency Co. v. *Short*, 37 W. R. 433, 13 App. Cas. 793, distinguished.—*Willis* v. *Earl Howe*, C.A. 433—[1893] 2 Ch. 545; 62 L. J. Ch. 690.

3. *Copyhold—Quit rent—Non-payment—Statutes of Limitation* (3 & 4 *Will.* 4, *c.* 27, *ss.* 2, 3; 37 & 38 *Vict. c.* 57, *s.* 1).—A quit rent payable in respect of a copyhold tenement is liable to be barred under the Statutes of Limitation.—*Howitt* v. *Earl of Harrington*. CH.D. STI., J. 664—[1893] 2 Ch. 497; 62 L. J. Ch. 571; 68 L. T. 703.

4. *Husband and wife—Separate property—Mortgage—Trustee—Same hand to pay and to receive—Statute of Limitations* (3 & 4 *Will.* 4, *c.* 27), *s.* 40.—Where a married woman was under a will entitled for life for her separate use to the income of a sum of money which the trustee of the will had lent to the husband on the security of a mortgage of two freehold houses, and the husband and wife had lived together in amity for a period of more than twenty years after the date of the mortgage, and during that time the husband had never paid any interest on the mortgage debt, or given any written acknowledgment of the mortgage to the mortgagee-trustee for the wife,

Held, that the husband retained the interest as a gift from the wife; that it was the same hand to pay and to receive; that, therefore, no payment over was requisite; and, consequently, that the Statute of Limitations did not run, and the mortgage was still subsisting.—*In re Hawes, In re Burchell, Burchell* v. *Hawes*, CH.D. KEK., J. 173—62 L. J. Ch. 463; 67 L. T. 756.

5. *Judgment debt*—3 & 4 *Will.* 4, *c.* 27, *s.* 40—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8—*Judgments Registration Act*, 1864 (27 & 28 *Vict. c.* 112).—Notwithstanding the Act 27 & 28 Vict. c. 112, judgments come within section 8 of the Real Property Limitation Act, 1874, and, in the absence of part payment or acknowledgment in writing, are barred by the lapse of twelve years.—*Jay* v. *Johnstone*, C.A. 161—[1893] 1 Q. B. 189; 62 L. J. Q. B. 128.

6. *Lease—Lessee out of possession—Title of lessee extinguished—Transfer of title to person in possession—Rent paid to landlord—Liability on covenant in lease*—3 & 4 *Will.* 4, *c.* 27, *s.* 34.—The plaintiff's predecessor in title in 1802 granted a lease of a house for eighty-nine years, containing the usual covenant by the lessee to repair. In 1836 G. entered into possession without any acknowledgment to the lessee, who disappeared at that date, and continued in possession for forty years paying the rent to the lessor. G., in 1876, assigned all his estate and interest to the defendant, who continued in possession, paying the rent to the lessor, until the expiration of the term in 1891. The plaintiff then sued the defendant for breach of the covenant to repair.

Held, that the rights and obligations of the lessee under the lease were not, by section 34 of 3 & 4 Will. 4, c. 27, transferred to G., and that, therefore, the defendant, who was the assignee of G., was not liable on the covenants in the lease.—*Tickborne* v. *Weir*, C.A.—67 L. T. 735.

7. *Lease for lives—Sublease—Surrender of lease—Renewal of lease—Ecclesiastical Commissioners—Recovery of possession — Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 2—Interesse termini—4 *Geo.* 2, *c.* 28, *s.* 6.—C., the owner in fee and predecessor in title of the plaintiffs, in 1805 granted a freehold lease of land for three lives. The lessees in 1807 sub-demised part of the land for a term determinable on the dropping of the last of the three lives, which occurred in 1874. The lessees in 1832 surrendered their lease, and on the next day took a new lease for lives, the last of which dropped in 1891. This lease was by common law demise, and bore an indorsement of livery of seisin. The defendant, claiming through the sub-lessees, had been, since 1874, when the sublease expired, in actual possession of the lands comprised therein without title. In an action to recover possession,

Held, that the lease of 1832, being a valid lease by virtue of 4 Geo. 2, c. 28, s. 6, operated to pass an estate to the lessees; and therefore the plaintiffs' reversionary estate did not become an estate in possession within the meaning of the Real Property Limitation Act, 1874, until 1891, when the last life in the lease dropped; and, therefore, that the plaintiffs' right to recover was not barred under that Act, and the plaintiffs were entitled to recover.

The expression "*interesse termini*" is never used with regard to a freehold lease, to which it has no application.

Ecclesiastical Commissioners v. *Rowe*, 29 W. R.

159, 5 App. Cas. 736, distinguished.—*Ecclesiastical Commissioners* v. *Treemer*, CH.D. CHI., J. 166—[1893] 1 Ch. 166; 62 L. J. Ch. 119; 68 L. T. 11.

8. *Mortgage—Assignment of equity of redemption—Settlement—Payment of interest by tenant for life—Remedy on mortgagor's covenants*—3 & 4 *Will.* 4, *c.* 42, *ss.* 3, 5—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 6—Chose in action—*Assignment before the* 1*st of November*, 1875—*Retrospective operation of section.*—The payment of interest by an assignee for life of an equity of redemption is sufficient payment to keep alive the right of action on the covenants of the mortgagor, under the 5th section of the statute 3 & 4 Will. 4, c. 42.

Forsyth v. *Bristowe*, 8 Ex. 716, 1 W. R. C. L. Dig. 100, and *Roddam* v. *Morley*, 5 W. R. 510, 1 De G. & J. 1, followed.

Section 25, sub-section 6, of the Judicature Act, 1873, is retrospective, and applies to assignments of *choses in action* made before that Act came into operation.—*Dibb* v. *Walker*, CH.D. CHI., J. 427—[1893] 2 Ch. 429; 62 L. J. Ch. 536; 68 L. T. 610.

9. *Mortgage — Covenant — Principal and surety — Joint and several covenant by mortgagor and surety—Payment on demand—Present debt—Collateral sum*—3 & 4 *Will.* 4, *c.* 42, *s.* 3.—Where there is a present debt and a promise to pay on demand, the demand is not considered to be a condition precedent to the bringing of an action.

Secus, where there is a promise to pay a collateral sum on request.

Where a mortgage contained joint and several covenants by J. B. and the mortgagor to pay the mortgage debt and interest "on demand," and that they would "in the meantime from the date" of the deed pay interest half-yearly until payment of the principal, and a proviso for redemption if the mortgagor should "on demand" pay the debt and interest.

Held, on the construction of the covenants, that there was intended to be a demand precedent to the bringing of any action thereon, and that no right of action accrued against J. B. until demand made.—*In re Brown's Estate, Brown* v. *Brown*, CH.D. CHI., J. 440—[1893] 2 Ch. 300; 62 L. J. Ch. 695; 69 L. T. 12.

10. *Petition for sale by incumbrancer*—3 & 4 *Will.* 4, *c.* 27, *s.* 40—37 & 38 *Vict. c.* 57, *s.* 8.—The filing of a petition for sale in the Chancery Division (land judges) by an incumbrancer on land is a proceeding to recover money charged on the land within the meaning of section 8 of 37 & 38 Vict. c. 57, and prevents the statute from running from that date against the petitioner until such petition has been dismissed.—*In re Stinson's Estate*, L.J. (Ir.)—29 L. R. Ir. 490.

11. *Soil under highway—Vesting—Tunnel—Easement or hereditament—Prescription Act* (2 & 3 *Will.* 4, *c.* 71)—*Statute of Limitations* (37 & 38 *Vict. c.* 57).—By a deed of the 12th of July, 1871, the trustees of a highway, in exercise of rights and powers given to them under Acts of Geo. 3 and Geo. 4, and for valuable consideration, granted a licence to the predecessor in title of the defendant company to excavate, construct, and use a tunnel under the highway. The rights and powers of the trustees came to an end on the 1st of November, 1871, when the Highways Act (33 & 34 Vict. c. 73) was passed. The tunnel in question was completed in 1872, and remained, without any substantial alteration, in the exclusive possession and occupation of the defendant company, or their predecessors in title, until the commencement of the action in August, 1891. The tunnel was many feet beneath the surface; it was bricked at either end, and was used to carry chalk and soil from one part of the defendants' property to another. The plaintiff was owner of the land abutting on the highway on one side, and, at one place, on both sides; and he alleged that he was owner of the soil under the highway. By his action he claimed an injunction to restrain the trespass upon his land.

Held, that, even assuming that the plaintiff had a sufficient title to the soil under the highway, apart from the Statute of Limitations, the action was barred by that statute, inasmuch as the defendant company had enjoyed no mere easement, but the exclusive occupation and possession of the tunnel for more than the required twelve years.—*Bevan* v. *London Portland Cement Co.*, CH.D. ROM., J.—67 L. T. 615.

See also EXECUTOR, 3; PRINCIPAL AND SURETY, 1, 7; TRUSTEE, 4, 7, 8.

LIVERPOOL COURT of PASSAGE:—

Admiralty jurisdiction—Rule empowering registrar to give summary judgment—Invalidity—Prohibition—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *ss.* 10, 13, 23, 25, 35—*County Courts Admiralty Jurisdiction Amendment Act*, 1869 (32 & 33 *Vict. c.* 51), *ss.* 1, 6.—Under section 6 of the County Courts Admiralty Jurisdiction Amendment Act, 1869, the assessor of the Court of Passage, Liverpool, has power to make general rules and orders for regulating the practice and procedure of the admiralty jurisdiction of that court.

Held, that a rule conferring on the registrar of the court a power of summary judgment similar to that exercised under order 14 of the R. S. C., 1883, was invalid.—*Fellows* v. *Owners of the Lord Stanley*, Q.B.D. 253—[1893] 1 Q. B. 98; 67 L. T. 857.

LOCAL GOVERNMENT:—

1. *Building — Bye-law — Sanitary authority — Deviation from plan.*—A bye-law of a sanitary authority, made under section 157 of the Public Health Act, 1875, required that a plan showing the dimensions of the several parts of any proposed building should be sent to, and approved by, the sanitary authority before the work of building was commenced.

The respondent sent in plans of a proposed building, which were approved by the sanitary authority. In the course of building he deviated from the plans sent in by altering the height of the floors of the building.

Held, that the respondent had committed a breach of the bye-law.—*James* v. *Master*, Q.B.D. 174—[1893] 1 Q. B. 355; 67 L. T. 855.

2. *Building—Bye-law— Validity — Dwellings for servants of railway company—Not "buildings" used for purposes of such "railway"*—38 & 39 *Vict. c.* 55 (*Public Health Act*, 1875), *s.* 157.—The appellants erected dwelling-houses, for their servants whose duties required them to live upon the spot, on vacant land, acquired and held by them under certain Acts of Parliament, near to but not forming part of one of their stations, nor used for the purposes of their railway. The appellants were convicted and fined at petty sessions for not having given the respondents, who were the rural sanitary authority, notice in writing of their intention to erect the buildings as required by one of the bye-laws, then in force, made by the respondents for the regulation of new streets and buildings under sections 157 and 276 of the Public Health Act, 1875, and allowed by the Local Government Board.

Section 157 contains a proviso that the section is

not to apply to "buildings belonging to any railway company, and used for the purposes of such railway under any Act of Parliament."

Held, that the bye-law was valid, and that the buildings in question were not within the proviso. Conviction affirmed. — *Manchester, Sheffield, and Lincolnshire Railway Co.* v. *Barnsley Union*, Q.B.D. —67 L. T. 119.

3. "*Building*"—*Meaning of term—Jurisdiction of magistrates—Jurisdiction of High Court—Public Health (Buildings in Streets) Act*, 1888 (51 & 52 *Vict. c.* 52), *s.* 3.—In a proceeding before justices under section 3 of the Public Health (Buildings in Streets) Act, 1888, for erecting a building in any street beyond the front main wall of the house or building on either side thereof in the same street, the question whether the thing erected is a "building" within the meaning of the section is a question of fact to be determined by the justices, provided the thing erected is of such a nature that it is capable of being a building, and in such a case the High Court has no jurisdiction to review their decision.

A photographer erected a wooden structure, 9 feet 6 inches long, 3 feet wide, and 7 feet high. It was roofed over, and had a glass front and a door to enter by at one end. It was fastened into the ground by four posts, forming part of the structure, and let into the ground to the depth of nine to twelve inches. It was used for the purpose of exhibiting photographs therein, but there was no approach to it for the public.

Held, that the structure was of such a nature that it was capable of being a building.

The justices having decided that the structure was a building within the meaning of section 3 of the Public Health (Buildings in Streets) Act, 1888,

Held, by Hawkins, J., that the court had no jurisdiction to review their decision.—*Mayor, &c., of Leicester* v. *Brown*, Q.B.D. 78—62 L. J. M. C. 22; 67 L. T. 686.

3a. *Building—Street—Prescribed line—Injunction —Laches—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 155, 159.—About the month of February, 1893, a house in a street of a borough was taken down by the defendant in order to be rebuilt or altered. On the 1st of March, 1893, the council of the borough at a meeting prescribed a certain line of building, and on the 2nd of March gave the defendant notice that they had prescribed a line. The plaintiffs complained that the defendant had begun to erect, and threatened and intended to continue and complete the erection of a building ten feet beyond the prescribed line. The plaintiffs tendered compensation, which was not accepted, and were ready to pay such compensation as might be settled by arbitration. They claimed an injunction. The defendant had pulled down the front and back of the house in question, leaving the top story resting upon the side walls and a bressummer. It appeared that the alterations were commenced on the 2nd of January, 1893, and early in February the front and back of the house were removed, the alterations being nearly completed on the 25th of February. Negotiations were entered into between the plaintiffs and the defendant, but on the 18th of February the defendant by letter informed the plaintiffs that he intended to proceed with the alterations.

On motion for an injunction, to be treated as the trial of the action,

Held, that the house or building had been taken down in order to be rebuilt or altered within the terms of section 155 of the Public Health Act, 1875, and the power of the plaintiffs to prescribe a line then arose;

That under section 159 of the Act, if only the upper part of a house were pulled down and the ground floor left, that would not be a "taking down" within section 155;

That it was implied by the words of section 155 that the local authority cannot exercise their power when the house had been built up or altered;

And that, the notice having been given after the alterations had been made, which the notice was intended to prevent, the notice was too late.

Injunction refused with costs.—*Attorney-General* v. *Hatch*, CH.D. KEK., J.—68 L. T. 854.

4. *County council—Main roads—Counties divided into hundreds—Expenses of repair of main roads—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 20—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 11, 23, 68.—The county authority of a county divided into hundreds made an order, under section 20 of the Highways and Locomotives Act, 1878, declaring every main road in each hundred to be repairable by that hundred, and one-half of the expense of repairing the same to be payable out of a separate rate levied on the hundred.

Held, that the maintenance and repair of main roads in the hundreds were "general county purposes" within the meaning of sections 11, 23, and 68 of the Local Government Act, 1888, so that the county council were entitled to apply moneys taken from the Exchequer Contribution Account in recouping the General County Fund so much of the costs of such maintenance and repair as was not provided for by the special rates on the hundreds. —*Reg.* v. *Dolby* (No. 2), Q.B D.—[1892] 2 Q. B. 736; 61 L. J. Q. B. 826; 67 L. T. 619.

5. *Fire brigade—Right to control of premises on fire—Exclusion of public—Justices—Jurisdiction—Towns Police Clauses Act*, 1847 (10 & 11 *Vict. c.* 89), *s.* 32—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 171.—The effect of section 171 of the Public Health Act, 1875, incorporating the provisions of the Towns Police Clauses Act, 1847, which, by section 32, provides that the urban authority "may employ a proper number of persons to act as firemen, and may make such rules for their regulation as they think proper," is to give the brigade provided by such local authority a right to do all necessary acts to maintain control over premises upon which they are lawfully engaged in extinguishing a fire.

The appellant, a member of a volunteer brigade in uniform, attempted to enter premises upon which the brigade provided by the local board were engaged in putting out a fire. Being refused admission by the respondent, a member of the local board brigade, who was in uniform and was directed by his foreman to exclude people from the premises, the appellant attempted to force his way in, but used no unnecessary violence; the appellant was convicted by the justices of an assault upon the respondent.

Held, that the respondent was justified in excluding the appellant, who could not justify his attempt to force an entrance, and that the conviction was right.—*Carter* v. *Thomas*, Q.B.D. 510—[1893] 1 Q. B. 673; 62 L. J. M. C. 104.

6. *Hospital — "Noxious business" — Smallpox hospital—Local authority—Adjoining district—Consent—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 112, 131, 285.—A hospital is not within the

provisions of section 112 of the Public Health Act, 1875.

The powers conferred by section 131, exercisable by a local authority, are not limited for their exercise to the district of the particular local authority which exercises them.

Section 285 does not apply to the powers conferred by section 131 so as to require for their exercise in an adjoining district the consent of the local authority of such adjoining district.

Decision of Chitty, J., affirmed.—*Withington Local Board* v. *Mayor, &c., of Manchester*, C.A. 306—[1893] 2 Ch. 19; 62 L. J. Ch. 393; 68 L. T. 330.

7. *Paving expenses — Apportionment — "Owner" of houses—Mortgagee in possession—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 4.—By a private Act a local board were empowered to execute works of sewering and paving in streets, and to apportion the estimated expenses among the owners of adjoining premises. The defendant was the second mortgagee of houses adjoining a street, and from April, 1891, to June, 1892, was in possession, collecting the rents, which he applied in keeping down outgoings and the interest on the first mortgage. No surplus remained after these payments. In June, 1891, the local board apportioned the estimated expenses of sewering and paving the street among the defendant and others. The first mortgagee entered into possession in June, 1892, and the works were not completed till July following.

Held, that the defendant was "owner" of the houses within the interpretation clause (section 4) of the Public Health Act, 1875, which was incorporated in the private Act, and was, therefore, liable for the estimated expenses apportioned in respect of them. — *Tottenham Local Board* v. *Williamson*, Q.B.D.—62 L. J. Q. B. 322; 69 L. T. 51.

8. *Paving expenses—Apportionment on frontage—Dispute—Action to enforce payment—Jurisdiction of High Court—Arbitration—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257, 268.—The plaintiffs, as urban sanitary authority, brought an action against the defendant, as owner, within the meaning of sections 150 and 257 of the Public Health Act, 1875, of certain houses and premises fronting on one of two streets within their district. In 1883 the plaintiffs considered it necessary to have those streets paved and metalled, and served the owners and occupiers with notice as required by the Act of 1875. None of the owners or occupiers having complied with the notice, the plaintiffs subsequently executed the works themselves, which were completed in 1884. The expenses thus incurred by the plaintiffs were apportioned by their surveyor between the different owners according to the frontage of their respective premises. In February, 1885, due notice of such apportionment was served on the defendant. In March, 1885, the defendant wrote to the plaintiffs' clerk giving notice of his objection to the "account rendered," and calling attention to the same. The defendant stated that the cost was greatly in excess of the cost per foot as given to him previously to the work being done; and that he found that in other cases a smaller charge had been made. No further steps were taken in the matter until May, 1891, when a demand for payment was sent to the defendant, but the money was not paid. The question was raised at the trial of the action whether the matter in dispute should not have been submitted to arbitration.

Held, that the defendant had not disputed the apportionment, but only the prime cost, he having disputed the "account rendered," explaining in his letter that he considered that the cost was excessive; and that, consequently, arbitration was not the proper procedure to be resorted to.

Sandgate District Local Board of Health v. *Keene*, [1892] 1 Q. B. 831, 66 L. T. N. S. 741, discussed and distinguished.—*Mayor, &c., of Folkestone* v. *Brooks*, CH.D. WRI., J.—68 L. T. 674.

9. *Rates — Assessment — Collection — Poor rate—County rate—Parish in two counties—County Rates Act*, 1852 (15 & 16 *Vict. c.* 81), *ss.* 21, 26, 31, 32, 33, 34.—Before the passing of a local Act in 1856 certain lands were extra parochial, and for secular purposes were situate partly in H. and partly in K. By the Act of 1856 these lands were constituted a parish, and it was thereby provided by section 52 that such parish should be deemed to be altogether in H., and that the laws in force for the relief of the poor in England should be enforced therein in like manner as in other parishes. To the section was added a proviso, that the county rate then payable in respect of the lands comprised in the parish should continue to be paid and payable to the respective treasurers of the rates for K. and H., within which such lands were situate. The parish is included in the Spalding Union, and it has been the custom of the county authorities of H. and K. to address precepts in respect of county rates to the guardians of the union. The guardians have then addressed a precept to the overseers and churchwardens of the parish to levy and pay from the poor rates of the entire parish a sum as their contribution to the common fund of the union. In this sum has been included the sums required to satisfy the county rates of both H. and K.

Held, that the proviso to section 52 of the Act of 1856 by implication reserved to the rating authorities of H. and K. their power of assessing and making county rates; that by that section the County Rates Act, 1852, was imported into the Act of 1856; that under section 34 of the Act of 1852 the overseers and churchwardens of the parish were entitled to pay out of any moneys in their possession the amount required by the guardians to pay the county rates of H. and K.; that the overseers and churchwardens ought to reimburse any sum paid out of the poor rates of the parish to satisfy the county rate of H. by a rate to be levied on the occupiers of land in H., and any sum paid out of such poor rates to satisfy the county rate of K. by a rate to be levied on the occupiers of land in K.—*Attorney-General* v. *Churchwardens and Overseers of Deeping St. Nicholas*, CH.D. STI., J.—62 L. J. Ch. 188; 68 L. T. 278.

10. *Rates—Lighting rate—Distress warrant, application for—Ministerial duty—Lighting and Watching Act*, 1833 (3 & 4 *Will.* 4, *c.* 90).—Upon an application for a distress warrant for arrears of a lighting rate imposed under the provisions of the Lighting and Watching Act, 1833, the overseers produced evidence of the existence of the rate, and of the amount due and the demand for the same. The justices refused to issue a distress warrant on the ground that evidence was not produced that all provisions for the adoption of the Act had been duly carried out.

Held, that upon proof by the overseers of their being required to levy the rate by the inspectors purporting to be appointed under the Act, and of the fact of the rate being in arrear, the duty of the justices was ministerial, and that a *mandamus* to issue the distress warrant must go.—*Reg.* v. *Reynolds*, Q.B.D.—[1893] 2 Q. B. 75; 62 L. J. M. C. 120.

11. *Sewer—Vesting in local authority—Private street, sewer in—Acceptance by local authority of in-*

complete sewer—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 13, 15, 150.—The owners of a building estate, who were the predecessors in title of the defendant, deposited plans, which were approved by the local authority, showing a road running down the slope of a hill and crossing the New River at the foot, with a sewer running the whole length of the road and crossing the New River to join another sewer on the farther side. An agreement was made by the New River Co. with the estate owners to divert the New River so as to enable the sewer to be laid across the old bed of the stream. In 1885 the sewer was made as far as the New River, where it stopped, the river not having then been diverted; it had no outfall, and was never, in fact, used as a sewer; but the work was from time to time inspected by a servant of the local authority, who authorized the covering in of the various sections, and made reports to the local authority, who never expressed dissatisfaction with the work. Nothing more was done to the sewer, which became out of repair and ruinous; and in 1890 the local authority gave to the frontagers in the road notice, under section 150 of the Public Health Act, 1875, to sewer the road down to the New River; on their default the local authority themselves constructed a new sewer, which they carried across the bed of the New River and connected with the sewer on the other side, the diversion of the river having been completed during the execution of the works by the local authority. The local authority having sought to charge the frontagers with the expenses of making the new sewer, the question of the amount to be paid by the defendant was referred to arbitration, and in an action on the award the jury found that the local authority had accepted the old sewer as a satisfactory sewer.

Held, that the local authority had power to accept the original sewer, although it had no outfall, and was at the time of acceptance incapable of being used as a sewer; and that, the road having once been sewered to the satisfaction of the local authority, the expenses of constructing the new sewer were not chargeable on the frontagers.—*Hornsey Local Board* v. *Davis*, C.A.—[1893] 1 Q. B. 756; 62 L. J. Q. B. 427; 68 L. T. 503.

12. *Sewer—Vesting in local authority—Sewer not made by a person for his own profit—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 13—*Pollution of stream—Rivers Pollution Act*, 1876 (39 & 40 *Vict. c.* 75), *s.* 3.—The defendants, who were not the local sanitary authority, made a sewer into which, by means of house drains, the ordinary sewage of sixty-nine cottages belonging to the defendants was, with the sanction of the sanitary authority, conveyed and discharged into a stream. The plaintiff, the owner of land on both sides of the stream below the outfall from the sewer, brought an action against the defendants for an injunction to restrain them from polluting the stream.

Held, that the sewer, being made for the ordinary purpose of draining the cottages, was not a sewer made by any person for his own profit, or by any company for the profit of the shareholders, within the meaning of section 13 of the Public Health Act, 1875; that it was, under that section, therefore, vested in and under the control of the local authority; and that the defendants were not liable.

Per curiam.—Assuming that the value of the premises was enhanced to the owners by the construction by them of the sewer, that was not the kind of "profit" contemplated by the exception in section 13.—*Ferrand* v. *Hallas Land and Building Co.*, C.A. 580—[1893] 2 Q. B. 135; 69 L. T. 8.

13. *Unsound meat—Seizure—Refusal of magistrate to condemn—Compensation to owner—Measure of damages—Costs of attendance before magistrate on application to condemn—Power of magistrate to hear owner—Right of owner to refuse tender of the meat—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117, 308.—Where meat has been seized by the officer of a local authority under section 116 of the Public Health Act, 1875, as being unwholesome, and taken before a magistrate for the purpose of being condemned, the attendance of the owner, though he has not been summoned, with his witnesses before the magistrate to give evidence as to the condition of the meat, is a natural consequence of the seizure; and, therefore, where the power of seizure has been wrongly exercised, and the magistrate refuses to condemn the meat, the owner is entitled to include in the amount of "full compensation" recoverable by him from the local authority under section 308 of the Act the costs incurred through his attendance before the magistrate.

So held by the Court of Appeal, affirming the decision of the Queen's Bench Division.

Held, also, by the Queen's Bench Division, that, when the meat which has been seized, and which the magistrate has refused to condemn, has been tendered by the local authority to the owner, he is not entitled to decline to receive it back, and the value of the meat at the time when it was tendered must be taken into consideration in assessing the amount of the compensation payable to the owner.—*In re An Arbitration between Bater and Mayor, &c., of Birkenhead*, C.A. 513—[1893] 2 Q. B. 77; 62 L. J. M. C. 107.

14. *Water supply—Landowner—Private road—"Street"—Entry and digging up without consent of owner—Injunction—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 28, 29—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 16, 54, 57.—Although a private road is a "street" within section 4 of the Public Health Act, 1875, the wide powers given to a local authority by sections 16 and 54 to carry water mains through any "street" in their district for the supply of water within the district are controlled by section 57, incorporating section 29 of the Waterworks Clauses Act, 1847, which prohibits any private land being entered upon and broken up for the purpose of laying mains without the consent of the owner; and the court will therefore grant an injunction at the instance of the owner of any private road entered upon by the local authority for the purpose without his consent. *Hill* v. *Wallasey Local Board*, CH.D. KEK., J.—[1892] 3 Ch. 117; 62 L. J. Ch. 132; 67 L. T. 49.

15. *Water supply—Entry on land without district—Notice required—Consent of adjoining authority—Public Health Act*. 1875 (38 & 39 *Vict. c.* 55), *ss.* 16, 32, 54, 285.—A joint board duly constituted as a local authority within the Public Health Act for the purpose of supplying their united district with water gave notice under the Public Health Act, s. 16, to a landowner whose lands lay without their district of their intention to enter his lands to lay water mains; but they did not comply with the requirements of section 32 as to giving notice of the intended work by advertisement, and serving a copy of such notice on the owners and occupiers of the land on which the work was to be made. The defendant board had, however, obtained leave under section 285 from the adjoining local authority, in whose district the said lands were situate, to lay the mains. The board had not yet actually supplied

any water. On motion to restrain the board from entering the said lands,

Held, by North, J., that the board were "a local authority supplying water within their district" within the meaning of the Public Health Act, s. 54; and that, therefore, by virtue of sections 54 and 16 read together, the board had the same rights and duties with respect to the laying of water mains without their district as they had with respect to sewage.

Held, by the Court of Appeal (affirming North, J.), that, as the board had not given the notices required by section 32, they must be restrained from entering on the plaintiff's lands; and that the fact of the leave of the adjoining local authority having been obtained under section 285 did not dispense with the necessity of giving the notices required by section 32.—*Jones* v. *Conway and Colwyn Bay Joint Water Supply Board*, C.A. 616—[1893] 2 Ch. 603.

See also HIGHWAY, 1-5; NUISANCE, 3, 4; RIVER.

LOCAL GOVERNMENT (IRELAND):—

1. *Election—Town commissioners—Ordinary and casual vacancies—Co-optation.*—Election of town commissioners at Nenagh,

Held, partly good and partly bad.—*Reg.* v. *Ryan*, Q.B.D. (Ir.)—30 L. R. Ir. 533.

2. *Rates—Military barracks—Exemption—General assessment—Liability of lessor to rates in respect of half rent issuing out of premises—Exempt from rate*—17 & 18 *Vict. c.* 8, *s.* 2—*Towns Improvement Act*, 1854, *s.* 60.—Premises used as military barracks in Tralee were exempt from rates under 17 & 18 Vict. c. 8, s. 2. The premises were demised by the plaintiff for a term still unexpired, and the plaintiff was assessed under section 60 of the Towns Improvement Act, 1854, as liable to rates for half the rent received by him.

Held, that a lessor assessed in respect of half rent under 17 & 18 Vict. c. 8 should be dealt with as an occupier, and is therefore liable to the general assessment under the Towns Improvement Act, 1854.—*O'Connell* v. *Tralee Town Commissioners*, Q.B.D. (Ir.)—32 L. R. Ir. 198.

3. *Rates—Sanitary rate—Railway company—Partial exemption—City of Dublin—Public Health (Ireland) Act*, 1878 (41 & 42 *Vict. c.* 52), *s.* 226.—By the Dublin Improvement Act, 1849, s. 115, the corporation were empowered to assess and levy an improvement rate for defraying the expenses of carrying out the Act, which contained certain sanitary provisions, but no power of levying a separate sanitary rate. By the Public Health (Ireland) Act, 1874, Ireland was divided into urban and rural sanitary districts, and the City of Dublin was made an urban sanitary district, and the corporation the urban sanitary authority. This latter Act was repealed by the Public Health (Ireland) Act, 1878, which by section 226 enacted that all expenses incurred or payable by an urban sanitary authority in the execution of this Act, and not otherwise provided for, should be defrayed out of the borough fund or borough rate, and "where any such rate shall be made and levied by any corporation becoming at any time after the passing of this Act an urban sanitary authority, all land used as . . . a railway . . . for public conveyance shall be assessed and liable in proportion of one-fourth only of the net annual value of such lands respectively."

Held (reversing the decision of the Queen's Bench Division) that the Dublin Town Council had not become an urban sanitary authority after the passing of the Public Health (Ireland) Act, 1878, and therefore the lands of the defendant railway company, used as a railway, were liable to the rates leviable under the Dublin Improvement Act, 1849, including the portion required to defray sanitary expenses, and were not assessable, as regards sanitary expenses, in the proportion of one-fourth part only of the net annual value of such lands.—*Kennedy* v. *Great Southern and Western Railway Co.*, C.A. (Ir.)—30 L. R. Ir. 685.

LOTTERY.—See GAMING, 3.

LUNATIC:—

1. *Committee—Married woman—Found to be of unsound mind—Summons for appointment of committee—Claim of husband to be appointed as of right.*—The husband of a woman found of unsound mind has no absolute right to be appointed, either solely or jointly, her committee.—*In re Davy*, LUN. 96—[1892] 3 Ch. 38; 61 L. J. Ch. 578; 67 L. T. 180.

2. *Contract — Contract to keep road in repair — Subsequent lunacy of contractor—Liability of surety—Right of indemnity—Grand Jury (Ireland) Act* (6 & 7 *Will.* 4, *c.* 116).—A., with B. as surety, entered into a recognizance for the due execution by A. of a contract with a grand jury to keep a portion of a road in repair for three years. Before the completion of the contract A. became of unsound mind, and was afterwards found a lunatic by inquisition. B., having been required by the county surveyor to do so, completed the contract.

Held, that the contract was not terminated by the lunacy of the contractor, and that B. was entitled to recover the amount expended by him in executing the contract from A. sued by his committee.—*Tracey* v. *M'Cabe*, EX.D. (Ir.)—32 L. R. Ir. 21.

3. *Medical examination of lunatic—Petition for inquiry—Private examination under order of court—Report to petitioner's solicitors — Right of alleged lunatic to see report—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 94—*Lunacy Act*, 1891 (54 & 55 *Vict. c.* 65), *s.* 26, *sub-section* 2.—While evidence was being taken during an inquiry into the state of mind of an alleged lunatic, an order was made under section 26, sub-section 2, of the Lunacy Act, 1891, at the instance of the petitioner, that the alleged lunatic should attend to be examined by a medical practitioner, whose evidence was to be used at the hearing. The interview took place in private, and the medical practitioner stated the result of his examination in the form of a letter addressed to the solicitors of the petitioner.

Held, (1) that under section 26 of the Lunacy Act, 1891, there was no obligation on the medical practitioner to make any report whatever; and (2) that the report which he did make was in the nature of the proof of a witness to be called upon behalf of the petitioner at the hearing, and that the respondent was not entitled to see or to have a copy of it before the trial of the inquiry.

If the medical practitioner had been so appointed as to occupy the position of an officer of the court, or in order to report to the court, then his report ought not to be produced to either party before the trial without the leave of the court.—*In re B.* (*an alleged Lunatic*), LUN.—[1892] 3 Ch. 194; 61 L. J. Ch. 487; 67 L. T. 62.

4. *Practice — Costs — Inquiry — Verdict of sanity —Discretion of judge in lunacy—Appeal—Order charging costs on stock belonging to alleged lunatic—Power to order sale or transfer of stock—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 109—*Ord.* 46, *r.* 1—*Judicature Act*, 1873, *ss.* 18 (5), 49—*Judicature Act*, 1884 (47 & 48 *Vict. c.* 61), *s.* 14.—Where the result

of a lunacy inquiry is that the person who was alleged to be a lunatic is found to be of sound mind, the judge in lunacy, in exercising his discretion over the costs of the inquiry under section 109 of the Lunacy Act, 1890, may, if the application for the inquiry seems to him to have been prompted by a desire to protect the person and property of the alleged lunatic, and to have been made on reasonable grounds and in a reasonable manner, order the costs of the applicant to be paid by the person who was alleged to be a lunatic.

If an order made under this section charges the amount of such costs on stock standing in the name of the alleged lunatic, this does not constitute a charging order within the meaning of ord. 46, r. 1; and therefore the procedure laid down in 1 & 2 Vict. c. 110 is not applicable. Such order may further direct the alleged lunatic to transfer an amount of such stock sufficient to satisfy the said costs. If the alleged lunatic fails to comply with this direction, an order may be made, under section 14 of the Judicature Act, 1884, directing the official solicitor to make the necessary transfer.

An appeal lies to the Court of Appeal from an order of the Lords Justices dealing with the costs of a lunacy inquiry under section 109 of the Lunacy Act, 1890.

Judgment of Lindley, Bowen, and Kay, L.JJ. (40 W. R. 257), affirmed.—*In re Cathcart*, C.A. 277—[1893] 1 Ch. 466; 62 L. J. Ch. 320; 68 L. T. 358.

5. *Property — Maintenance — Income — Capital — Power of appointment—Release—Dealing with the estate inconsistent with the exercise of the power—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 116 (*e*), 117, 120, 128.—Where a person of unsound mind was entitled under a settlement to a life interest in certain funds, below the limit referred to in section 116 of the Lunacy Act, 1890, with a power of appointment in favour of her children or remoter issue, there being nothing in that statute enabling the court to release a power, the court made an order (67 L. T. 702) for a sale of the lunatic's interest in the funds (without prejudice to any question which might arise in the event of an appointment by her in favour of remoter issue should she ultimately recover), coupled with a declaration that the lunatic's interest should be charged with recouping to the trustees, to be held upon the trusts of the settlement, all sums raised and paid under the order, with interest and costs.—*In re Hirst*, LUN.—68 L. T. 557.

See also POOR RATE, 3.

MANDAMUS:—

Local Act—Remedy given by Act inconvenient and obsolete.—Case where it was held (1) that the duties of the inhabitants of a parish in vestry assembled under a local Act to levy a rate from the inhabitants for the benefit of the rector of the parish was transferred to the vestry as constituted under the Metropolis Management Acts; and (2) that, as the procedure and remedy given by the local Act was inconvenient and obsolete, the procedure by *mandamus* was applicable.—*Reg.* v. *St. George's, Southwark*, Q.B.D.—67 L. T. 412.

See also SHERIFF, 4.

MARINE INSURANCE.—See INSURANCE (MARINE).

MARKET:—

Disturbance—Exposure for sale within prescribed limits—Markets and Fairs Clauses Act, 1847 (10 & 11 *Vict. c.* 14), *s.* 13.—A baker living outside the limits of a borough in the regular course of dealing delivered bread to his customers within the borough from a cart three days a week.

Held, that he was not guilty of the offence of exposing bread (in respect of which tolls were authorized to be taken within the borough) for sale so as to constitute a disturbance of the market.—*White* v. *Mayor, &c., of Yeovil*, Q.B.D.—61 L. J. M. C. 213.

MARRIED WOMAN:—

1. *Desertion — Separation by mutual consent — Request of wife to return to cohabitation—Refusal of husband—Jurisdiction of justices to order alimony—Married Women (Maintenance in Case of Desertion) Act*, 1886 (49 & 50 *Vict. c.* 52), *s.* 1.—A husband and wife cohabited at a place in Cornwall until the wife, with her husband's consent, went to her mother's house in Devonshire for her approaching confinement. After her confinement the husband refused to allow her to return to cohabitation with him or to contribute towards her maintenance, and she remained at her mother's house.

Held, that the husband had deserted his wife, and that the justices in Devonshire had jurisdiction under section 1 of the Married Women (Maintenance in Case of Desertion) Act, 1886, to order the husband to contribute towards her maintenance.

Pape v. *Pape*, 20 Q. B. D. 76, and *Rey.* v. *Leresche*, [1891] 2 Q. B. 418, distinguished.—*Chudley* v. *Chudley*, Q.B.D.—62 L. J. M. C. 97.

2. *Joint tenancy—Tenancy by entireties—Divorce—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1, 5.—A husband and wife purchased real property, some of which was conveyed to them jointly before the Married Women's Property Act, 1882, and some after it. The husband and wife were subsequently divorced.

Held, that the decree absolute in the divorce proceedings rendered them joint tenants as regards property conveyed to them before the said Act, even though before it they were tenants by entireties; that, as regards property conveyed to them as joint tenants since the Act, the wife's share belonged to her for her separate use; and that she was entitled to an account of the rents and profits.—*Thornley* v. *Thornley*, CH.D. ROM., J. 541—[1893] 2 Ch. 229; 62 L. J. Ch. 370; 68 L. T. 199.

3. *Policy for benefit of wife and children—Appointment of trustees—Rights of widow and children inter se—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 11.—Upon a motion under section 11 of the Married Women's Property Act, 1882, to appoint trustees of a policy of assurance effected for the benefit of the insurer's wife and children, there is no jurisdiction to adjudicate upon the rights of the widow and children *inter se*. An application for that purpose must be made on summons under order 55.—*In re Graham's Policy Trusts*, V.C. (Ir.)—29 L. R. Ir. 498.

4. *Protection order—Separate estate—Restraint on anticipation—Power to contract—Judgment against married woman—Equitable execution—Receiver—Divorce and Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *ss.* 21, 25, 26.—A married woman, who was possessed of a life interest in leasehold property for her separate use, without power of anticipation, obtained a protection order under section 21 of the Divorce and Matrimonial Causes Act, 1857. She subsequently mortgaged her life interest, and the mortgagee obtained judgment against her in an action on her covenant to pay the mortgage debt.

Held, that, notwithstanding sections 21 and 26 of the Divorce and Matrimonial Causes Act, the

restraint on anticipation still attached, and therefore a receiver of the rents and profits of the leasehold property could not be appointed by way of equitable execution.—*Hill* v. *Cooper*, C.A. 500—[1893] 2 Q. B. 85; 62 L. J. Q. B. 423.

5. *Separate estate—Restraint on anticipation — Ante-nuptial debts—Settlement made by stranger—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 13, 19.—A clause restraining alienation in a settlement made upon a *feme sole* by another person of property settled to her separate use will not, on the clause becoming operative by her marriage after the passing of the Married Women's Property Act, 1882, protect such property from the claims of her ante-nuptial creditors.—*Kirk* v. *Murphy*, EX.D. (Ir.)—30 L. R. Ir. 508.

6. *Separate estate—Settlement by husband and wife —Infancy of wife—Subsequent repudiation—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 2, 19.—The 19th section of the Married Women's Property Act, 1882, enacts that nothing in the Act shall interfere with or affect any settlement or agreement for a settlement respecting a married woman's property.

Any property of a woman married after the commencement of the Act which would have been bound, apart from the Act, by an assignment of the husband alone in a settlement, is still bound by such assignment in virtue of the 19th section, notwithstanding the 2nd section of the Act, which makes the property of a woman married after the Act her separate property.

Hancock v. *Hancock*, 36 W. R. 417, 38 Ch.D. 78, applied and followed.

In re Queade's Trusts, 33 W. R. 816, W. N., 1884, p. 225, not followed.—*Stevens* v. *Trevor-Garrick*, CH.D. CHI., J. 412—[1893] 2 Ch. 307; 62 L. J. Ch. 660; 69 L. T. 11.

7. *Separation order—Justices — Appeal — Matrimonial Causes Act*, 1878 (41 & 42 *Vict. c.* 19), *s.* 4—"*Probate and Admiralty*" *Division — Judge or Divisional Court—Practice.*—Appeals under section 4 of the Matrimonial Causes Act, 1878, are now to be made from justices to a divisional court of the Probate, Divorce, and Admiralty Division.—*Bluett* v. *Bluett*, P.D. & A.D.—68 L. T. 260.

See also BANKRUPTCY, 3; COUNTY COURT, 10; DIVORCE; LANDED ESTATES COURT (IRELAND), 1; LIMITATIONS, STATUTE OF, 4; LUNATIC, 1; POWER OF APPOINTMENT, 2, 4; PROBATE, 17.

MASTER and SERVANT:—

1. *Apprentice—Infant—Stipulation in apprenticeship deed not for benefit of infant—Validity—Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 6.—An apprenticeship deed contained a stipulation that the master should not be liable to pay any wages to the apprentice, an infant, so long as his business should be interrupted or impeded by or in consequence of any turn out; and that the apprentice might employ himself in any other manner or with any other person for his own benefit during any such turn out, and for such reasonable time thereafter as might be necessary to enable him to determine such employment.

Held, that this stipulation was unfair to the infant, and rendered the contract as a whole unfair as against him; and that, therefore, the apprenticeship deed was invalid.

Meakin v. *Morris*, 32 W. R. 661, 12 Q. B. D. 352, followed.—*Corn* v. *Matthews*, C.A. 262—[1893] 1 Q. B. 310; 62 L. J. M. C. 61; 68 L. T. 480.

2. *Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-sections* 1, 4—*Defect in condition of machinery—Reasonable fitness—Absence of sufficient safeguard.*—A defect in the condition of machinery within section 1, sub-section 1, of the Employers' Liability Act, 1880, means the absence of reasonable fitness to secure safety in the operation for which it is intended.

An employer who uses machinery, not in itself defective, the handling of which he knows is intrusted to such men as stevedores' labourers, is not entitled to have excluded from the consideration of its reasonable fitness an obvious chance of danger through their want of care.

The absence of any sufficient safeguard against danger arising from an ordinary and probable occurrence, as a slip in the management of a winch, is a defect.—*Stanton* v. *Scrutton & Sons*, Q.B.D.—62 L. J. Q. B. 405.

3. *Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-sections* 1, 4—*Defect in condition of machinery — Negligence — Dangerous employment.*—Machinery could be worked by the servant employed in a reasonable manner without danger to himself. No instructions were given to him to work it in a mode which would endanger his safety. The safe mode, as well as the dangerous mode, of working was known to him, the danger of the latter being apparent. In an action against the employers to recover damages for the death of the servant, caused by working the machine in a dangerous way,

Held, that there was no evidence of negligence on the part of the defendants.—*Noonan* v. *Dublin Distillery Co.*, EX.D. (Ir.)—32 L. R. Ir. 399.

4. *Negligence—Master's liability—Employment of servant by third party—Negligence of servant while so employed.*—The defendants entered into an agreement with a wharfinger, who was engaged in loading and unloading barges at a wharf, to let him have the use of a steam crane and a man who was engaged and paid by the defendants to work it whenever he required the same, for £50 a year. While the wharfinger was engaged in loading a barge at the wharf, one of his men was injured by the negligent act of the man working the crane in the course of the loading.

Held (affirming the judgment of Pollock, B.), that, though the man who was working the crane was the general servant of the defendants, the defendants were not liable, for, at the time of the accident, the man working the crane was employed under the orders and control of the wharfinger, and for that particular employment he must be regarded as the servant of the wharfinger, and not as the servant of the defendants.—*Donovan* v. *Laing, Wharton, and Down Construction Syndicate (Limited)*, C.A. 455—[1893] 1 Q. B. 629; 68 L. T. 512.

5. *Negligence—Common employment—Stevedore and servant.*—To an action to recover damages for injury caused by the defendants' servant, the defence of common employment is not applicable, unless the plaintiff was, at the time of the injury, in the defendants' actual employment in the relationship of master and servant.

Where the defendants were stevedores, the plaintiff a servant of the shipmaster on whose ship the injury was caused, and the person whose negligence caused the injury was a servant of the stevedores,

Held, that the defence of common employment was not available.

Johnson v. *Lindsay*, 40 W. R. 405, [1891] A. C. 371, approved.—*Cameron* v. *Nystrom*, P.C.—[1893] A. C. 308; 68 L. T. 772.

6. *Wages—Payment otherwise than in current coin —Deductions—Truck Act*, 1831 (1 & 2 *Will.* 4, *c.* 37),

s. 23.—The plaintiff, upon entering the employment of the defendants, signed an agreement to conform to all the rules of the defendants' works. One of the rules provided that the *employés* were to become members of the sick and accident club connected with the works, and were to contribute weekly to its funds according to the amount of wages received by each. The amount of the plaintiff's contribution was deducted weekly from her wages and paid over to the sick and accident fund. In an action by the plaintiff to recover as arrears of wages the deductions so made, except those in respect of medicine and medical attendance,

Held, that the agreement under which the deductions were made was illegal under the Truck Act, and therefore could not justify the deductions being made, nor could it be vouched as an authority by the plaintiff to the defendants to pay the contributions for her to the fund; but that the plaintiff, by her conduct and acquiescence, had precluded herself from recovering the amount so paid. —*Hewlett* v. *Allen & Sons*, C.A. 197—[1892] 2 Q. B. 662; 62 L. J. Q. B. 9; 67 L. T. 457.

7. "*Workman*"—*Person employed on ship engaged in traffic in rivers and estuaries*—"*Seagoing ship*"—*Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90)—*Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 109, 243.—A ship engaged in carrying cargo upon rivers and their estuaries, although it may be capable of going to sea, is not a "seagoing ship" within the meaning of section 109 of the Merchant Shipping Act, 1854. Therefore the provisions of section 243 of that Act for the punishment of offences by seamen do not apply to a man who is employed upon such a ship, and he may be dealt with under the Employers and Workmen Act, 1875.—*Salt Union* v. *Wood*, Q.B.D. 301—[1893] 1 Q. B. 370; 62 L. J. M. C. 75; 68 L. T. 92.

See also SEDUCTION.

MAYOR'S COURT:—

Removal of action — Certiorari — *Discretion of judge—Borough and Local Courts of Record Act*, 1872 (35 & 36 *Vict. c.* 86), *schedule, clause* 12.—By clause 12 in the schedule to the Borough and Local Courts of Record Act, 1872, which has been applied by Order in Council to the Mayor's Court, "No action entered in the court shall before judgment be removed or removable from the court into any superior court by any writ or process, except by leave of a judge of one of the superior courts in cases which shall appear to such judge fit to be tried in one of the superior courts."

Held, that the question whether an action was fit to be tried in the superior court was a matter of opinion for the judge, and that he had a discretion in all cases as to whether an action should be removed into the superior court.

Per Lord Esher, M.R., and A. L. Smith, L.JJ. —The words "fit to be tried" mean "ought to be tried" in the superior court.—*Banks* v. *Hollingsworth*, C.A. 225—[1893] 1 Q. B. 442; 62 L. J. Q. B. 239; 68 L. T. 477.

MEDICAL PRACTITIONER:—

Faculty of Physicians—Faculty of Surgeons—Right of College of Physicians to hold examinations and grant diplomas in surgery as well as medicine—32 *Hen.* 8, *c.* 40, *s.* 3—*Medical Acts*, 1858, *and* 1886 (21 & 22 *Vict. c.* 90; 49 & 50 *Vict. c.* 48).—The plaintiffs claimed a declaration that they were, at the passing of the Medical Act, 1886, a medical corporation legally qualified to grant diplomas conferring the right of registration under the Medical Acts then in force in respect of medicine and surgery, and were entitled independently, and without acting in combination with any other medical corporation or body, to hold such qualifying examinations in medicine, surgery, and midwifery as mentioned in the Act of 1886, and to confer by their single diplomas on their members and licentiates who had passed such qualifying examinations the right of registration under the Medical Acts at present in force.

The plaintiffs were a corporation incorporated by Royal Charter by King Henry VIII. in 1518.

The charter was ratified and confirmed by various subsequent Acts of Parliament, and the powers of the plaintiffs were enlarged by section 3 of 32 Hen. 8, c. 40.

The defendants were established by the Medical Act, 1858, and were directed to publish annually a medical register.

The defendants did not dispute that the plaintiffs were legally qualified to independently hold examinations and grant diplomas in respect of medicine, but they contended that the plaintiffs could not grant diplomas in respect of surgery.

Held, that the provisions of section 3 of 32 Hen. 8, c. 40 embraced the general art of healing, whether by drugs or surgery, and were not confined to healing by drugs; that the plaintiffs were, at the date of the passing of the Medical Act, 1886, a corporation legally qualified to grant diplomas in respect of medicine and surgery; and that they were, therefore, the persons designated by the statute to hold examinations. — *Royal College of Physicians of London* v. *General Medical Council*, Q.B.D.—62 L. J. Q. B. 329; 68 L. T. 496.

MERCHANDISE MARKS ACT:—

"*False trade description*"—*Place of manufacture and production—Merchandise Marks Act*, 1887 (50 & 51 *Vict. c.* 28), *ss.* 2, 3.—At his establishment in Ireland the appellant, Lipton, sold under the descriptions (*a*) "Lipton's prime mild cured," and (*b*) "Finest quality smoked ham, own cure at Lipton's market," hams which had been manufactured and cured by him in America.

Held, that neither of the descriptions was a "false trade description" within section 2 of the Merchandise Marks Act, 1887.

The appellant also sold hams under the description "Tracey's Mild Cure," Tracey being the name of his foreman curer.

Held, that the appellant was rightly convicted of an offence under section 3, sub-section 3, of the Act.—*Reg.* v. *Lipton*, Q.B.D. (Ir.)—32 L. R. Ir. 113.

METROPOLIS:—

1. *Building—Notice by district surveyor—Alteration after building completed—Metropolitan Building Act*, 1855 (18 & 19 *Vict. c.* 122), *ss.* 45, 46, 105.—Under section 45 of the Metropolitan Building Act, 1855, a district surveyor has power to give to a builder engaged in erecting a building notice requiring alterations to be made in the work, and by section 46 a justice of the peace may order a builder to comply with the requisitions of the notice.

Held, that, where the notice is not served on the builder until after the building is completed, the builder cannot be ordered to comply with the notice.—*Smith* v. *Legg*, Q.B.D. 464—[1893] 1 Q. B. 398; 68 L. T. 347.

2. *Building—Notice to district surveyor—Commencement of new building—Building "used for the purposes of" a canal — Exemption — Metropolitan Building Act*, 1855 (18 & 19 *Vict. c.* 122), *ss.* 6, 38. —By section 38 of the Metropolitan Building Act, 1855, two days before any building is commenced

notice in writing, stating certain particulars, is required to be given by the builder to the district surveyor.

By section 6, "buildings belonging to any canal, dock, or railway company, and used for the purposes of such canal, dock, or railway under the provisions of any Act of Parliament," are exempt from the operation of the first part of the Act (including section 38.

A canal company, under their statutory powers, erected a building upon one of their wharves and let it to tenants who used it, in the course of their business, as a place for chopping up firewood. The company were not carriers, but received tolls in respect of the passage of barges over their canal; and it was arranged between them and the tenants that all the wood to be chopped in the building should be carried to the wharf in barges along the canal.

Held, that, the building was not "used for the purposes of the canal" within the meaning of section 6 of the Metropolitan Building Act, 1855, and that it was the duty of the builder to give notice to the district surveyor before commencing to build.—*Coole* v. *Lovegrove*, Q.B.D. 570—[1893] 2 Q. B. 44; 69 L. T. 19.

2a. *Building—Height—"Erected on the side of any new street"—Metropolis Local Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 85.—Section 85 of the Metropolis Local Management Amendment Act, 1862, provides that no building shall be erected on the side of any new street which shall exceed the height specified in the section.

A building was erected at the corner of two streets, one being a new street within the Act, and the other not such a street. The main entrance to the building was from the old street, but there was a small tradesmen's entrance from the area at the side of the building in the new street.

Held, that the building was erected on the side of the new street within the meaning of the section.—*London County Council* v. *Lawrance & Sons*, Q.B.D. 688—[1893] 2 Q. B. 228.

3. *Building—Street—Addition to old buildings — Extension of boundary fence — Distance from centre of road — "Existing street" — Metropolis Management and Building Acts Amendment Act*, 1878 (41 & 42 *Vict. c.* 32), *s.* 6.—It is provided by 41 & 42 Vict. c. 32, s. 6, that from and after the passing of that Act no house or building shall be extended in such manner that the external wall or front of any such house or building, or if there be a forecourt or other space left in front of any such house or building, the external fence or boundary of such forecourt or other space shall be at a distance less than the prescribed distance from the centre of the roadway, provided the construction or extension of any house or building in or abutting upon any street existing at the time of the passing of the Act may be begun and completed in like manner in every respect as if the preceding provision of this section had not been made.

The appellant was the owner of a house and garden abutting upon an old public carriageway. The house of the appellant, as well as several others, were erected on either side of the road prior to the passing of the above-mentioned Act. In 1889, the appellant pulled down the wall which separated his garden from the road, and erected a new fence a few feet further back from the road. He subsequently commenced to build shops upon the site of the garden, and extended his boundary fence to its original position, which was less than the prescribed distance from the centre of the roadway. The respondents required him to set back his boundary fence.

Held, that the road was an "existing street" at the time of the passing of the above-mentioned Act, and that therefore the appellant could not be required to set back his boundary fence.—*Ellis* v. *London County Council*, Q.B.D.—67 L. T. 558.

4. *Building line—"Building, structure, or erection"—Boundary wall or fence—Forecourts or spaces —Metropolis Local Management Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 75.—Section 75 of the Metropolis Management Act, 1862, is not intended, under the conditions specified in the section, to prevent an owner erecting such a wall or fence as would be a reasonable ascertainment of, and protection to, his property; and it must be left to the good sense and discretion of the magistrate to say in each case whether a wall or fence is so, or whether, by not being *bonâ fide* confined to that object, it becomes a "building, structure, or erection" within the meaning of the section.—*Ellis* v. *Plumstead Board of Works*, Q.B.D. 496—68 L. T. 291.

5. *Nuisance—Repair of drain—Drain repaired so as to be a nuisance—Builder employed by owner to do repair—Liability of builder in first instance for the nuisance—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 42.—A builder who is employed by the owner of a dwelling-house to repair a drain, and who repairs it so as to be a nuisance and injurious to health, is "the person who undertook or executed the repair" of the drain within the meaning of the 42nd section of the Public Health (London) Act, 1891, and may be proceeded against under that section in the first instance, although the owner is not summoned.—*Young* v. *Fosten*, Q.B.D. 589.

6. *Obstruction in street—Exposure of goods for sale in street—Costermongers—Inconsistent enactments—Implied repeal—57 Geo.* 3, *c. xxix.*, *s.* 65—*Metropolitan Streets Acts*, 1867 (30 & 31 *Vict. c.* 134), *s.* 6, *and* 1868 (31 & 32 *Vict. c.* 5), *s.* 1—*Metropolis Police Act*, 1839 (2 & 3 *Vict. c.* 47), *s.* 74.—The provisions contained in the Metropolitan Streets Acts, 1867 (section 6) and 1868 (section 1), as to the deposit of goods in streets and for the regulation of the business of costermongers and itinerant traders, are inconsistent with the powers given to metropolitan local authorities by section 65 of 57 Geo. 3, c. xxix. (Michael Angelo Taylor's Act) to order the removal of goods, barrows, &c., from carriageways and footways; that section is therefore impliedly repealed so far as it affects costermongers, and a conviction of a costermonger for an offence under it cannot be sustained.—*Summers* v. *Holborn District Board of Works*, Q.B.D. 445—[1893] 1 Q. B. 612; 62 L. J. M. C. 81; 68 L. T. 226.

7. *Police Acts—Magistrate—Jurisdiction—Penalty —Imprisonment in default of payment of—Street musician—*2 & 3 *Vict. c.* 47, *s.* 77—27 & 28 *Vict. c.* 55, *s.* 1.—By 2 & 3 Vict. c. 47, s. 57, a street musician who played on a musical instrument in a thoroughfare near any house, after being required by the householder for reasonable cause to depart, was made liable to a penalty of forty shillings. By section 77 of the same Act a magistrate is empowered, in case of the non-payment of a pecuniary penalty under the Act, to commit the offender to prison for not more than one month.

By 27 & 28 Vict. c. 55, s. 1: "Section 57 of 2 & 3 Vict. c. 47 is hereby repealed, and in lieu thereof the following provision shall take effect"; the section then proceeds to re-enact the offence

under the repealed section, and provides that "the offender shall be liable to a penalty of not more than forty shillings, or, in the discretion of the magistrate before whom he shall be convicted, may be imprisoned for any time not more than three days."

A. was charged with an offence under the last-mentioned section before a metropolitan police magistrate. He was convicted and fined forty shillings, and, in default of payment of the fine, was committed to prison for one month. Upon a rule *nisi* for a *certiorari* to quash the conviction,

Held, discharging the rule, that section 77 of 2 & 3 Vict. c. 47 was not, by the provisions of section 1 of 27 & 28 Vict. c. 55, rendered inapplicable to the enforcement by imprisonment of a penalty under that section, and that the conviction was good.—*Reg.* v. *Hopkins*, Q.B.D. 431—[1893] 1 Q. B. 621; 62 L. J. M. C. 57; 68 L. T. 292.

8. *Refuse — Neglect to remove — Contract with scavengers — Liability of local authority shifted—Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 125-129.—The duty imposed on vestries and district boards by section 125 of the Metropolis Local Management Act, 1855, as to the removal of house refuse within their parish or district is discharged by their entering into a *bonâ fide* contract with scavengers to execute and perform the work; and such vestries and district boards cannot, in such cases, be made liable in damages for the scavengers' neglect to properly carry out their contract.

Guardians of the Holborn Union v. *Vestry of St. Leonard's, Shoreditch*, 2 Q. B. D. 145, distinguished. Decision of Grantham, J., reversed.—*Ellis* v. *Strand District Board of Works*, C.A.—67 L. T. 307.

9. *Sky signs—Control by County Council—London Sky Signs Act*, 1891 (54 & 55 *Vict. c. lxxviii.*), *ss.* 5, 13. —The defendant had erected previous to the enactment of the London Sky Signs Act, 1891, and retained subsequent to that enactment without the licence of the London County Council, a structure of the following kind:—The structure consisted of a tower fifty feet high upon the top of the defendant's business premises, in the shape of a windmill, upon the fantails of which were painted the words, "Carwardine wheatmeal, oatmeal, flour." Half way up the tower was a gallery, with an open balustrade, consisting of iron letters, spelling the name "Carwardine." The letters were affixed to an iron rod. The whole structure was formed of baulks of timber braced together by iron rods, and the lower end was securely tied down to girders supporting the top floor of the defendant's premises. Upon a summons before the magistrate for retaining the said structure as an advertisement without the licence of the County Council, contrary to the provisions of the London Sky Signs Act, 1891, the magistrate found that the structure, taken as a whole, was a *bonâ fide* windmill, used for hoisting and driving purposes, and only incidentally for purposes of advertisement, and dismissed the summons, subject to a special case being stated.

Held, that the structure came within the definition given in section 5 of the Sky Signs Act, 1891, on the ground that, so long as it had the words and letters upon it as above-mentioned, it was "a sign, device, or representation in the nature of an advertisement," and that it was immaterial whether the structure was wholly or only in part erected or used for purposes of advertisement.—*London County Council* v. *Carwardine*, Q.B.D.—62 L. J. M. C. 40; 68 L. T. 761.

9a. *Valuation—Valuation list—Appeals—Time for hearing appeals—Whether assessment sessions has jurisdiction to hear appeals after the 31st of March in each year—Valuation of Property (Metropolis) Act*, 1869 (32 & 33 *Vict. c.* 67), *s.* 42, *sub-section* 13.—Section 42 of the Valuation of Property (Metropolis) Act, 1869, provides:—"With respect to the times within which proceedings under this Act and the Acts incorporated herewith are to be done, the following provisions shall have effect—that is to say: (13) The justices may hold the assessment sessions at any time after the 1st of February in the same year, which will enable them to determine all appeals (except where a valuation list or valuation is ordered) before the ensuing 31st of March."

Held, that the provisions in this sub-section as to the time of hearing of appeals are imperative, and not directory; so that the court has no jurisdiction to hear the year's appeals after the 31st of March in each year.—*Reg.* v. *Justices of London and the London County Council*, Q.B.D. 668.

10. *Water supply—Metropolis—Cutting off water supply—Temporary stoppage by water company to stop leakage—Whether this is a "cutting off"—Notice to vestry—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 49.—A water company, which supplied a certain dwelling-house with water, turned off the water by turning down the stopcock in the service pipe, and this was done solely to prevent waste of water through a certain leak in the service pipe. The stopcock and service pipe were the property of the landlord of the house, and, when the leak was repaired by the landlord, he turned on the water again by opening the stopcock.

Held, that, upon the facts, a magistrate was justified in coming to the conclusion that there was no "cutting off" of the water supply by the company within the meaning of section 49 of the Public Health (London) Act, 1891, and, therefore, no necessity for the water company to give notice under that section to the sanitary authority.—*Young* v. *Southwark and Vauxhall Water Co.*, Q.B.D. 622.

See also ESTOPPEL, 2.

MINE:—

1. *Fencing—Working discontinued—Mine abandoned—Securely fencing side entrance—Metalliferous Mines Regulation Act*, 1872 (35 & 36 *Vict. c.* 77), *s.* 13.—After the passing of the Metalliferous Mines Regulation Act, 1872, a copper mine was abandoned and the working thereof discontined. There was a side entrance into the mine, which was, for the purposes of the arguments and judgment, assumed not to be dangerous. The only fence round or about the side entrance was a stone wall erected many years previously to the mine being abandoned. The wall enclosed an area of about ten acres, and within this area the mine and side entrance were situated.

Held, that the side entrance was not securely fenced within the meaning of section 13 of the Act. —*Foster* v. *Owen*, Q.B.D. 240—62 L. J. M. C. 7; 67 L. T. 712.

2. *Licence to work—Tenant for life—Revocable licence.*—A tenant for life of real estate having under a power in a will agreed with the plaintiff that the latter should take from her certain bog ore for three years, and after the three years he should be entitled to continue raising the ore on payment of a royalty. After the expiration of the three years the tenant for life commenced raising ore. In an action for an injunction to restrain her (1) from raising the ore and from carrying away the

ore already raised, and (2) from impeding the plaintiff in raising and removing the ore, and for damages,

Held, that after the expiration of the three years the licence was revocable, and that the plaintiff was not entitled to the injunction, but that he was entitled to damages for the removal of the ore already raised by him.—*Stanley* v. *Riky*, C.A. (Ir.)—31 L. R. Ir. 196.

3. *Offence—Use of naked lights in coal mine—"Owner, agent, and manager" each liable—Managing director appointing a certificated manager—Liability of managing director as "agent"—Reasonable precautions by publishing rules—Coal Mines Regulation Act*, 1887 (50 & 51 *Vict. c.* 58), *ss.* 49 (*r.* 8), 50.—Section 50 of the Coal Mines Regulation Act, 1887, provides that, "in the event of any contravention or non-compliance with any of the general rules . . . by any person whomsoever, the owner, agent, and manager shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the said rules as regulations for the working of the mine, &c."

A limited company were the owners of a coal mine of which the respondent was the managing director; but the respondent did not interfere with the actual management of the mine underground, which was left in the hands of a duly certificated manager, under the Coal Mines Regulation Act, who was the manager of the colliery, and was in charge thereof. The respondent, as managing director, occasionally visited the mine, but he had in no way interfered with the manager in his duties, though he had authorized all necessary expenditure for the safety and conduct of the mine, and had duly published at the mine the rules under the Mines Act and the abstract of the Act itself. An offence having been committed by the use of naked lights in the mine on a day when the respondent was not at the mine,

Held, (1) that the respondent, as managing director, was "agent" of the mine within the meaning of the Act, and was legally responsible as such; but (2) that he had, by publishing and to the best of his power enforcing the rules as regulations for the working of the mine, taken all reasonable means, within section 50 of the Act, to prevent such contravention of the rules, and was therefore not liable to be convicted for the offence.—*Stokes* v. *Checkland*, Q.B.D.—68 L. T. 457.

4. *Wages—Coal Mines Regulation Act*, 1887 (50 & 51 *Vict. c.* 58), *s.* 12—*Payment by weight—Deductions—Fines—Contract of employment—Agreement for allowance of fines—Validity of contract.*—According to the true construction of section 12 of the Coal Mines Regulation Act, 1887, which provides for the payment of miners by weight, subject to the right of masters and men to agree upon certain deductions, the "deductions" therein mentioned are deductions from weight, not from wages. That from which the deduction is to be made is the whole amount of material which is sent up in tubs from the mine. That which is to be deducted is the foreign substance which is sent up in the tubs with the coal, or the slack or coal dust with which the tubs are improperly filled. Any other mode of making deductions is in contravention of the statute.

The appellant entered into a contract of employment with the respondents, who were the owners of a colliery, by which he agreed not to leave his employment without giving fourteen days' notice, and further agreed that deductions might be made from his wages in respect of (*inter alia*) "fines for dirt." A system of fines and forfeitures was in force at the colliery in respect of dirt sent up with the coal, under which, if a collier sent up a tub containing more than 35lb. of dirt, he was to receive no payment in respect of such tub; if a tub contained between 25lb. and 35lb. of dirt, he was to receive half payment; and if a tub contained less than 25lb. of dirt, he was to receive full payment.

The appellant having left his employment without giving notice, and having justified on the ground that the above system was unlawful, and therefore the contract of employment was illegal,

Held, that such fines and forfeitures were not deductions within the meaning of section 12 of the Coal Mines Regulation Act, 1887, and that the system adopted was in contravention thereof; but that the contract of employment was not thereby rendered illegal, and the appellant was liable in damages to the respondents.

Nethersea Colliery Co. v. *Bourne*, 14 App. Cas. 228, 37 W. R. Dig. 119, considered.—*Kearney* v. *Whitehaven Colliery Co.*, C.A. 594—[1893] 1 Q. B. 700; 62 L. J. M. C. 129; 68 L. T. 690.

MINERALS.—See CANAL; RAILWAY, 3.

MISREPRESENTATION.—See FALSE REPRESENTATION.

MORTGAGE:—

1. *Accounts—Mortgage of life estate—Second mortgage—Mortgage of the fee—Conveyancing Act*, 1881, *ss.* 19, 24.—In 1866 A., who was mortgagee of the estate of the tenant for life in lands, appointed by deed a receiver under section 19 of the Conveyancing Act, 1881. The deed provided that the receiver should apply all moneys received by him in manner directed by section 24 of that Act, save that, in priority to all other charges except rent, rates, and taxes specified in section 24, sub-section 8 (1), he should pay any reasonable costs or charges incurred by A. An absolute order for sale was made in 1890, and on A.'s application a receiver was appointed by the court. On settling the schedule of priorities, on which prior and puisne incumbrancers appeared, it was referred to an examiner to take an account of what was due on A.'s mortgage, and A. showed in detail by affidavit the amount which had accrued due for interest and premiums on policies, and the sums which he had received on account through B. or otherwise.

Held, that incumbrancers on the fee and puisne incumbrancers on the life estate were not entitled to an order directing a further affidavit to be filed, accounting for the rents and profits received by B. from the date of his appointment before the inquiry should be further proceeded with.—*In re Della Rocella's Estate*, L.J. (Ir.)—29 L. R. Ir. 464.

2. *Conveyance for value without reference to mortgage—Covenant for further assurance—Indemnity against mortgage debt—Partition—Expenditure by one tenant in common in improvements—Contribution.*—The owner of an estate mortgaged, and afterwards sold, an undivided moiety of it. The conveyance to the purchaser did not mention the mortgage, but it contained a covenant by the vendor for further assurance. The two moieties afterwards devolved upon different persons. In a partition action,

Held, that, as between the owners of the two moieties, the unsold moiety must bear the mortgage debt.

The owner of one moiety of a property, who was also tenant for life of the whole, borrowed money on mortgage, which was, with other moneys,

expended in permanently improving the property. In an action after her death for the partition of the property,

Held, that the present value of the improvements (but not exceeding the sum originally borrowed on mortgage) must be borne rateably by the owners of both moieties.

Teasdale v. *Sanderson*, 33 Beav. 534, explained.—*In re Jones, Farrington* v. *Forrester*, CH.D. NOR., J.—[1893] 2 Ch. 461; 69 L. T. 45.

3. *Costs of transfer—Charge on estate—Tenant for life.*—F. devised real estate to trustees for a term of 2,000 years, upon trust to raise moneys in aid of his personal estate, and subject thereto in strict settlement. Large sums of money were raised under this trust, and amongst others a sum of £10,000 was raised by a mortgage, dated the 2nd of November, 1882, of a mansion-house and premises to M. and M. In 1890 M. and M. wished to call in their mortgage. At this time the estate of the tenant for life under the will had been assigned to the Law Life Assurance Society; the tenant in tail in remainder was an infant. The solicitors for the infant tenant in tail arranged for a transfer of the mortgage for £10,000, a small part of the security being released, and applied to the surviving trustee of the term to transfer the mortgage, and raise the costs of the transfer by a mortgage of the part so released for the residue of the term. The trustee refused to act without the direction of the court, as actions were pending relating to the testator's estate. An order was then made on a summons taken out by the infant tenant in tail (by his next friend), to which the trustee of the term was the only defendant, that the trustee should be at liberty to raise the sum of £10,000, which M. and M. had called in, by way of transfer of the hereditaments comprised in the said mortgage, except a small portion thereof, and that the costs of all parties should be raised by a further mortgage of the hereditaments comprised in the said term. The costs, £345, were raised by a mortgage by the trustee of the excepted portion, and the mortgagee now took out a summons for foreclosure and a receiver. The Law Life Assurance Society were made defendants, and opposed.

Held, that the trustee of the term had discharged his duties when the money to be raised under the said term was raised; that he had no duty to procure a transfer when the mortgage was called in, and had acted as a volunteer merely in so doing, and could not charge the costs of the transfer on the estate under the trusts of the term, and the mortgage was therefore not binding upon the tenant for life or his assignees, and that they were not bound by the order made on a summons to which they were not parties.—*Sewell* v. *Bishopp*, CH.D. NOR., J.—62 L. J. Ch. 615; 68 L. T. 323. [Reversed 69 L. T. 68.

4. *Foreclosure—Claim for possession after decree absolute—R. S. C.*, 1883, *ord.* 18, *r.* 2.—In a foreclosure action the plaintiff did not ask for possession in his originating summons. An order for foreclosure absolute having been made, the plaintiff applied for delivery of possession.

Held, that after foreclosure absolute the court could make such order.—*Jenkins* v. *Ridgley*, CH.D. NOR., J. 585—68 L. T. 671.

5. *Foreclosure — Parties — Trustees representing* cestuis que trust—*Ord.* 16, *r.* 8.—L., by a memorandum dated the 25th of March, 1879, made an equitable mortgage of certain property to B. and J. L. died in 1886, having by his will given all his real and personal estate to trustees upon trust for sale and conversion, and in the events which happened to set aside the sum of £700, and stand possessed thereof upon trust to pay the income to his son, J. S. L., until the youngest child of his son should attain twenty-one, and then, if his said son's children should not receive £700 to which they would then be entitled under a certain settlement, upon trust for the said children, and subject thereto he gave all his real and personal estate in trust for his said son J. S. L. He appointed J. S. L. and others trustees and executors of his will; but, owing to their death or disclaimer, J. S. L. became the sole trustee of, and alone proved, the will. In 1890 the equitable mortgagees, B. and T., commenced a foreclosure action, making J. S. L. and his eldest daughter (the only one of his children who had attained twenty-one) and a second mortgagee defendants. An order for foreclosure absolute was made on the 20th of March, 1891, and on the 1st of August, 1891, B. and T. entered into a contract for sale of the mortgaged property as absolute owners. The purchaser objected that the infant children of J. S. L. ought to have been parties to the foreclosure action; that they were not foreclosed, and must join in the conveyance. The vendor declined to make them parties.

Held, that, as J. S. L. was executor as well as trustee of L.'s will, his infant children were sufficiently represented by him, and that the requisition was sufficiently answered.—*In re Booth and Kettlewell*, CH.D. NOR., J.—62 L. J. Ch. 40; 67 L. T. 550.

6. *Foreclosure—Personal judgment on the covenant—Second action for interest—Vexatious action—Practice—Receiver—Interest claimed as liquidated sum—R. S. C.*, 1883, *ord.* 3, *r.* 6; *ord.* 14.—While an action by mortgagee for foreclosure and for personal judgment against the mortgagor on the covenant was pending, the mortgagee brought a second action against the mortgagor for payment of the interest on the mortgage down to the date of the second action.

Held (reversing Kekewich, J.), that the second action should be stayed as vexatious, because the interest claimed in the second action was recoverable in the first action according to the form of order settled by the Court of Appeal in *Farrer* v. *Lacy, Hartland, & Co.*, 33 W. R. 265, 28 Ch. D. 482.

Where there is a receiver of mortgage hereditaments, although the rents be insufficient to keep down the interest on the mortgage debt, no liquidated sum can be claimed in respect of the interest, and therefore the mortgagee cannot issue a specially-indorsed writ claiming payment of a specific sum in respect of the interest.—*Earl Poulett* v. *Lord Hill*, C.A. 503—[1893] 1 Ch. 277; 62 L. J. Ch. 466; 68 L. T. 476.

7. *Foreclosure—Receiver—Personal order for payment against mortgagor—Form of judgment.*—In a foreclosure action, a receiver having been appointed, upon judgment, in default of appearance, for a personal order for payment against the mortgagor, and for foreclosure, the plaintiff must produce an affidavit to the registrar that since filing his statement of claim nothing has been received on account of principal or interest. As there were no special circumstances in this case, a proviso to the effect that "any person redeeming, or the plaintiff in event of foreclosure, might apply in chambers for transfer of any money in court to the credit of the action or in the hands of the receiver," was not allowed to be inserted.—*Cheston* v. *Wells*, CH.D. NOR., J. 374—[1893] 2 Ch. 151; 62 L. J. Ch. 468; 68 L. T. 197.

8. *Foreclosure—Sale instead of foreclosure—Conveyancing and Law of Property Act*, 1881 (44 & 45

Vict. c. 41), *s.* 25.—This was a foreclosure action, brought by a first mortgagee against second mortgagees, the representatives of the mortgagee's wife (who claimed a charge in respect of certain premiums paid by her upon policies of assurance on the mortgagor's life included in both mortgages) and the trustees in liquidation of the mortgagor. The mortgagor died pending the action, and the proceeds of the policies were applied in reduction of the amount due on the first mortgage. The property remaining subject to the mortgages consisted of eight pieces of property in different places, one being a residential estate, and the others plots of building land. At the hearing the second mortgagees and the representatives of the mortgagor's wife applied for a sale instead of a foreclosure. The first mortgagee opposed on the ground that the property could not be sold in one lot, and if it were put up in lots, the first mortgagee could not be protected by a reserve price, for the most valuable part of the property would probably be sold, and only a worthless part left as security for the balance of his debt. The trustees of the mortgagor also objected to a sale, on the ground that they believed the property would improve in value, and wished to redeem. In answer to the mortgagee's objection, it was suggested that the property might be put up for sale under conditions that no lot should be sold unless all were disposed of. There had been a previous application in chambers for a sale which had been refused.

Held, that the court was not bound by the refusal of the application in chambers, but no fresh evidence having been produced, and the court being of opinion that an attempt to sell under the conditions suggested would depreciate the value of the property, declined to exercise its discretion by ordering a sale.

Semble, the fact that a mortgaged property can only be sold in lots is a reason for refusing a sale if the first mortgagee objects. — *Provident Clerks' Mutual Life Assurance Association* v. *Lewis*, CH.D. NOR., J.—62 L. J. Ch. 89; 67 L. T. 644.

9. *Priority—Executors—Negligence of one of legal mortgagee's executors—Subsequent equitable mortgage—Recovery of title deeds.*—A mortgagee of leasehold property died, having by his will appointed his widow and his son executrix and executor, and he left all his estate to his widow for her life, with remainder to his son, and also gave to them, as joint tenants, his trust and mortgage estates. The widow and son duly proved the will. The widow took possession of the title deeds, and pressed for repayment of the mortgage debt. The mortgagor replied that he could only pay by raising a fresh loan, and that for that purpose he should require the title deeds. The widow sent the deeds to the mortgagor, who, being unable to borrow the money, purported to return them in a paper parcel. The widow died, and shortly afterwards the mortgagor also died. The son found only the mortgage deed in the parcel, the other deeds being missing; and it then appeared that the mortgagor had, in the lifetime of the widow, but without giving any notice of the existing mortgage, mortgaged the leasehold property to a bank, and had deposited the title deeds with them, but he had never paid off any part of either of the mortgages.

The son, who denied that he had any knowledge of the deeds having been sent to the mortgagor, claimed to be entitled to his security in priority to the bank, and asked that the bank should be ordered to deliver up the deeds to him as owner of the legal estate.

Held, that, whatever might have been the rights of the bank as against the widow, the son had not been guilty of fraud or of any such negligence as would postpone him to the bank; that he was entitled to priority, and that the deeds should be delivered to him.

The acts of one of several executors cannot bind their testator's estate so as to preclude other persons interested in that estate from relying on their legal title, unless the legal owner himself, or some predecessor of his in title, has personally either been guilty of misconduct or conferred on the mortgagor an apparent authority to deal with the mortgaged property as if it were unincumbered.—*In re Ingham, Jones* v. *Ingham*, CH.D. STI., J. 235—[1893] 1 Ch. 352; 62 L. J. Ch. 100; 68 L. T. 152.

10. *Priority—Tacking.*—In November, 1862, the S. trustees mortgaged certain lands, including the piece in question, to L., but by some accident the title deeds of the piece remained with the S. trustees. In January, 1883, the survivor of the S. trustees, together with the tenant for life, conveyed this piece to T., and he received the title deeds.

T., in February, 1883, mortgaged this piece of land to the appellants, but the title which he purported to show was a forgery.

In October, 1887, T. mortgaged the same piece of land to R., showing in his abstract the real title, and handing over the real title deeds.

R., having afterwards discovered that there was an outstanding mortgage in the representatives of L., asked them to release the piece of land from the mortgage debt secured by the indenture of November, 1862, and to convey the legal estate to the S. trustees discharged from the mortgage debt, upon the express condition that they should thereupon convey the legal estate to R. This was carried out.

Held, that R., thus getting in the legal estate, was not to be postponed to the prior equitable mortgagee.

Decision of the Court of Appeal (reported 39 W. R. 81, [1891] 1 Ch. 8) affirmed.—*Taylor* v. *Russell*, H.L. (E.) 43—[1892] A. C. 244; 66 L. T. 565.

11. *Redemption—Mortgage of two properties—Release of one—Right to redeem both—Priorities—Apportionment.*—On the 26th of October, 1876, P. mortgaged certain paper mills to H. to secure £6,000; and by a deed of even date he mortgaged a reversionary interest to H. as a further security for the £6,000.

On the 15th of May, 1882, P. mortgaged the same reversionary interest and paper mills to F. to secure £5,000, and on the 30th of April, 1884, P. mortgaged the paper mills to F. to secure £2,500.

On the 3rd of February, 1885, P. mortgaged the reversionary interest and paper mills to M. to secure £1,700. On the 15th of December, 1885, M. assigned the £1,700 due on the security of the 3rd of February, 1885, to certain transferees. By an indenture of the 30th of October, 1885, between F., P., and H., the sum of £2,500 secured by the mortgage of the 30th of April, 1884, was assigned to H. in consideration of the payment of £2,500 by H. to F., and in consideration of £4,000 advanced by H. to P. the paper mills were assured to H. in fee simple discharged from all principal money secured by the indenture of the 15th of May, 1882, and freed from all equity of redemption by virtue of the indenture of the 30th of April, 1884; and the reversionary interest was assigned to H. to further secure the £6,500. The effect of this was to make H. first and second mortgagee of the paper mills.

In March, 1889, F. brought a redemption and foreclosure action against the mortgagees and the mortgagor in respect of the reversionary interest

comprised in the mortgage of the 15th of May, 1882, and obtained an order for foreclosure absolute. In May, 1890, the transferees of M. brought a redemption action against H. and others in respect of the mortgage of the 3rd of February, 1885, and obtained judgment, but without prejudice to the rights of F. as owner of the equity of redemption in the reversionary interest. This interest had fallen into possession, and the amount had been paid into court. In an action by F. against H., the transferees of M., P., and the trustees of the reversionary interest, F. claimed to redeem both the mortgages of the 26th of October, 1876.

Held, that F. was entitled to redeem the mortgages of the 26th of October, 1876, as to both properties, notwithstanding that he was a party to the deed of the 30th of October, 1885, and that he was also absolute owner of the reversionary interest; but that, if F. did redeem, there must be an apportionment of the amount to be borne by the paper mills and reversionary interest respectively.—*Flint* v. *Howard*, C.A.—[1893] 2 Ch. 54; 68 L. T. 390.

12. *Redemption—Sale with option of repurchase—Personal option—Second mortgagee.*—By an indenture, dated the 12th of March, 1888, A., in consideration of £2,000 paid to him by a life assurance company, covenanted, if he should survive his father, to pay to the company an annuity of £1,400 during his life; and A., as beneficial owner, conveyed to the company all the dividends, interest, and annual income of the proceeds of the sale of certain freehold, copyhold, and leasehold property, or of the property itself until sale, to have and to hold the same unto and to the use of the company and their assigns, "by way of security for the said annuity of £1,400." Under clause 4 of the deed A. might, upon giving to the company or their assigns one calendar month's notice of his intention to do so, and upon paying to the company or their assigns, on or before the 12th of March, 1890, the sum of £3,000, together with the amount of any additional premiums payable as thereinafter mentioned, and all costs and expenses, and all arrears (if any) of the said annuity of £1,400 up to the day of repurchase, repurchase the annuity, and the premises thereinbefore conveyed by him should upon such repurchase be reconveyed on his request and at his expense. By clause 8 it was provided that the deed should "be deemed to be a mortgage within the meaning of sections 19 to 24 inclusive of the Conveyancing and Law of Property Act, 1891"; and that the powers thereby conferred on mortgagees should be incorporated therein. By clause 10 the company had power to consolidate the deed with any other charge or mortgage. By an indenture dated the 31st of December, 1889, in consideration of £8,500, A., as beneficial owner, assigned to B. all his reversionary interest in the hereditaments before mentioned subject to the deed of the 12th of March, 1888. On the 11th of March, 1890, B., in pursuance of the 4th clause of the deed of the 12th of March, 1888, gave notice to the company of his intention to redeem the securities and repurchase the annuity. The money was tendered to the company first on behalf of B. then on behalf of A. The company refused the tender. An action was accordingly brought against the company by A. and B. claiming that they were entitled to redeem the property comprised in the deed of the 12th of March, 1888, and to have a reconveyance thereof.

Held, that the deed was a mortgage, and that the right of repurchase under clause 4 thereof was not a personal privilege, but one capable of assignment; and that, therefore, B. had the right to redeem the property.

Decision of Kekewich, J., affirmed.—*Secretary of State for India* v. *British Empire Mutual Assurance Co.*, C.A.—67 L. T. 434.

13. *Reversionary lease by mortgagor subsequent to date of mortgage—Sale in chancery at suit of judgment creditor—Impugning lease.*—W. mortgaged certain land in 1789, and in 1793 he granted to the defendants' predecessor a reversionary lease of the land for 999 years to commence in 1884 for valuable consideration, and registered. In 1812, in a chancery suit by judgment creditors, holding judgments dated 1782 and 1788 respectively, to administer the real and personal estate of W., a decree was granted for the sale of the land, reserving leave to the plaintiffs therein to impeach the validity of any deeds made by W. subsequent to the date of their judgments. In 1815 the land was sold in court, and in 1817 was conveyed to the plaintiffs' predecessor. The mortgagees joined in the deed for the purpose of exonerating the land from their incumbrances merely. In an ejectment action by the representatives of the purchaser against the representatives of the lessee of the reversion,

Held, that all that the Court of Chancery could sell in such suit, and all that the purchaser in 1817 took, was, not the interest of the mortgagees in the land, but the interest of the mortgagor discharged from those mortgages; that, therefore, the representatives of the purchaser could not claim to stand in the place of such mortgagees, so as to impugn the subsequent reversionary lease; and that the action must fail.—*Hassard* v. *Fowler*, Q.B.D. (Ir.)—32 L. R. Ir. 49.

14. *Sale—Proceeds of sale—Negligence—Payment of interest by agent—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8.—The defendants were first mortgagees and the plaintiff second mortgagee of a property called "The Nest." The defendants in 1878 sold the property under their power of sale, the purchase-money being received by one J. S., a solicitor, who acted usually for the plaintiff and also for the defendants in any legal business. He gave the defendants a receipt for the balance of the purchase-money after payment of the sum due to them, the receipt stating that the balance was due to the plaintiff. J. S. never handed over the balance to the plaintiff, but continued to pay him interest as if from the defendants down to the year 1891, when he became bankrupt, and it was then discovered he had applied the surplus of the sale moneys to his own use.

Held, that the defendants were not liable to the plaintiff for the balance of the sale moneys, since, even if they had been guilty of negligence in not seeing that J. S. had authority from the plaintiff to receive the money for him, and in not seeing that J. S. paid it to him, section 8 of the Trustee Act, 1888, barred the claim, and the payment of interest by J. S. until 1891 did not keep the right of action alive against the defendants.—*Thorne* v. *Heard*, CH.D. ROM., J. 636—68 L. T. 791.

15. *Sale—Irregularity—Purchaser without notice—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 21, *sub-section* 2; *Conveyancing Act*, 1882 (45 & 46 *Vict. c.* 39), *s.* 3, *sub-section* 1.—Section 21, sub-section 2, of the Conveyancing Act, 1881, providing that where a conveyance is made in professed exercise of the power of sale conferred by the Act, the title of the purchaser shall not be impeachable on the ground that the power was improperly exercised, extends only to cases where the purchaser has bought without notice of an impropriety.

C. J. mortgaged property to secure the payment of £6,000 and interest. The mortgagees transferred their securities to J. B. in consideration of £6,316 5s. 8d., the mortgage debt and interest. Two days later J. B., in professed exercise of the powers of sale conferred by the Conveyancing Act, 1881, conveyed the mortgaged property to H. M. in consideration of £6,316 5s. 8d. On the death of H. M. the property became vested in E. M., and E. M. sold the property to A. P. L.

Prior to the sale A. P. L. was shown a recent valuation which stated that the property was worth £8,700. An abstract of title was delivered, but no requisitions were made as to circumstances attending the sale by J. B. to H. M. In an action by incumbrancers of C. J.'s equity of redemption, the sale by J. B. was declared invalid, on the ground that the powers of sale had not been properly exercised. A. P. L. claimed that under section 21, sub-section 3, of the Conveyancing Act, 1881, he was entitled to the property free from redemption.

Held, that the not obtaining further information as to the circumstances under which the sale took place did not amount to culpable negligence; that consequently A. P. L. was not affected with notice of the impropriety, and was entitled to rely on the sub-section.—*Bailey* v. *Barnes*, CH.D. STI., J.—68 L. T. 818.

See also ASSIGNMENT OF DEBT; BUILDING SOCIETY, 2; ESTOPPEL, 1; LANDLORD AND TENANT, 10; LIMITATIONS, STATUTE OF, 4, 8, 9; NATIONAL DEBT (CONVERSION) ACT, 2; TENANT FOR LIFE AND REMAINDERMAN, 2; VENDOR AND PURCHASER, 11.

MORTMAIN.—See CHARITY, 1-3.

MUNICIPAL CORPORATION:—

Contract — Capacity to contract — Ultrà vires— *Borough rates, misapplication of—Improvement rate—Surplus of borough fund—Agreement to make annual payments for use of bridge in borough for foot passengers, how far valid—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 140, 143, 144.—A municipal corporation, which was subject to the Municipal Corporations Act, 1882, and a Local Improvement Act, agreed with a railway company to pay the company a certain annual sum for fifteen years in consideration that the company would throw open the roadway of a bridge belonging to them within the borough for the use of foot passengers free from toll. The local Act authorized rates for certain purposes not including such a bridge as the agreement referred to, and provided that the money accruing from the general rate should be applied to certain specified purposes, "and subject thereto for the improvement or benefit of the borough in such manner as the corporation from time to time think fit in as full and ample a manner as any borough rate authorized by the Municipal Corporations Act is made applicable." An action having been brought by the Attorney-General, at the instance of relators against the corporation, claiming an injunction to restrain the corporation from making the said payments out of moneys derived from the rates, and a declaration that the agreement was *ultrà vires* and void,

Held, affirming the decision of the Court of Appeal (23 Q. B. D. 492), that there must be a declaration that the corporation were not entitled to pay any moneys (which might become payable under the agreement) out of the borough fund, nor to make any borough rate nor any general or improvement rate under the Municipal Corporations Act, 1882, or the local Act for the purpose of such payments; but that the agreement was not *ultrà vires* or void, and that the foregoing declaration was not to prevent the corporation from paying such moneys out of any surplus which there might be of the borough fund or of the aforesaid rates after applying the same respectively to the purposes for which they might respectively be made under the provisions of those Acts, with liberty to the plaintiff to apply for an injunction if necessary.—*Mayor, &c., of Newcastle-upon-Tyne* v. *Attorney-General*, H.L. (E.)—[1892] A. C. 568; 62 L. J. Q. B. 72; 67 L. T. 728.

MUNICIPAL CORPORATION (IRELAND):—

Franchise—Notice of objection—Burgess roll—Appellate jurisdiction of Queen's Bench Division—Proceedings in lieu of quo warranto—*Acquiescence.*—At the revision of the qualification lists of the burgess roll of a borough before the mayor and assessors under 3 & 4 Vict. c. 108, the mayor has no power to expunge a name from the list and roll unless due notice of objection under section 43 has been given.

Where no such objection was given, and where, accordingly, the mayor did not and could not adjudicate, the appellate jurisdiction of the Queen's Bench Division under section 50 cannot arise.—*Riordan* v. *M'Namara*, Q.B.D. (Ir.)—30 L. R. Ir. 495.

NATIONAL DEBT (CONVERSION) ACT:—

1. *Rent-charge—Option to redeem by transfer of specified sum of £3 per Cent. Consols—National Debt (Conversion) Act*, 1888 (51 & 52 *Vict. c.* 2), *s.* 21, *sub-section* 1; *s.* 25, *sub-section* 2—*Deed executed before passing of Act—Right to redeem by New* 2¾ *per Cent. Annuities* (*Goschens*).—The plaintiffs, by two deeds executed before the passing of the National Debt (Conversion) Act, 1888, created on their estates a perpetual rent-charge of £10,000 in favour of the defendant, with a right on their part to redeem the said rent-charge, or certain portions thereof, by a transfer of specified sums of £3 per Cent. Annuities.

Held, that, under section 25, sub-section 2, of the National Debt (Conversion) Act, 1888, the plaintiffs could redeem by a transfer of a similar amount of the New 2¾ per Cent. Stock (Goschens).—*Duke of Northumberland* v. *Percy*, CH.D. NOR., J. 597—[1893] 1 Ch. 298; 62 L. J. Ch. 331; 68 L. T. 45.

2. *Stock mortgage — Redemption — National Debt (Conversion) Act*, 1888 (51 & 52 *Vict. c.* 2), *s.* 21.—By a mortgage, dated in 1867, the mortgagor covenanted to transfer to the mortgagee a specified amount of New 3 per Cent. Stock, and the lands were conveyed subject to redemption on such transfer. The lands having been sold in this court,

Held, that the mortgage was satisfied by the transfer of a like amount of New 2¾ per Cent. Stock. — *In re Borough's Estates*, L.J. (Ir.) — 31 L. R. Ir. 244.

NEGLIGENCE:—

1. *Dangerous premises—Landlord and tenant—House let in flats—Staircase in occupation and control of landlord—No covenant to keep stairs in repair—Personal injury caused by stairs being out of repair—Liability of landlord.*—The defendant, who was the owner of certain premises in the City of London, let the different floors as offices to separate tenants. The only mode of access to the offices was by means of a staircase, which was not let to the tenants, but which remained in the occupation and control of the defendant. The leases to the tenants contained no covenant by the defendant to keep the staircase in repair. The plaintiff went to the office occupied by one of the tenants on business, and, when

coming down the stairs, fell and was injured owing to the stairs being out of repair.

Held, that there was a duty on the defendant, both towards the tenants and towards those persons who came to the premises on business with them, to keep the stairs in a reasonably safe state of repair; and that, therefore, the defendant was liable to the plaintiff.—*Miller* v. *Hancock*, C.A. 578. —[1893] 2 Q. B. 177.

2. *Drunken man trying to enter tramcar—Right of conductor to prevent him—Injury.*—The plaintiff, being drunk, tried to get into the defendants' tramcar while it was in motion. The conductor tried to prevent him, and pushed him off with no more force than was necessary. The plaintiff fell and was injured. In an action to recover damages for negligence the jury found a verdict for the plaintiff.

Held, by Lord Ashbourne, L.C., and FitzGibbon, L.J.; Barry, L.J., *diss.* (reversing the decision of the Exchequer Division), that the plaintiff was acting illegally and wrongfully in forcing his way, when drunk, into the tramcar while it was in motion; that by so doing he placed himself in a position of peril and the conductor in a position of difficulty; that, even assuming the conductor did not under the circumstances act with the most perfect presence of mind, it could not be said that he acted with such want of care and skill as to amount to evidence that it was his negligence that caused the accident, and that the verdict should be set aside and judgment entered for the defendants. —*Delany* v. *Dublin United Tramways Co.*, C.A. (Ir.) —30 L. R. Ir. 725.

See also MASTER AND SERVANT, 2-5; RAILWAY, 4; SCOTCH LAW, 4; SOLICITOR, 19.

NEGOTIABLE INSTRUMENT.—See BANKER, 2-5.

NEW SOUTH WALES, LAW of:—

1. *Municipalities Act of* 1867, *s.* 163—*Construction —Practice as to raising a new point.*—Where, by section 163 of New South Wales Municipalities Act of 1867, "land the property of her Majesty, and unoccupied or used or reserved, or vested in trustees for public purposes," was exempted from rateability.

Held, that on its true construction lands not the property of her Majesty, but occupied by a municipality for the purpose of water supply, were within the exemption.

It appearing that the point whether the land in question was in fact used for public purposes had not been raised in the court below or in argument before the full bench, held that it was too late to raise it before their lordships.—*Council of the Borough of Randwick* v. *Australian Cities Investment Corporation*, P.C.—[1893] A. C. 322; 68 L. T. 771.

2. *New South Wales Lands Acts*, 1861, 1875, 1880, *and* 1884—*Reserved lands—Revocation of reserve—Rights of improver—Sale by appraisement.*—Held, that although the Lands Act of 1880, s. 12, rendered improved lands conditionally purchasable, yet the proviso to that section on its true construction preserved as against claims by conditional purchasers the right of the governor, under section 2 of the Lands Acts Amendment Act, 1875, to sell by appraisement, and without competition to the improving tenant, any improved reserved land, the improvements on which were made before the reservation or before the 1st of July, 1876.

Where such application by the improver had been made while the lands were still reserved from sale, under the Act of 1861,

Held, that such application was valid (regard being had to section 3, sub-section 2, of the Crown Lands Act, 1884), and operated as a continuing offer until after the reserve was revoked on the 14th of December, 1889, and the governor, acting under section 2 of the Act of 1875, accepted such offer on the 4th of February, 1890.

Section 102 of the Act of 1884 does not apply to lands reserved from sale under the previous Acts, and therefore the acceptance of the governor of the appellants' offer was not valid, by reason of sixty days not having expired from the date of the reservation having been revoked.—*Ricketson* v. *Barbour*, P.C.—[1893] A. C. 194; 62 L. J. P. C. 55; 68 L. T. 543.

NEW ZEALAND, LAW of:—

1. *Governor, power of—Supreme Court Judges Act*, 1858, *s.* 2—*Statutory limitation of power to appoint judges.*—The 2nd section of the Supreme Court Judges Act, 1858, provides that "the Supreme Court of New Zealand shall consist of one judge, to be appointed in the name and on behalf of her Majesty, who shall be called the chief justice, and of such other judges as his excellency, in the name and on behalf of her Majesty, shall from time to time appoint."

Held, that this section can only be construed consistently with other parts of the Act (see section 6 especially) as vesting in the governor the appointment of judges to whom an ascertained salary is payable by law at the time of their appointment; and that the Act of 1882 did not affect this limitation of the governor's power of appointment.—*Attorney-General of New Zealand* v. *Edwards*, P.C. —[1892] A. C. 387; 61 L. J. P. C. 64; 66 L. T. 833.

2. *Local legislature, powers of—Proceedings against absentees without service*—15 *&* 16 *Vict. c.* 72.—Held, that 15 & 16 Vict. c. 72, on its true construction, empowers the Legislature of New Zealand to subject to its tribunals persons who are neither by themselves nor their agents present in the Colony.

Held, further, that a law of the local legislature authorizing the local courts in any case of contracts made or to be performed in the colony to decide whether they will or not proceed in the absence of the defendant is *intrà vires* and reasonable.

Whether a judgment against an absentee without service of the writ will be enforced by the courts of another country is a matter for those courts to determine, and does not affect the validity of the local law.—*Ashbury* v. *Ellis*, P.C.—[1893] A. C. 339.

NUISANCE.—

1. *Crowds—Theatre—Collecting crowd in highway —Obstruction of access to plaintiff's premises.*—The defendant was the lessee of a theatre at which a play was produced which caused people to assemble at the pit door about two hours before it was opened in order to get places, and the access to the plaintiff's house next door was seriously obstructed.

Held, that the defendant had committed a nuisance by holding a performance which caused crowds to assemble, though he had not in any way invited persons to come before the doors were open, and that the plaintiff was entitled to an injunction; but that as the nuisance had been abated since the action was brought, by the action of the police, the court held that an injunction was unnecessary.—*Barber* v. *Penley*, CH.D. NOR., J.—[1893] 2 Ch. 447; 62 L. J. Ch. 623; 68 L. T. 662.

2. *Noise—Playing on musical instruments—Reasonable user of house—Injunction.*—Case in which the

giving of musical lessons in a house separated from the adjoining house by a party wall only, and occasional practising and singing, and in the evening musical performances, were held not to constitute a nuisance to restrain which an injunction would be granted. Injunction granted to restrain the adjoining occupier from making noises in his house to annoy the occupier of the other house, the court being of opinion that it was done maliciously.—*Christie* v. *Davey*, CH.D. NOR., J.—[1893] 1 Ch. 316; 62 L. J. Ch. 439.

3. *Pollution of stream — Sanitary authority — Injunction—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 13, 17, 21, 29, 332, 333.—An action was brought against a sanitary authority to restrain the pollution of a ditch running through the main street of a town past the plaintiff's lands into the sea. The ditch was covered over as it passed through the town, but was afterwards an open stream, and had been for many years seriously polluted. The plaintiff claimed an injunction to restrain the defendants, as the owners of the covered part of the ditch and as the sanitary authority of the district, from permitting any sewage or other noxious matter to come on to her lands or into her part of the ditch. In 1877 the attention of the defendants was called to the condition of the houses in two new streets, and they required the owners of those houses to improve their drains. The owners accordingly ran two drains down the two streets and made communications with the main sewer. These drains were made for the purpose of carrying off surface water, and were not connected with any privies, but in addition to the surface water the slops of the houses were allowed to be thrown down the drains. In 1885, in consequence of a complaint made to the defendants, notices were directed to be served upon the occupiers to divert all polluting matter from the sewer, and the inspector of nuisances was ordered to inspect all drains entering into the main sewer. The notices so served were all effective in causing an abatement of the nuisance except four. Subsequent directions of the defendants as to cleansing the sewer were duly carried out, the effect of which was to diminish the pollution of it to some extent. The defence was, that the defendants had done everything in their power to prevent any nuisance from being occasioned to the plaintiff or her property; and that they were not responsible for the nuisance.

Held, that the defendants had done all they could to abate the nuisance of which the plaintiff complained, and were not responsible for it; but that the plaintiff's remedy, if any, was against the persons who actually caused the nuisance.

Held, therefore, that the action could not be maintained.

Attorney-General v. *Guardians of the Poor of Dorking*, 20 Ch. D. 595, followed.—*Ogilvie* v. *Bything Union Sanitary Authority*, C.A.—67 L. T. 18.

4. *Smallpox hospital*—Quia timet *action—Injunction.*—An injunction will not be granted in a *quia timet* action unless the plaintiff makes out a strong case of probability that the apprehended mischief will in fact arise.

The site of a proposed smallpox hospital was 200, 240, and 450 years respectively from the three adjacent public roads, ninety yards from a much-frequented cemetery, and 256 yards from the nearest house, there being only fifteen houses within a half-mile radius. The medical evidence being conflicting,

Held, that, in the absence of strong medical evidence that the proposed hospital would be a nuisance, no injunction could be granted.

Quære, whether, in the case of a hospital, the health of the public at large may not be considered, to some extent, as against the merely local inconvenience.—*Attorney-General* v. *Mayor, &c., of Manchester*, CH.D. CHI., J. 459—[1893] 2 Ch. 87; 62 L. J. Ch. 459; 68 L. T. 608.

5. *Tramway company—Statutory powers—Acquisition by company of undertakings of companies having special statutory powers—Authority to erect "works and conveniences"—Stables—Injunction.*—A company incorporated under the Companies Acts, 1862 and 1867, acquired, under the authority of a special Act, the undertakings of two tramways companies, which had power under their special Acts to purchase land for the purposes of their undertakings. The company was subsequently authorized, by special Act, to construct and maintain three short extensions of their tramways, "with all proper rails, plates, works, and conveniences connected therewith." The company acquired land near one of such extensions, and erected stabling thereon for the accommodation of the horses employed on the tramway. In an action by a neighbouring owner against the company to restrain a nuisance caused by the smells arising from these stables,

Held, that the company could not claim to exercise the special powers conferred upon the companies whose undertakings they had acquired.

That the words "works and conveniences" did not extend to the stables of the company so as to authorize their erection.

And, that, in the absence of express words authorizing the acquisition of land for the purpose of the erection of stables, it must be presumed that it was the intention of the Legislature that the company should have such powers only as they possessed by reason of their constitution under the Companies Acts.

Held, therefore, that the company were liable for the nuisance caused by their stables.—*Rapier* v. *London Tramways Co.*, CH.D. KEK., J.—68 L. T. 645.

See also LOCAL GOVERNMENT, 6, 12; RIVER; SCOTCH LAW, 6.

NULLITY of MARRIAGE.—See DIVORCE, 13.

PARLIAMENT:—

1. *Election—Costs—Charges of returning officer—Parliamentary Elections (Returning Officers) Act*, 1875 (38 & 39 *Vict. c.* 84), *s.* 3, *sub-section* 6; *s.* 4.—It is the duty of a returning officer, whose account has been taxed under section 4 of the Parliamentary Elections (Returning Officers) Act, 1875, to return to each candidate out of his deposit a proportionate amount of any part of the account which has been disallowed, whether such candidate has or has not been a party to the taxation.—*Martin* v. *Tomkinson*, Q.B.D.—[1893] 2 Q. B. 121; 62 L. J. Q. B. 400.

2. *Election petition—Amendment—Jurisdiction to grant leave to amend—Judge not upon the rota—Rules of Court—Corrupt and Illegal Practices Act*, 1883 (46 & 47 *Vict. c.* 51), *ss.* 40, 56—*Parliamentary Elections Act*, 1868 (31 & 32 *Vict. c.* 125), *s.* 25—*Parliamentary Election Petition Rules*, 1868, *r.* 44—*Practice—Appeal—Judicature Act*, 1881 (44 & 45 *Vict. c.* 68), *s.* 14.—Section 40, sub-section 2, of the Corrupt and Illegal Practices Prevention Act, 1883, provides that an election petition may be amended with the leave of the High Court; and, by section 56, sub-section 1, "subject to any rules of court, any jurisdiction vested by this Act in the High Court may," except as to criminal matters, "be exercised by one of the

judges for the time being on the rota for the trial of election petitions," or by a master, "in manner directed by and subject to an appeal to the said judges." Rule 44 of the rules made under the Parliamentary Elections Act, 1868, provides for the hearing of interlocutory matters by a judge on the rota "if practicable, and if not, then by any judge at chambers."

Held, by the Queen's Bench Division, that the rules made under the Act of 1868 do not apply to section 56 of the Act of 1883, and that a judge who is not on the rota for the trial of election petitions has no jurisdiction to make an order giving leave to amend an election petition.

Held, also, that such an order ought not to be made *ex parte*.

Held, upon appeal, that the decision of the Divisional Court was a decision upon a question of law within section 14 of the Judicature Act, 1881 —which provides that the jurisdiction of the High Court to decide questions of law, upon appeal or otherwise, under the Parliamentary Elections Act, 1868, or any Act amending it, shall be final and conclusive, unless special leave to appeal be given by the High Court—and that, therefore, no appeal lay without leave.—*Shaw* v. *Reckitt*, C.A. 497—[1893] 1 Q. B. 779; [1893] 2 Q. B. 59; 62 L. J. Q. B. 375; 68 L. T. 688.

3. *Election petition — Particulars — Corrupt and illegal practices—Time for delivery of particulars—Extension of time—Special circumstances—Rules of Court for Trial of Election Petitions*, 1868, *rr.* 6, 7.—The general rule of practice in election petitions, that particulars of corrupt and illegal practices will be ordered to be delivered seven days before trial of the petition, is not a hard and fast rule, and, in determining whether there are special circumstances upon which it will act in extending the time, the court will take into consideration the size and nature of the constituency, the population, and the number of voters, and also the number of witnesses whom it is proposed to call.

Where, in a parliamentary election petition claiming to void the election, and also claiming the seat upon a scrutiny, and relating to a division of a metropolitan borough which contained above 7,000 voters, 58,000 inhabitants, and in which some 170 witnesses were intended to be called by the petitioners, an order had been made for the delivery of particulars of alleged corrupt and illegal practices seven days before trial, the court made an order extending the time to ten days, the particulars being by consent limited to such as would not have the effect of anticipating the scrutiny list.—*Rushmere* v. *Isaacson*, Q.B.D. 124—[1893] 1 Q. B. 118.

4. *Election petition—Scrutiny—Particulars—Parliamentary Election Petition Rules*, 1868, *rr.* 6, 7.—The respondent in a parliamentary election petition, in which the petitioner claims the seat on grounds for a scrutiny, is not entitled to obtain particulars under rule 6 of the Parliamentary Election Petition Rules, 1868. Rule 7 applies exclusively to such a case.—*Munro* v. *Balfour*, Q.B.D. 143—[1893] 1 Q. B. 113; 67 L. T. 526.

5. *Election petition—Trial of—Change of venue—Scrutiny—"Special circumstances"—Parliamentary Elections Act*, 1868 (31 & 32 *Vict. c.* 125), *s.* 11, *sub-section* 11.—The existence of "special circumstances" is, under section 11, sub-section 11, of the Parliamentary Elections Act, 1868, a condition precedent to the exercise by the court of the jurisdiction, under that sub-section, to order that an election petition shall be tried elsewhere than in the county or division where the election took place.

Where, therefore, an application was made to change the venue of an election petition, upon the grounds that the petition was limited to a scrutiny of certain ballot papers, involving the examination of a very small number of witnesses; that it would materially lessen the expense of the trial; and would otherwise be for the general convenience of the parties, who both concurred in the application,

Held, that the above circumstances did not amount to "special circumstances" within the meaning of the Act of Parliament, and that the court had, therefore, no power to make the order.—*Lawson* v. *Master*, Q.B.D. 221—[1893] 1 Q. B. 245; 62 L. J. Q. B. 231; 68 L. T. 60.

6. *Franchise—Registration—County voter—Notice of objection—Description of objector—Place of abode—Sufficiency of—Registration Order*, 1889, *Forms* 5 (*A*) *and* (*B*), *and I., No.* 2.—Where notices of objection to certain county voters were signed "John Budgery, Burnard's-terrace, on the register of electors for the township of Bodmin Borough," without stating that Burnard's-terrace was situated in Bodmin, and it was found by the revising barrister that nobody had been misled by the omission,

Held, that the description of the objector's place of abode was sufficient to satisfy the Registration Order, 1889, Forms 5 (A) and (B).—*Hicks* v. *Stokes*, Q.B.D. 123—[1893] 1 Q. B. 124.

7. *Franchise—Registration—Lodger—Description of qualification—Mistake—Power to amend—Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-sections* 2, 13.—Where, in a lodger claim, the character of the qualification is misdescribed, but the revising barrister is satisfied that the misdescription is the result of a mistake, and that the qualification, upon the facts, is sufficient, he may amend the claim under sub-section 2 of section 28 of the Registration Act of 1878; and sub-section 13 of the same section, which means that a person claiming in respect of one qualification may not prove for another and distinct qualification, does not apply to prevent the correction.—*Reg.* v. *McKellar, Ex parte Baker*, Q.B.D. 142 —[1893] 1 Q. B. 121; 62 L. J. Q. B. 97; 67 L. T. 527.

8. *Franchise — Registration — Lodger — Servant lodging with master on premises where business carried on.*—The appellant, an assistant to a wine merchant at weekly wages, resided on his employer's premises, occupying a room at a rent of 5s. a week, and having the sole use of it for the qualifying period.

Held (reversing the decision of the revising barrister), that he was duly qualified as a lodger voter. —*Bennett* v. *Evans*, Q.B.D.—68 L. T. 765.

9. *Franchise—Registration—Lodger—Joint lodger —Alteration of claim and declaration.*—A lodger with the exclusive use of one room under the annual value of £10 cannot qualify himself for the franchise by adding thereto any portion of the annual value of another room which he occupies jointly with other lodgers in the same house (Fitz-Gibbon, L.J., *diss.*).

A lodger claim and declaration cannot, without the knowledge and authority of the claimant, be altered after it is duly signed and attested.—*Hay's case*, C.A. (Ir.)—32 L. R. Ir. 166.

10. *Franchise—Registration—Objection to name being on list of voters—Qualification of objector—Objector's name struck off list before objection heard— —6 & 7 Vict. c.* 18, *s.* 17.—By section 17 of 6 & 7

Vict. c. 18: "Every person whose name shall have been inserted in any list of voters for any city or borough may object to any other person as not having been entitled on the (15th) day of July next preceding to have his name inserted in any list of voters for the same city or borough, and every person so objecting shall give notice of objection as therein prescribed."

Held, that, under this section, an objector is qualified for the purposes of his objection if his name was, at the time of service of notice of his objection, upon any of the lists of voters prepared by the overseers, even though before such objection is heard his name has been struck off such list by the revising barrister.—*Pease* v. *Town Clerk of Middlesborough*, Q.B.D.—[1893] 1 Q. B. 127; 62 L. J. Q. B. 94; 68 L. T. 766.

11. *Franchise — Registration —Occupier—Borough vote*—30 & 31 *Vict. c.* 102, *s.* 3, *sub-section* 2.—Two canons of a cathedral claimed to be entitled to borough votes in respect of their occupation of an official residence within the borough, which they and two other canons had during the qualifying year occupied for three months each. There was an agreement subsisting among the canons that each should occupy for three months in every year, but under certain circumstances each might occupy for a larger part, or for the whole of any year.

Held, that, by their agreement, the claimants had deprived themselves of the right to reside during the whole year, and that they had therefore not occupied as inhabitants during the qualifying year, as required by 30 & 31 Vict. c. 102, s. 3.—*Rowland* v. *Pritchard*, Q.B.D.—62 L. J. Q. B. 319; 68 L. T. 586.

12. *Franchise—Registration—"Owner or tenant"—Trustee—Parochial house—Joint rated occupier.*—The Roman Catholic bishop of the diocese, along with his administrator and two curates, occupied the parochial house for the qualifying period, each having separate rooms and using the rest in common. The house was held by trustees in trust for the parish. Among the trustees were the bishop, the administrator, and the curates. The trustees, who were in occupation, were jointly rated for the premises. The bishop had the power of removing or promoting the administrator and curates to another parish (which power he had not exercised), but he could not in any other way deprive them of their respective rooms in the house.

Held, that the bishop, the administrator, and the two curates occupied as tenants, and were entitled to the franchise as rated occupiers.—*Hollands* v. *Chambers*, C.A. (Ir.)—32 L. R. Ir. 156.

See also CONTEMPT OF COURT, 1.

PARTITION ACTION:—

Costs—Incumbered shares—Discretion of court—Partition Act, 1868 (31 & 32 *Vict. c.* 40), *s.* 10.—In partition actions, though the court has an absolute discretion as to costs, it will, as a general rule, allow only one set of costs out of the entire proceeds of sale in respect of each share of the property.

The chief clerk's certificate in a partition action found that the plaintiff was entitled to an unincumbered third share of the estate, that one of the defendants was entitled to another third share, subject to one mortgage, and that another defendant was entitled to the remaining third share, subject to two mortgages. The estate was sold and the money paid into court.

Held, that three sets of costs only—one in respect of each share of the property—were payable out of the entire proceeds.

Belcher v. *Williams*, 39 W. R. 266, 45 Ch. D. 510, not followed.—*Catton* v. *Banks*, CH.D. KEK., J. 429—[1893] 2 Ch. 221; 62 L. J. Ch. 600; 68 L. T. 245.

PARTNERSHIP:—

1. *Articles—Bankruptcy of some of the partners—Provision for retention of bankrupt partner's share—Validity—Receiver and manager—Right of trustee in bankruptcy to appointment of.*—It was provided by articles of partnership entered into in August, 1891, that if any partner should become bankrupt, he should be deemed to have ceased to be a partner at the date of such bankruptcy; and that, upon any partner ceasing to be a partner from any cause, before the expiration of the partnership term (which was for fourteen years), the partnership should thereupon determine as to such partner, and his share in the capital of the partnership should remain as a loan, bearing interest, to the continuing partners for the residue of the term of fourteen years, or so long as the business should be carried on, and the repayment of the loan and interest should be secured by the joint and several bond, or the bond or covenant, of the continuing partners.

The partnership consisted of four persons, one of whom had provided the whole of the capital. This partner and two of the other three became bankrupt in June, 1892, and their trustees in bankruptcy brought an action against the defendant, the remaining solvent partner, for a declaration that the above provisions of the partnership articles were void as against the plaintiffs and the creditors of the bankrupts. On an application by the plaintiffs for the appointment of a receiver and manager of the partnership business, the defendant claimed the right, as solvent partner, to be appointed receiver and manager.

Held, that, in the absence of any explanation as as to the reason for the insertion of the above provisions in the partnership articles, the inference was that they were inserted in contemplation of bankruptcy, and that under the circumstances the plaintiffs were entitled to the protection of a receiver and manager, but that the defendant was entitled to be appointed receiver and manager; that he must give security, pass his accounts, furnish the plaintiffs with proper accounts, and give them reasonable access to the books; and that he must pay the balances in his hands when they reached an agreed amount, either into court, or to a joint banking account of himself and the plaintiffs.—*Collins* v. *Barker*, CH.D. STI., J. 442—[1893] 1 Ch. 578; 62 L. J. Ch. 316; 68 L. T. 572.

2. *Assignment of business by debtor to creditor—Provision for reassignment—Joint interest—Construction of agreement.*—By an agreement in writing W., a trader, who was insolvent, assigned all his machinery, stock, and book-debts to B., his largest creditor; B. agreed to carry on the business as before in W.'s name, to engage W. as manager at a weekly salary, to discharge the existing and future trade liabilities of W., and to find funds for carrying on the business; all profits made were to be placed to the credit of W., and as soon as the losses were made up B. was to resell the business to W. without any further responsibility on the part of B., or any consideration on the part of W. B. having become bankrupt, and W. having become bankrupt, a question arose as to the ownership of the business.

Held (affirming the judgment of the Queen's Bench Division), that, under the agreement, B. and W. took a joint interest in the business.

Price v. *Groom*, 2 Exch. 542, commented upon.—*In re Whiteley, Ex parte Smith & Co.*, C.A.—67 L. T. 69.

3. *Death of partner—Share of partner dying to be determined by last signed yearly account—Death after expiration of partnership year, but before taking of account for that year completed.*—Under a deed of partnership it was provided that the partnership accounts should be taken and signed by the partners at the end of each partnership year, or as near thereto as conveniently might be, and that the share of a partner dying should be determined by reference to the last signed yearly account prior to his death. A partner died shortly after the expiration of a partnership year, but before the taking of the account for that year had been completed. The yearly accounts had been, according to the practice of the firm, taken somewhat later in the year than the date of his death.

Held, that the surviving partners were not entitled to have his share determined by reference to the last signed yearly account, but that the account for the partnership year immediately preceding his death must be taken, and his share determined thereby.

Semble, it would not have made any difference if, in fact, the taking of the accounts for the partnership year immediately preceding his death could not have been completed in his lifetime.—*Hunter* v. *Dowling*, CH.D. ROM., J. 390—[1893] 1 Ch. 391; 62 L. J. Ch. 380; 67 L. T. 826. [Affirmed: 62 L. J. Ch. 617; 68 L. T. 780.]

4. *Real estate—Conversion.*—Land was held by two persons under an agreement made between them for a common object. One of the parties having died,

Held, that the deceased's interest in the land devolved as real estate.

The effect of the existence of a partnership between the parties on the question of conversion considered.—*In re Wilson, Wilson* v. *Holloway*, CH.D. NOR., J. 684—[1893] 2 Ch. 340; 68 L. T. 785.

See also BANKRUPTCY, 7, 17, 20; POWER OF ATTORNEY, 1.

PATENT:—

1. *Co-owners by purchase—One co-owner mortgagee of other co-owners' share—Patent worked by mortgagee co-owner—Profits received as mortgagee.*—Where a patentee assigns to each of two persons a moiety of his patent rights, each assignee can work the patent without being liable to account to the other for profits; and none the less if one of the assignees be mortgagee of the others' moiety.

So held, affirming the decision of the Court of Appeal ([1892] 2 Ch. 13).

The decision in *Mathers* v. *Green*, L. R. 1 Ch. 29, approved.—*Steers* v. *Rogers*, H.L. (E.)—[1893] A. C. 232; 62 L. J. Ch. 671; 68 L. T. 726.

2. *Infringement—Analogous use—Novelty—Utility.*—The plaintiff patented an improvement in the "wet spinning for flax and like yarns," which consisted in the introduction of a thin flexible paper tube outside of a rigid tube, in substitution for rigid tubes of various kinds previously used, upon which the yarn was wound during the process of spinning, and to which it was claimed the yarn would adhere after being artificially dried. It was proved that similar paper tubes of various sizes had been used in cotton and woollen spinning for a number of years before the date of the patent. The purpose for which the tubes were used in cotton spinning was to form a base for the "cop," and keep the hole in it open. In flax spinning the yarn is passed through a trough of water for the purpose of dissolving gum from the yarn, of which it contains a large quantity, and when spun the flax yarn, which is an inelastic fibre, has to be artificially dried, consequent shrinking taking place. Cotton is an elastic fibre containing very little gum, and is spun dry, except that in the process known as "doubling" the cotton is damped to remove roughness from the surface of the yarn and to prevent shrinking.

Held, that the introduction of thin paper tubes into wet spinning was an application of a principle well known in the process of dry spinning to the achievement of a result not previously attained in wet spinning—namely, the adhesion of the yarn during the process of drying to that upon which it had been wound, and that the use of paper tubes in dry spinning was not so analogous to the use of them in wet spinning as to deprive the plaintiff's invention of the merit of novelty.—*Pirrie* v. *Yorkstreet Flax Spinning Co.*, V.C. (Ir.)—31 L. R. Ir. 3.

3. *Infringement—Prior publication—Prior public user.*—The validity of a patent for making dynamo-electric machines was challenged on the ground of prior publication, founded upon a description in the specification in an earlier patent.

Held, that the question whether the specification of the earlier patent was sufficient to disclose the invention to the public did not turn upon the sufficiency or insufficiency of the specification for the guidance of a skilled workman, for the patent might be void for incomplete directions to a workman of ordinary skill, and yet sufficient to inform the public of the invention; but that the proper test was whether the description in the specification was sufficient to convey to men of science and employers of labour information which would enable them to understand the invention, and give a workman specific directions for the making of the machine; and that, applying that test, there had been prior publication.—*Anglo-American Brush Electric Light Corporation* v. *King, Brown, & Co.*, H.L. (Sc.)—[1892] A. C. 367.

4. *Practice—Interrogatories—Refusal to answer—Action for infringement—Validity of patent denied—R. S. C.*, 1883, *ord.* 31, *r.* 20.—In an action for infringement of a patent the plaintiffs administered interrogatories to the defendants, based on the statements in the plaintiffs' specification, asking the defendants if they used the processes therein described. The defendants denied the validity of the patent, and refused to answer certain of the interrogatories, on the ground (*inter alia*) that the discovery sought depended on the determination of a question in dispute—namely, the validity of the patent.

Held, that the discovery sought could not be postponed until after the validity of the patent had been established, and that the plaintiffs were entitled to specific answers to the interrogatories.—*Benno Jaffe and Darmstaedter Lanolin Fabrik* v. *Richardson & Co.*, CH.D. NOR., J. 534—62 L. J. Ch. 710; 68 L. T. 404.

5. *Threats by "circulars, advertisements, or otherwise"—Threats contained in letters—Answer to inquiries—Privileged communications—Patentee unable to bring action for infringement—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 32.—A "threat" within the meaning of section 32 of the Patents Act, 1883, may be contained in letters written *bonâ fide* in answer to inquiries made about a patent. Such a letter cannot be considered as a privileged communication.

The words "or otherwise" in the section are not to be classed as *ejusdem generis* with "circulars or advertisements": they are extended by the words which precede them, and not confined by them.

Driffield and East Riding Pure Linseed Cake Co. v. *Waterloo Mills Cake and Warehousing Co.*, 34 W. R. 360, 31 Ch. D. 638; *Combined Weighing and Advertising Co.* v. *Automatic Weighing Machine Co.*, 37 W. R. 636, 42 Ch. D. 665; and *Barrett* v. *Day*, 38 W. R. 362, 43 Ch. D. 435, approved.—*Skinner & Co.* v. *Shew & Co.*, C.A. 217—[1893] 1 Ch. 413; 62 L. J. Ch. 196; 67 L. T. 696.

6. *Validity—Provisional and complete specification—Patentable and non-patentable inventions.*—In an action for infringement of a patent,

Held, that the plaintiffs' invention was novel; but that the patent as amended was invalid, upon the grounds (1) that the original patent was granted for an invention different from that for which he claimed protection after the disclaimers; (2) that it was not, when taken out, useful for its purpose; and (3) that the specification was insufficient to enable an electrician of that date to carry it out without further experiments and invention.

To make a patent valid the patentee must make some addition to previously known inventions, and must produce either a new and useful thing or result, or a new and useful method of producing an old thing or result.—*Lane Fox* v. *Kensington and Knightsbridge Electric Lighting Co.*, C.A.—[1892] 3 Ch. 424; 67 L. T. 440.

7. *Validity — Subject-matter — Nonconformity of provisional specification and complete specification—Prior publication—Anticipation—Patents, &c., Act,* 1883 (46 & 47 *Vict. c.* 57), *s.* 5, *sub-sections* 3, 4; *ss.* 14, 46.—A patent for the mere new use of a known contrivance without any additional ingenuity in overcoming fresh difficulties is bad, and cannot be supported. If the new use involves no ingenuity, but is in manner and purpose analogous to the old use, although not quite the same, there is no invention, no manner of new manufacture within the meaning of the Statute of Monopolies (21 Jac. 1, c. 3). On the other hand, a patent for a new use of a known contrivance is good, and can be supported if the new use involves practical difficulties which the patentee has been the first to see and overcome by some ingenuity of his own. An improved thing produced by a new and ingenious application of a known contrivance to an old thing is a manner of new manufacture within the meaning of the statute.

A specification which discloses a principle and applies it to one thing will not necessarily invalidate a subsequent patent for the application of the same principle to another thing. It may or may not do so, and the question in each case must be decided on the same principles as those applicable to the question of subject-matter. In considering subject-matter novelty is assumed; the question is whether, assuming the invention to be new, it is one for which a patent can be granted. In considering novelty the invention is assumed to be one for which a patent can be granted if new, and the question is whether on that assumption it is new.

The patent in the present case held good.

Per Smith, L.J.—The evidence of experts as to the construction of specifications is inadmissible except as to the meaning of scientific terms when they occur, or as to the working of mechanical appliances, or as to what such working will bring about.—*Gadd* v. *Mayor, &c., of Manchester*, C.A.—67 L. T. 569.

PENALTY:—

1. *Bond and interest—Judgment on bond—Penal sum—Interest beyond penal sum—Decree charging judgment on land "with interest until paid"—Sale of land under Incumbered Estates Court (Ireland)—Priorities of incumbrancers—Clerical mistake in judgment—Correction of error in judgment—Judicature Act (Ireland)* (40 & 41 *Vict. c.* 57), *s.* 25—*Rules of Court (Ireland)*, 1891, *ord.* 28, *r.* 11.—In 1842 a judgment was obtained by B. against a debtor upon a bond for £1,000 conditioned for payment of £500 and interest. A bill in equity having been filed by other judgment creditors, a decree was made in 1853 confirming the master's report that there was then due to B. under the judgment the sum of £500 with the interest then accrued, and declaring that that sum and the sums found by the master's report to be due to other creditors with interest "until paid" were well charged upon the debtor's lands. Part of the lands were sold in 1856 under an order of the Incumbered Estates Court (Ireland), but there were not sufficient funds to pay B. In 1891 moneys derived from the sale of lands being found in court to the credit of the cause, B.'s representative applied to have the principal and interest, then amounting to more than £1,000, paid out to him. The next incumbrancer objected that no more ought to be paid to the applicant than the penal sum, £1,000.

Held, that B.'s charge upon the lands ought not to have been extended beyond the penalty to the prejudice of a subsequent incumbrancer; that there was obviously in the decree of 1853 an error arising from an accidental omission, and that under order 28, r. 11, of the Rules of the Supreme Court (Ireland), 1891, the decree should, on a proper application, be corrected by inserting the words, "the principal sum and interest not to exceed the amount of the penalty on the bond."

The decision of the Irish Court of Appeal, 27 L. R. Ir. 512, affirmed.—*Hatton* v. *Harris*, H.L. (Ir.)—[1892] A. C. 547; 62 L. J. P. C. 24; 67 L. T. 722.

2. *Liquidated damages — Deposit — Purchase and sale—Payment of purchase-money by instalments — Payment made before agreement—Breach of contract to pay instalments — Breach of other stipulations—Money paid by purchaser for machine—Default by purchaser — Contract rescinded by vendor—Right of vendor to retain sums paid as liquidated damages.*—A written agreement for the sale of certain patent rights provided that the purchase-money should be £14,000, of which £1,400 was already paid at the date of the agreement, and the remainder was to be paid by instalments of £4,200 each on certain days, and it was a term of the agreement that the first two machines were to be furnished at net cost price, one half of such cost to be paid to the vendors when the machines were ordered, and the other half when they were ready for shipment. The agreement provided that if default should be made by the purchaser in the payment of any of the instalments at the stipulated times, or in case there should be a breach of any of the conditions mentioned in a clause of the agreement, then all payments made to the vendors should be absolutely forfeited to them as and by way of liquidated damages. The purchaser had paid the £1,400 as part of the purchase-money and also £450 for the machines, but, as he had made default in paying the first instalment, the vendors rescinded the contract and refused to supply the machines, and they claimed to retain the two sums paid to them as liquidated damages for breach of the contract.

Held, that, although the parties had used in their agreement the words "liquidated damages," the case came within the first class of cases mentioned by Jessel, M.R., in *Wallis* v. *Smith*, and was to be treated as a penalty only, and not as liquidated damages, and a reference was ordered as to the actual damage sustained by the vendors.—*Barton* v. *Capewell Continental Patents Co.*, Q.B.D.—68 L. T. 857.

PHARMACY ACTS:—

Sale of poison—Compound or medicine containing "poison"—"Patent medicine"—Pharmacy Act, 1868 (31 & 32 *Vict. c.* 121), *ss.* 1, 2, 15, 16.—By the Pharmacy Act, 1868, s. 2, certain articles specified in Part 2 of Schedule A to the Act, which include opium and all preparations of opium and chloroform, are deemed to be poisons within the meaning of the Act; and by sections 1 and 15 it is made unlawful for persons to keep open shop for the retailing, dispensing, or compounding poisons unless they are chemists or druggists, and duly registered under the Act, under a penalty of £5 for each offence. By section 16 nothing in the Act is to interfere with the dealing in "patent medicine."

The appellants, who were not qualified persons within the meaning of the Act, sold over the counter a half-ounce bottle of chlorodyne, a proprietary medicicine, which contained, amongst other ingredients, one grain of morphine, the active principle of opium, the evidence being that less than that quantity had been known to be fatal to an adult, but that, if taken according to the directions, the dose would not be so to an adult, but might be to an infant.

In an action against the appellants to recover a penalty under section 15 for a breach of the provisions of the Act,

Held, that, inasmuch as the article sold by them contained one of the scheduled poisons, it was a poison within the meaning of the Act, and it was immaterial that it did not consist, or was not compounded, of the scheduled poisons alone.

Held, also, that it was not a "patent" medicine within the exemption in section 16, which applied exclusively to medicines protected by the letters patent, and, therefore, that the appellants were liable to the penalty.—*Pharmaceutical Society* v. *Piper & Co.*, Q.B.D. 447—[1893] 1 Q. B. 686; 62 L. J. Q. B. 305; 68 L. T. 490.

PLEDGE:—

Detinue—Tender—Waiver.—In an action in detinue for the return of certain goods, Y. alleged that he had pledged the goods with B. to secure an advance. He subsequently requested B. to return the goods, as he had a purchaser for them. B. refused, alleging on his part that the goods had been sold to him. Y. did not tender the amount due under the pledge.

Held, that, assuming the transaction to have been one of pledge, in the absence of a waiver, tender and refusal of the amount due upon the pledge was a condition precedent to the right of action; that B.'s conduct did not amount to a waiver of tender; that his special property in the goods was not, therefore, determined; and that the action would not lie.—*Yungmann* v. *Briesmann*, C.A. 148—67 L. T. 642.

See also BANKER, 2-5; BILL OF SALE, 5; FACTOR.

POISON.—See PHARMACY ACTS.

POOR LAW:—

1. *Settlement — Apprenticeship — Instrument not under seal*—3 *W. & M.*, *c.* 11, *s.* 8—31 *Geo.* 2, *c.* 11, *s.* 1.—In order to acquire a settlement by apprenticeship in the place where the pauper was bound apprentice, it is not necessary for such apprentice to have been bound under a deed of indenture, since, under the provisions of 31 Geo. 2, c. 11, s. 1, amending 3 W. & M., c. 11, s. 8, a settlement by apprenticeship can be acquired under any deed, writing, or contract not indented, provided such has been first duly stamped, and the apprentice has resided forty days in the place where he was so bound.—*Guardians of Woodstock Union* v. *Guardians of Shipton-on-Stour*, Q.B.D.—62 L. J. M. C. 43; 68 L. T. 449.

2. *Settlement — Derivative settlement — Child under sixteen—Second marriage of mother—Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.—Under section 35 of the Divided Parishes Act, 1876, as interpreted by the House of Lords in *Guardians of Reigate Union* v. *Guardians of Croydon Union*, 14 App. Cas. 465, the children under sixteen years of age of a first marriage do not follow the settlement derived by their mother from a second marriage.—*Guardians of Llanelly Union* v. *Guardians of Neath Union*, Q.B.D.—[1893] 2 Q. B. 38; 62 L. J. M. C. 112.

3. *Settlement — Irremovability — Residence apart from parent while under sixteen*—11 & 12 *Vict. c.* 111—*Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 34.—A pauper resided in domestic service from the age of fourteen to the age of eighteen in a parish in the appellant union. Her father was dead, and her mother never resided nor had a settlement in the appellant union.

Held, that the proviso in section 1 of 11 & 12 Vict. c. 111 only applied to prevent the separation of families, and therefore did not apply where the pauper was residing apart from her parent; that the pauper acquired a *status* of irremovability by such residence while under sixteen; and that, accordingly, the period of residence under sixteen could be added to the period of residence over sixteen, so as to confer a settlement upon her under section 34 of the Divided Parishes Act, 1876.—*Guardians of West Ham Union* v. *Churchwardens, &c., of St. Matthew, Bethnal Green*, C.A. 182—[1892] 2 Q. B. 676; 62 L. J. M. C. 9; 67 L. T. 465.

4. *Treasurer to guardians—Services of treasurer gratuitous—Sum lost to guardians through failure of bank—Liability of treasurer for loss.*—The defendant had been appointed, and for some years had acted, as the treasurer of the plaintiffs; his services were gratuitous, and his duty was to receive all moneys tendered to be paid to the guardians and to pay thereout all orders drawn on him in respect of the union, and for the faithful performance of his duties he had given a bond with sureties. The accounts of the union were kept alternately at one bank for a year, and at another bank for the next year, and the account was entitled "C. Union," and into this account were paid direct all moneys received for rates, &c., and receipts countersigned by the defendant were given by the bank to the overseers. In an action by the guardians against the defendant to recover a loss caused by the failure of the bank,

Held, on the authority of the *Guardians of Halifax Union* v. *Wheelwright*, L. R. 10 Ex. 183, that the defendant was not liable to pay to the guardians the amount lost through the failure of the bank, whether the account were the guardians' account—which was found as a fact to be the case—or the defendant's account; and that, moreover, apart from that authority, the position of an honorary treasurer is analogous to that of a trustee

or receiver, and he would not be responsible for a loss incurred through no default of his own, but through the necessary employment of an ordinary mercantile agent.—*Colchester Union* v. *Moy*, Q.B.D.—68 L. T. 564.

POOR RATE:—

1. *Appeal—Poor rate made by vestry under provisions of local Act—Necessity for notice to the union assessment committee and failure to obtain relief*—6 & 7 *Will.* 4, *c.* 96, *ss.* 2 *and* 6—*Union Assessment Committee Act*, 1862 (25 & 26 *Vict. c.* 103), *ss.* 2, 14, 17, 24, 29—*Union Assessment Committee Amendment Act*, 1864 (27 & 28 *Vict. c.* 39), *s.* 1.—By 25 Geo. 3, c. xli. the vestry of Richmond were authorized and required to make rates for the relief of the poor, and in pursuance thereof they made a rate on the 5th of July, 1892, on a valuation in which the present applicant was assessed at £150 for each of two houses and shops which he occupied. In the valuation list prepared under the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), he was assessed at £102 only for each house and shop. He appealed against the vestry's rate to the magistrates at special sessions on the ground that he was over-rated.

The magistrates held that they had no jurisdiction to hear the appeal, as the appellant had not satisfied the requirements of section 1 of the Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), which enacts that "after the first day of August next no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just."

A rule *nisi* directed to the justices and to the vestry and churchwardens, &c., of Richmond having been obtained for a *mandamus* to compel the justices to hear and determine the applicant's appeal, it was

Held, that under the Act of 1836 (6 & 7 Will. 4, c. 96) an appeal lay from the vestry's rate to the justices at special sessions, which was in no way affected by section 1 of the Act of 1864 (27 & 28 Vict. c. 39), which applied only to valuations made under the Act of 1862 (25 & 26 Vict. c. 103); and the rule for the *mandamus* therefore was made absolute.—*Reg* v. *Price*, Q.B.D.—62 L. J. M. C. 71; 68 L. T. 171.

2. *Exemption—Crown property—Servants of the Crown—Occupation for Crown purposes—Volunteer corps—Storehouse for arms—Volunteer Act*, 1863 (26 & 27 *Vict. c.* 65), *s.* 26.—Premises occupied by a volunteer corps for the purpose of the service of the corps, and being reasonably necessary for such service, are occupied by servants of the Crown for the purposes of the Crown, and therefore are exempt from rates.

Therefore premises occupied by the commanding officer of a volunteer corps for the purpose of the service of the corps, and being reasonably necessary for such service, are exempt from rates, including both such part of the premises as is a storehouse for the depositing and safe keeping of arms, ammunition, and stores, within the meaning of section 26 of the Volunteer Act, 1863, and, therefore, exempted from rates by that section, and all such other parts of the premises as are reasonably necessary for the service of the corps.—*Pearson* v. *Assessment Committee of Holborn Union*, Q.B.D.—[1893] 1 Q. B. 389; 62 L. J. M. C. 77; 68 L. T. 351.

3. *Lunatic asylum—Rates charged by visiting committee on maintenance fund—Lunacy Act* 1890 (53 & 54 *Vict. c.* 5).—The visiting committee of a lunatic asylum paid the poor rates out of moneys in their hands and charged the amount to the maintenance fund. An order of the Local Government Board provided, in effect, for the payment of the rates out of the building and repair account. The auditor disallowed the payments, and surcharged the individuals who had made them.

Held, that the payment of rates was part of the expense of maintenance, and that the payment was not an illegal payment, and the surcharge was wrong.—*Reg.* v. *Dolby*, Q.B.D.—61 L. J. Q. B. 809; 67 L. T. 296.

4. *Occupier—Arrears—Application for distress warrant—Evidence of non-occupation—Conclusiveness of rate-book.*—A person summoned before justices to show cause why a warrant of distress should not issue for non-payment of a poor rate has a right to call evidence to show that, though his name appears on the rate-book as occupier of the premises rated, he is, in fact, a mere caretaker.—*Reg.* v. *Simmonds*, Q.B.D.—62 L. J. M. C. 106.

5. *Rateability—Sewage works—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 135, 150.—The appellants were the owners of certain sewage works, consisting of deodorizing and outfall works, pumping engines and machinery, constructed under the Metropolis Management Act, 1885.

Held, that such works were, by section 135 of that Act, placed on the same footing as sewers, and therefore, on the authority of *London County Council* v. *Churchwardens of West Ham*, 40 W. R. 659, [1892] 2 Q. B. 44, the appellants were not liable to be assessed to the poor rate in respect of the sewage works.—*London County Council* v. *Assessment Committee of Woolwich Union; Same* v. *Assessment Committee of St. George's Union*, C.A. 227—[1893] 1 Q. B. 210; 62 L. J. M. C. 136; 68 L. T. 71.

6. *Tenant for a term not exceeding three months—Rate made for period of a year—Claim to pay by instalments — Demand, sufficiency of — Poor Rate Assessment and Collection Act*, 1869 (32 & 33 *Vict. c.* 41), *s.* 2.—By the Poor Rate Assessment and Collection Act, 1869, "no such occupier"—that is, an occupier for a short term—"shall be compelled to pay to the overseers at one time or within four weeks a greater amount of the rate than would be due for one quarter of a year."

Held, that where any such occupier, after having been served with a demand in writing for the full amount of a rate, claims to pay under the section such rate by instalments, a distress warrant may be issued for non-payment of any such instalment upon proof that it was orally demanded by the overseers.—*Overseers of Walton-on-the-Hill* v. *Jones*, Q.B.D.—[1893] 2 Q. B. 175; 62 L. J. M. C. 123.

See also ARREST; LOCAL GOVERNMENT, 9.

POWER of APPOINTMENT:—

1. *Execution—Change of investment—Ademption of legacy—Breach of trust—Concurrence of married woman—Trustee Act*, 1888, *s.* 6.—The decision of Porter, M.R. (29 L. R. Ir. 156), affirmed by the Court of Appeal.—*Willett* v. *Finlay*, C.A. (Ir.)—29 L. R. Ir. 497.

2. *Execution—Covenant in marriage settlement that wife's power of appointment should be exercised only in favour of trustees—General testamentary power, exercise of—Specific performance—Damages—Liability of wife's executors.*—A marriage settlement

executed in 1867 contained covenants by the husband and wife that all the property which the wife, or her husband in her right, should at any time during the coverture become entitled to at law or in equity should be settled, and that any power or powers of appointment over any property whatsoever of which the wife might at any time during the coverture be the donee, under any settlement, will, or other instrument whatsoever, should, if executed by her, be executed only in favour of the trustees of the settlement. During the coverture the wife became, under the will of her father, who died in 1871, donee of a general testamentary power of appointment over a sum of stock. She died in June, 1892, having by her will, dated the 29th of March, 1889, executed the power, not in favour of the trustees of the settlement, but in favour, amongst others, of her husband, whom she appointed one of her executors, and who duly proved her will.

Held, that, although the cases showed that the court had gone a long way in enforcing, by way of specific performance, contracts to leave property by will, not one of them was a case of a contract to leave by will on the part of one who was merely donee of a testamentary power of appointment, and that specific performance ought not to be decreed in such a case; but that the trustees were entitled to recover, as damages against the wife's executors to the extent of her assets, the value of the property which would have come to the hands of the trustees if the covenant had been performed; and that the appointed fund was assets for the payment of her debts.—*In re Parkin, Hill* v. *Schwarz*, CH.D. STI., J. 120—[1892] 3 Ch. 510; 62 L. J. Ch. 55; 67 L. T. 77.

3. *Execution—Exercise of power subject to condition—Excess of power—Fraud on power—Hotchpot clause—Intention.*—A testator devised real estate on trust for sale and conversion, and directed a third of the proceeds of the sale to be held on trust for each of his daughters for her life, and after her death in trust for such of her children or their issue born in her lifetime as she should by will or deed appoint, and, failing any such appointment, in trust for all her children in equal shares. A general hotchpot clause followed. The testator then directed two other funds to be held by his trustees on the same trusts. One of the testator's daughters by will appointed part of the trust moneys to her two sons on condition that they should resign a benefit accruing to them under their father's will (whereby the residuary estate of the testatrix, which was given to a stranger, would be enlarged), and, failing their compliance with this condition, the testatrix appointed the fund to one of her daughters.

Held, that the appointment was a fraud on the power, and that the share must go as if unappointed.

Alexander v. *Alexander*, 2 Ves. sen. 640, discussed.

Held, also, that the testator's intention was not to create three funds, but one fund, and that, therefore, there was one general hotchpot clause applying to the whole share of the issue of testator's daughter in the moneys accruing to them under his will.—*In re Perkins, Perkins* v. *Bagot*, CH.D. NOR., J. 170—[1893] 1 Ch. 283; 62 L. J. Ch. 531; 67 L. T. 743.

3a. *Execution—General power of appointment—Exercise by will—Ineffectual appointment—Residuary bequest—Wills Act* (1 *Vict. c.* 26), *s.* 27.—By a settlement a general power of appointment over certain stocks, funds, and securities was given to P. W. E., and it was provided that in default of appointment the settled property should go to the next of kin of P. W. E. By his will, dated in 1866, P. W. E., after making an appointment of part of the property, appointed the residue to J. T. and R. S. upon trust to convert and pay certain legacies, and to pay the ultimate residue to E. T., if she should be living at the death of C. M. E., and he constituted H. J. E. S. his residuary legatee. E. T. survived P. W. E., but predeceased C. M. E.

Held, that H. J. E. S., the residuary legatee, was entitled to the ultimate residue of the settled property.

Re Spooner's Trust, 2 Sim. N. S. 129, followed.

Easum v. *Appleford*, 5 My. & Cr. 56, distinguished.—*In re Elen, Thomas* v. *McKechnie*, CH.D. STI., J.—68 L. T. 816.

4. *Married woman — Execution of power.* — A married woman had by her marriage settlement a power to appoint to children and grandchildren a sum of £2,000. By a post-nuptial settlement she had power to appoint a sum of £3,000 to the like objects. Her will contained no reference to either power, or to the funds, but simply bequeathed to four of her children sums of money which amounted in all to £2,000. She had no property at the time of her death except a small sum.

Held, that the will was not an exercise of the power.

Shelford v. *Acland*, 23 Beav. 10, considered.—*In re Herdman's Trusts*, M.R. (Ir.)—31 L. R. Ir. 87.

See also SETTLEMENT, 2; WILL, 21.

POWER of ATTORNEY:—

1. *Agreement for sale—Sale of business under power of attorney—Partnership—Specific performances—Waiver by purchaser.*—A., B., C., and D. traded under the firm of A. & Co. A., who lived abroad, gave a power of attorney to B., by which he authorized him to sell, or concur in selling, any of A.'s property by auction, or privately, upon such terms, subject to such conditions, and in such manner as B. should think fit. B., C., and D. agreed to sell the business as a going concern to H., B. signing as attorney for A. as well as on his own behalf. H. agreed to pay the debts of the business, which were estimated at £15,000; if they did not exceed that amount the vendors were to be entitled to a share of profits calculated on £5,000 "deferred capital"; if the debts exceeded £15,000, £5 for every £2 of the excess was to be deducted from the £5,000 deferred capital; the vendors might require H. to take over their deferred capital, paying in cash two-fifths of its nominal amount; if the concern was converted into a limited company, the vendors were to receive shares for their deferred capital; and if the debts were less than £15,000 H. was to pay the difference in cash at the end of two years. It was agreed that H. might carry on the business under the style of A. & Co., and that the vendors should not carry on any like business within fifty miles of K. H. brought an action for specific performance.

Held, by Romer, J., that the clause in restraint of trade was not authorized by the power of attorney; that the agreement, therefore, was not binding on A.; that this objection was not removed by H.'s offer to waive that clause; and that the action must be dismissed.

Held, on appeal, that the stipulations as to deferred capital did not constitute a partnership, but were only a mode of ascertaining the purchase money, and that the agreement, therefore, could not be held void as against A. on the ground that

the power of attorney did not authorise an agreement for a partnership.

Held, further, that, assuming the licence to trade under the name of A. & Co. and the agreement by the vendors not to trade to be unauthorized by the power of attorney, they were stipulations for the benefit of H. which he might waive, and, he having waived them, that specific performance ought to be decreed.

Semble, that the agreement by the vendors not to trade was authorized by the power of attorney, inasmuch as a going concern could not be sold to advantage without such a stipulation.

Whether the giving an authority to the purchaser to trade in the name of A. & Co. was within the power, *quære.*—*Hawksley* v. *Outram*, C.A.—[1893] 3 Ch. 359; 62 L. J. Ch. 215; 67 L. T. 804.

2. *Construction — Agent's authority — Bill of exchange.*—Where an agent is authorized by power of attorney to enter into contracts for (1) the purchase or sale of goods, (2) the chartering of vessels, and (3) the employment of agents and servants; and, as incidental thereto, or consequential thereon, to do certain specified acts and other acts of the same kind as those specified, such an authority does not confer upon the agent powers at large, but only the necessary powers, in addition to those named, which are requisite to carry into effect the declared purposes of the power of attorney.

An agent, borrowing money on behalf of his principal under such a power, would exceed his powers.

But should the agent do any act which is in itself warranted by the terms of the power used, then such act is binding on the principal as to all persons dealing in good faith with the agent, and they are not bound to inquire into the facts *aliunde.*

An agent indorsing bills of exchange "per pro," and getting them discounted by a bank in the ordinary course of business, is within the powers conferred on him, when the power of attorney given him specifically mentions the drawing and indorsing of bills on behalf of the principal; and this is so as to *bonâ fide* holders for value, though the agent abuse his authority.—*Bryant, Powis, & Bryant* v. *La Banque du Peuple*, P.C. 600—[1893] A. C. 70; 62 L. J. P. C. 68; 68 L. T. 546.

3. *Stock — Stockbroker — Payment on account by London stockbroker to country stockbroker— London stockbroker's liability to country customer—Foreign principal.*—The plaintiff, who lived abroad, being the owner of a sum of New Consols, gave to the defendants, a firm of stockbrokers in London, a power of attorney appointing one of the defendants his attorney to sell the Consols. The power of attorney was sent originally to the plaintiff's brother in England, and by him to C., a country stockbroker. C. sent it to the defendants, who were his London agents. The defendants sold the stock and credited C. with it in his account with them, and the sum went in reduction of sums due to them by him, or sums paid to C. by them. C. subsequently became bankrupt, and the plaintiff sued the defendants for the proceeds of the sale of the Consols, less commission.

Held, that the defendants were liable to refund the moneys to the plaintiff, as the crediting it in their account with their country client, C., was not a payment to the plaintiff; and that, though the power of attorney to sell came to them through C., the defendants were not entitled to treat the plaintiff as a foreign principal, and so to act as if C. only were their principal.—*Crossley* v. *Magniac*, CH.D. ROM., J. 598—[1893] 1 Ch. 594; 67 L. T. 798.

PRACTICE:—

APPEAL—

1. Habeas corpus—*Appeal against issue of writ—Excuse for non-compliance with writ—Judicature Act*, 1873, *s.* 19.—An appeal lies to the Court of Appeal against an order for the issue of a writ of *habeas corpus*, but the order should not be set aside unless, in the opinion of the court, there are unquestionably no grounds for its issue.

The appellant, without authority from the parent, who had placed her child in his institution, handed over the child to a gentleman to be taken to Canada. This, it appeared, had taken place before the application by the parent for a writ of *habeas corpus*, and the appellant alleged that it was impossible for him to find the child.

Held, affirming the decision of the Court of Appeal (reported 38 W. R. 315, 24 Q. B. D. 283), that the writ ought to issue, so that the facts might be further inquired into.

The law as laid down in *Reg.* v. *Barnardo, Tye's case*, 37 W. R. 789, 23 Q. B. D. 305, as to what is a valid excuse for not producing a person in obedience to a writ of *habeas corpus*, discussed and disapproved by Lord Halsbury, L.C., and by Lords Watson, Herschell, and Hannen. — *Barnardo* v. *Ford, Gossage's case*, H.L. (E.) 333—[1892] A. C. 326; 61 L. J. Q. B. 728; 67 L. T. 1.

2. *Interpleader—Decision in summary manner—Common Law Procedure Act*, 1860 (23 & 24 *Vict. c.* 126), *s.* 17—*Ord.* 57, *rr.* 9, 11.—Where, upon an interpleader summons, the question is one of law, and the judge decides it under ord. 57, r. 9, without directing an issue or a special case, his decision is a decision in a summary manner, and is final and conclusive, and there is no power to give leave to appeal. *In re Tarn*, C.A. 397—[1893] 2 Ch. 280; 62 L. J. Ch. 564; 68 L. T. 311.

3. *Motion to vary minutes—Refusal of judge.*—The minutes of an order made in the trial of an action as settled by the registrar did not mention certain documents which the plaintiff contended were admitted during the trial. The judge refused to alter the minutes, and the plaintiff appealed.

Held, that the Court of Appeal would not entertain an appeal from the decision of a judge with reference to the minutes of his order.

Held, also, that the proper course for the plaintiff was to give notice to the respondents that at the hearing of the appeal he would apply to the court for leave to read the documents.—*James* v. *Jones*, C.A.—67 L. T. 584.

4. *Pauper — Application to appeal* in formâ pauperis—*Court to which application should be made.*—Where a party who has not sued or defended as a pauper in the court below desires to appeal *in formâ pauperis*, the application for leave should be made *ex parte* to the Court of Appeal, and the court will require the provisions of ord. 16, rr. 22-24, to be followed upon such application.—*Ex parte Goldberg*, C.A. 210—[1893] 1 Q. B. 417; 62 L. J. Q. B. 127; 68 L. T. 142.

5. *Prohibition—County court—Appeal—Refusal to grant writ of prohibition—Jurisdiction of Court of Appeal—Jurisdiction of judge of the Admiralty Division—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 132.—By section 132 of the County Courts Act, 1888, "When the High Court, or a judge thereof, shall have refused to grant a writ of *certiorari* or prohibition to a court, . . . no other court or judge shall grant such writ, but nothing herein shall affect the right of appealing

from the decision of the judge of the High Court to the High Court itself."

Held, that this section only applied to proceedings in the High Court, and did not prevent an appeal to the Court of Appeal from the refusal of the High Court to grant a writ of prohibition to a county court.

A judge of the Admiralty Division has jurisdiction to grant a writ of prohibition; and, therefore, where a judge of that division, while sitting in chambers in vacation to hear applications from all divisions of the High Court, refused to grant a writ of prohibition to a county court in an admiralty cause, the court held that he was acting as a judge of the Admiralty Division, and that, therefore, upon his certifying that he did not desire to hear further argument in court, an appeal lay direct to the Court of Appeal, and not to a divisional court of the Queen's Bench Division.—*The Recepta*, C.A. 561.

6. *Special case stated by arbitrator—Judicial decision—Consultative opinion—Right of appeal to the Court of Appeal—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 19.—The Court of Appeal has no jurisdiction to entertain an appeal from an opinion of the High Court of Justice on a question submitted to it by an arbitrator under section 19 of the Arbitration Act, 1889, such opinion not being a judicial decision, but merely consultative.—*In re Knight and The Tabernacle Permanent Building Society*, C.A. 35—[1892] 2 Q. B. 613; 62 L. J. Q. B. 33; 67 L. T. 403.

7. *Stamp—Sufficiency of—Document—Ruling of judge—Trial without jury—Right of appeal—Ord.* 39, *r.* 8.—The ruling of a judge at the trial of an action, whether with or without a jury, that a document offered in evidence is sufficiently stamped is not subject to review in the Court of Appeal.—*Blewitt* v. *Tritton*, C.A. 36—[1892] 2 Q. B. 327; 61 L. J. Q. B. 773; 67 L. T. 802.

ATTACHMENT—

8. *Discharge from custody—Contempt—Obedience to the order*—Ex parte *motion—Ord.* 44, *r.* 2; *ord.* 65, *r.* 1.—A defendant had been attached and committed to prison for contempt in disobeying an order to attend before an examiner, but afterwards under a writ of *habeas corpus ad test.*, sued out by him in prison, submitted to attend before the examiner, and was examined accordingly.

On motion *ex parte* for the defendant's discharge from custody,

Held, that a motion for his discharge could not be made *ex parte*, but only on notice to the plaintiff, on the ground that the plaintiff was entitled to be present so as to insure that all costs to which he was entitled were included in the order for discharge.—*In re Evans, Evans* v. *Noton* (*No.* 2), CH.D. KEK., J.—68 L. T. 324.

9. *Irregularity—Motion—Name of wrong judge—Affidavits—Service—Condonation — Ord.* 52, *r.* 4; *ord.* 70, *r.* 1.—A motion for attachment was marked with the name of the wrong judge in the Chancery Division.

Held, that it was a mere irregularity which could be amended.

No affidavits were served with the notice of motion for attachment. The defendant had seen copies of the affidavits subsequently to the service of the notice of motion, and had answered them.

Held, that this objection was fatal, and that the court would not in such a case condone the irregularity.—*Taylor* v. *Roe*, CH.D. KEK., J.—62 L. J. Ch. 391; 68 L. T. 213.

10. *Notice of motion for leave to issue writ—Service of notice where no appearance entered—Filing at Central Office—Rules of Supreme Court*, 1883, *ord.* 44, *r.* 2; *ord.* 67, *r.* 4.—A notice of motion for leave to issue a writ of attachment is sufficiently served, where the party against whom the attachment is to issue has not entered any appearance, by filing it with the proper officer, pursuant to ord. 67, r. 4, of the Rules of the Supreme Court, 1883.

Decision of Kekewich, J., affirmed.

In re Morris, Morris v. *Fowler*, 38 W. R. 522, 44 Ch. D. 151, followed.—*In re Evans, Evans* v. *Noton*, C.A. 230—[1893] 1 Ch. 252; 62 L. J. Ch. 413; 68 L. T. 271.

CHANGE OF SOLICITOR—

11. *Costs—Omission to file notice of change at Central Office—Ord.* 7, *r.* 3.—After an action had been set down for trial the defendant changed his solicitor, but did not file notice of the change at the Central Office. At the trial the defendant succeeded.

Held, that the defendant was not thereby disentitled to his costs.—*Norris* v. *Bailey*, Q.B.D.—62 L. J. Q. B. 338.

CHARGING ORDER—

12. *Shares—Director of company—Shares held for purpose of qualification—"In his own right"*—1 & 2 *Vict. c.* 110, *s.* 14.—Shares standing in the name of a judgment debtor in the books of a company cannot be made the subject of a charging order if he is not the beneficial owner of them, but is merely registered as owner for the purpose of qualifying as a director of the company.

Pulbrook v. *Richmond Consolidated Mining Co.*, 27 W. R. 377, 9 Ch. D. 610, commented on and followed.—*Howard* v. *Sadler*, Q.B.D. 126—[1893] 1 Q. B. 1; 68 L. T. 120.

13. *Shares—Discretion of judge—Interest of debtor in shares of no value*—1 & 2 *Vict. c.* 110, *s.* 14—3 & 4 *Vict. c.* 82, *s.* 1.—Under section 1 of 1 & 2 Vict. c. 110, which says that "it shall be lawful" for a judge to make a charging order upon shares belonging to a judgment debtor, the judge has a discretion whether he will make such an order or not, and he may refuse to make an order upon the ground that the shares are of no value.—*Wicks* v. *Shanks*, C.A.—67 L. T. 609.

14. *Shares—Order* nisi—*Application before master to discharge order—No jurisdiction*—1 & 2 *Vict. c.* 110, *ss.* 14, 15—*Ord.* 46, *r.* 1; *ord.* 54, *r.* 12.—A master having once granted a charging order *nisi* upon shares in a public company upon an *ex parte* application under 1 & 2 Vict. c. 110, ss. 14, 15, is *functus officio*, and, except by consent, has no jurisdiction to discharge it.—*Mitchell* v. *De Vesey*, Q.B.D.—67 L. T. 53.

COSTS—

15. *County court—Action on contract—Claim over £50—Set-off—Verdict for sum over £50—Set-off afterwards ascertained—Judgment for balance under £20—Amount "recovered"—Action "which might have been commenced in county court"—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 57, 116.—In an action on contract to recover £175, tried by a judge without a jury, a verdict was found for the plaintiff for £76, subject to a set-off which was afterwards ascertained to be £63, and judgment was given for the plaintiff for the difference between these sums—that is, for the sum of £12. Upon the question of costs, the learned judge having decided to deal with the costs as if the case had been tried before a jury, and the objection having been taken by the defendant that, as the plaintiff had recovered less than

£20, he was deprived of his costs by section 116 of the County Courts Act, 1888.

Held, that the sum "recovered" by the plaintiff was not the £76 for which the verdict was given, but the balance of £12 for which judgment was given; yet, as there was no admitted set-off within section 57 of the Act, which must be a set-off admitted by both parties; and as, consequently, the action was one—being for a sum of over £50—which could not have been commenced in a county court, section 116 did not apply to deprive the plaintiff of his costs, as the words in that section, "action which could have been commenced in a county court," govern the whole section.—*Goldhill* v. *Clarke*, Q.B.D.—68 L. T. 414.

16. *County court—Certificate—Action of tort brought in High Court—Judgment in default of pleading—Assessment of damages by under-sheriff—Power of under-sheriff to certify for costs on High Court scale—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.—An under-sheriff, before whom damages are assessed in an action brought in the High Court under a judgment signed in default of pleading, has no power to certify for costs on the High Court scale under section 116 of the County Courts Act, 1888, such power being now, under that section, exercisable only by the High Court, or a judge of the High Court.—*Cox* v. *Hill*, Q.B.D.—67 L. T. 26.

17. "*Good cause*"—*Discretion of court over costs—Trial with jury—Ord.* 65, *r.* 1.—The plaintiff brought an action to recover damages for breach of contract to put the drains of a house, which he agreed to take on lease from the defendants, into sound condition. Shortly after the plaintiff had gone into occupation of the house some members of his family became ill with scarlet fever. The plaintiff, acting upon the opinion of his medical man, alleged that the scarlet fever was caused by the defective condition of the drains, and claimed, in addition to the cost of putting the drains into sound condition, £366 19s. as special damage in respect of the expenses of medical attendance, medicine, and nurses, the cost of disinfection of the house and furniture, and the cost of houses to which the plaintiff's family and household were removed, and expenses of removal. The jury found that the drains were not in sound condition, but that the scarlet fever was not caused by their defective condition, and awarded the plaintiff £12 12s., the amount expended in making good the defects therein. The judge having ordered the plaintiff to pay the costs occasioned by the claim in respect of the above items of special damage,

Held, that, though this claim was not an issue in the strict sense of the term, it was a separate head of claim involving a distinct class of evidence, and that it was not fair to the defendants to make them pay the costs of resisting it, and that, therefore, "good cause" for making the order existed.—*Forster* v. *Farquhar and Others*, C.A. 425—[1893] 1 Q. B. 564; 62 L. J. Q. B. 296; 68 L. T. 308.

18. "*Good cause*"—*Discretion of court over costs—Trial with a jury—Oppression—Ord.* 65, *r.* 1.—The plaintiff brought an action for damages for a libel published in the *Star*. The *Times* had published a letter signed by the plaintiff, and in the same issue a leading article thereon, and a few days after a letter from someone else upon the subject of the letter. The *Star* thereupon published the article complained of, commenting upon what had appeared in the *Times*, and making a personal attack upon the plaintiff.

The defendants pleaded that their article was fair comment upon a matter of public interest. The jury found a verdict for the plaintiff with one shilling damages. The court was of opinion that it was obvious that the letter was not really written by the plaintiff, but that she had allowed her name to be used for the purpose of raising a political controversy and injuring political opponents.

Held, that it was, under these circumstances, oppression on the part of the plaintiff to bring the action, and that there was, therefore, good cause for which the judge might, in the exercise of his discretion, deprive the plaintiff of costs.—*O'Connor* v. *Star Newspaper Co.*, C.A.—68 L. T. 146.

19. *Refresher fees—Taxation—R. S. C., ord.* 65, *r.* 27 (48).—By ord 65, r. 27 (48), where a cause is tried upon *vivâ voce* evidence in open court, "if the trial shall extend over more than one day, and shall occupy, either on the first day only, or partly on the first and partly on a subsequent day or days, more than five hours, without being concluded, the taxing officer may allow for every clear day subsequent to that on which the five hours shall have expired" refresher fees to counsel.

Held, that, when a trial has not occupied five hours on the first day, but on the second day the five hours are completed and a further period is occupied on that day before the case is concluded, a "clear day" begins after the expiration of the five hours, and refresher fees may be allowed in respect of the further period of work done on the second day.

Walker v. *The Crystal Palace District Gas Co.*, 39 W. R. 716, [1891] 2 Q. B. 300, not followed.

The Courier, 40 W. R. 336, [1891] P. 355; *Gibbs* v. *Barrow*, 30 S. J. 538; and *Collins* v. *Worley*, 60 L. T. N. S. 748, 37 W. R. Dig. 58, approved.—*O'Hara, Matthews, & Co.* v. *Elliott & Co.*, Q.B.D. 248—[1893] 1 Q. B. 362; 62 L. J. Q. B. 317; 68 L. T. 166.

20. *Trustee—Appeal—Jurisdiction—Charges and expenses—Ord.* 65, *r.* 1—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 49.—A trustee of real estate unsuccessfully defended a common law action of detinue of title deeds brought by the legal tenant for life of the estate, and was ordered as defendant to pay the costs of the action. The trustee subsequently took out an originating summons in the Chancery Division for administration of the trust estate, in which he asked for, and obtained from the judge by whom the administration proceedings were heard, an order authorizing payment to him out of the trust estate of all the costs in the common law action.

Held, that the costs of the common law action were not, and could not be dealt with as, "costs" in the administration proceedings, but could only in the administration proceedings be dealt with as "charges and expenses"; that the order of the judge in the administration proceedings was therefore not an order as to "costs only," which by ord. 65, r. 1, and section 49 of the Judicature Act, 1873, would be within his unappealable discretion; and, accordingly, that a right of appeal lay on the part of the beneficiaries from the above order.

Charles v. *Jones*, 35 W. R. 88, 33 Ch. D. 80, discussed.

In re Chennell, Jones v. *Chennell*, 26 W. R. 595, 8 Ch. D. 492, approved.

Held, also (varying the decision of Kekewich, J.), that the trustee was not entitled, and ought not, to be recouped out of the trust estate all the costs of the common law action, inasmuch as a trustee was only entitled to be indemnified out of his trust estate against all costs, charges, and expenses reasonably, as well as honestly, incurred.—*In re*

Beddoe, Downes v. *Cottam*, C.A. 177—[1893] 1 Ch. 547; 62 L. J. Ch. 233; 68 L. T. 595.

See also PRACTICE, 51, 52.

COUNTER-CLAIM—

21. *Dismissal of action for want of prosecution—Counter-claim—Default of reply thereto—R. S. C.*, 1883, *ord.* 21, *r.* 16; *ord.* 23, *r.* 4; *ord.* 27, *r.* 11.—The defendant to an action delivered a counter-claim. The action was dismissed for want of prosecution, the plaintiff having failed to deliver a reply.

Held, that, under ord. 27, r. 11, the defendant was entitled to set down the action on motion for judgment on his counter-claim.—*Roberts* v. *Booth*, CH.D. NOR., J. 220—[1893] 1 Ch. 52; 67 L. T. 646.

DEFAULT—

22. *Default of defence—Motion for judgment—Jurisdiction of court to order interlocutory judgment—Ord.* 27, *r.* 11.—Upon motion for judgment under ord. 27, r. 11, upon default in delivery of defence, the court or a judge may order interlocutory judgment to be entered, and may refer the whole claim to an official referee to ascertain and report to the court the amount due to the plaintiff.—*Charles* v. *Shepherd*, C.A.—[1892] 2 Q. B. 622; 61 L. J. Q. B. 768; 67 L. T. 67.

DISCOVERY—

23. *Documents — Affidavit — Interrogatories — R. S. C.*, 1883, *ord.* 31, *rr.* 1, 12.—An action was brought by the Attorney-General at the relation of numerous tramcar manufacturers to restrain a tramway company incorporated by Act of Parliament from manufacturing and supplying rolling stock to other companies by means of capital not authorized to be so applied.

The court refused to order the defendants to make an affidavit of documents; but allowed the plaintiffs to interrogate as to what capital the defendants were employing in such manufacture.—*Attorney-General* v. *North Metropolitan Tramways Co.*, CH.D. NOR., J.—[1892] 3 Ch. 70; 61 L. J. Ch. 693; 67 L. T. 283.

24. *Documents—Affidavit—Motion to remove trade-mark—Ord.* 31, *r.* 12.—In an application to remove trade-marks from the register after all the evidence had been put in except the cross-examination of two witnesses which was to take place in court, Kekewich, J., made an order that a member of the firm should make an affidavit of documents, the member to be examined in court, and that it should suffice, as regards each class of labels or documents, to mention a specimen fairly representative of the whole.

Held, on appeal, that the order was oppressive at that stage of the proceedings, and that the order must be discharged without prejudice to any order which the judge at the trial might think fit to make as to production of documents.—*In re Wills' Trade-Marks*, C.A.—[1892] 3 Ch. 201; 67 L. T. 453.

24a. *Documents—Affidavit—Sufficiency — Production of documents — Privilege — Documents relating solely to the case of the party claiming privilege.*—In an action of trespass, to which the defence pleaded was a right of way, the plaintiff made an affidavit of documents in the following terms:—"I have in my possession or power certain documents numbered 1 to 26 inclusive, which are tied up in a bundle marked A, and initialed by me; the said documents relate solely to the title or to the case of the plaintiff, and not to the case of the defendant, nor do they tend to support it, wherefore the plaintiff objects to produce the same, and says they are privileged from production."

Held, that the affidavit sufficiently described the documents so as to enable the court, if it thought fit so to do, to enforce production; and, consequently, that the affidavit was sufficient.

Taylor v. *Batten*, 27 W. R. 106, 4 Q. B. D. 85, followed.

Held, also, that the documents so described were privileged from production; and that the fact that the affidavit stated that the documents related to the case as well as to the title of the plaintiff, and omitted to state that the documents contained nothing impeaching the case or title of the plaintiff, did not render the affidavit insufficient for the purpose of supporting the plaintiff's claim of privilege from production.

Bewicke v. *Graham*, 29 W. R. 436, 7 Q. B. D. 400, followed.

McLean v. *Jones*, 66 L. T. N. S. 653, 40 W. R. Dig. 182, not followed.—*Budden* v. *Wilkinson*, C.A. 657.

25. *Documents—Privilege—Bankruptcy—Examination by solicitor of trustee in bankruptcy—Transcript of notes of examination—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 27.—A trustee in bankruptcy had, under section 27 of the Bankruptcy Act, 1883, obtained an order for the examination of certain persons, including the bankrupt and the manager of a bank with whom the bankrupt had entered into an arrangement in reference to his business, and had obtained a transcript of the shorthand notes of the examination by his solicitor of those persons. He subsequently brought an action against the bank to set aside the arrangement, and in that action he made the usual affidavit of documents, in which he objected to produce the transcript, on the ground that it had "come into existence for the purpose of furnishing to his solicitors evidence to be used in this litigation, or information which might lead to the obtaining of such evidence for the use of his solicitors, to enable them to conduct this litigation and advise him in reference thereto."

Held, that the transcript was a privileged document.—*Learoyd* v. *Halifax Joint-Stock Banking Co.*, CH.D. STI., J. 344—[1893] 1 Ch. 686; 62 L J. Ch. 509; 68 L. T. 158.

25a. *Documents—Privilege—Action for negligence—Report of accident made by defendants' servant.*—An accident, upon which the plaintiff subsequently founded an action for negligence against the defendants, occurred about six o'clock in the evening, and on the following day a written report thereof was made by the defendants' servant, at a time when no action had been commenced or even threatened.

Privilege from inspection was claimed for this report, on the ground that it had been made or had come into existence solely for the use of the defendant company's solicitor, in anticipation of this action, to advise the company in reference thereto.

Held, that, though there was at the time of the making of the report no action begun or even threatened, the circumstances of the case were such as to raise a high probability, amounting almost to a certainty, that litigation would ensue, and that the report, having come into existence, in view of litigation reasonably apprehended, for the purpose of being laid before the defendants' professional adviser, was privileged from inspection by the other side.—*Collins* v. *London General Omnibus Co.*, Q.B.D.—68 L. T. 831.

26. *Documents—Taking photographs of documents—Ord.* 31, *r.* 14; *ord.* 50, *r.* 3.—The court has power to allow a party to an action to take photographs of documents in the possession of the other party.—*Lewis* v. *Earl of Londesborough*, Q.B.D.—[1893] 2 Q. B. 191; 62 L. J. Q. B. 452.

27. *Interrogatories—Exhibited unreasonably—Prolix or unnecessary—Power to set aside or strike out part of a set—Ord.* 31, *r.* 7.—Ord. 31, r. 7, deals with two cases—first, where interrogatories are exhibited which are in themselves unobjectionable, but, by reason of the circumstances of the case, it would be unreasonable or vexatious to call upon the party interrogated to answer them; secondly, where interrogatories are in themselves objectionable by reason of being prolix, oppressive, unnecessary, or scandalous. In the first case, all or any of the interrogatories may be set aside by a judge's order; in the second case, all or any may be struck out.

Where any party objects to answer interrogatories on any of the grounds mentioned in rule 7, he is entitled to apply for an order under the rule, and cannot be required to take his objection in his affidavit in answer.

The fact that leave has been obtained to administer interrogatories is not a bar to an application under either part of the rule.

If the judge considers a set of interrogatories to be as a whole prolix, oppressive, or unnecessary, he has power to strike them all out, though some of them may be unobjectionable.

McIlroy v. *Duncan*, W. N., 1884, p. 48, and *Sammons* v. *Bailey*, 38 W. R. 605, 24 Q. B. D. 727, overruled.—*Oppenheim* v. *Sheffield*, C.A. 65—[1893] 1 Q. B. 5; 62 L. J. Q. B. 167; 67 L. T. 606.

EXECUTION—

28. *Dormant action—Notice to proceed—Application for leave to issue writ of sequestration—R. S. C.*, 1883, *ord.* 42, *rr.* 22, 23; *ord.* 64, *r.* 13.—Ord. 64, r. 13, does not apply to the issue of execution; and therefore it is not necessary, in an action in which no proceeding has been had for one year, to give a month's notice of intention to proceed prior to the issue of execution.—*Taylor* v. *Roe* (*No.* 2), CH.D. KEK., J.—62 L. J. Ch. 391; 68 L. T. 253.

29. *Judgment debtor—Examination—Property or means of satisfying judgment—Ord.* 42, *r.* 32.—Ord. 42, r. 32, provides that a judgment debtor may be examined "as to whether any and what debts are owing to the debtor, and whether the debtor has any and what other property or means of satisfying the judgment."

A judgment debtor had deposited, before the judgment was obtained, with the judgment creditor a debenture bond of a company, payable to bearer, for £1,000 as security for the sum of £300, and the judgment creditor had commenced an action against the company to recover the amount of the bond. The company obtained leave to defend that action. The judgment was for £600, and the judgment creditor obtained an order for the examination of the debtor under ord. 42, r. 32. The debtor refused to answer certain questions as to the validity of the bond, and the judge at chambers and the court refused to order him to answer those questions. The judgment creditor appealed.

Held, that the interest of the judgment debtor in the bond was property of the debtor within the meaning of ord. 42, r. 32, as to which he could be examined, but that the appeal must dismissed, the judge and the court having refused, in the exercise of their discretion, to order the debtor to answer these questions.—*Watkins* v. *Ross*, C.A.—68 L. T. 423.

See also PRACTICE, 49.

INJUNCTION—

30. *Undertaking as to damages—Interlocutory injunction—Restraining sale of shares—Dismissal of action at trial—Measure of damages.*—The plaintiff, claiming certain shares as his property, obtained, on giving the usual undertaking as to damages, an interlocutory injunction restraining the shareholder and his mortgagees from parting with the shares.

Before the trial a summons by the mortgagees, asking that the shares might be sold and the proceeds paid into court, was successfully opposed by the plaintiff and the shareholder. At the trial the action was dismissed.

Held, that, in ascertaining the amount of damages under the undertaking, all the facts must be considered, including the fluctuations of the market during the continuance of the injunction; and that the amount payable by the plaintiff was not the difference between the price of the shares when the action was dismissed and the highest price at which they had been quoted during that period, but the difference between the price when the injunction was granted and the price when the summons asking for a sale was issued.—*Mansell* v. *British Linen Co. Bank*, CH.D. ROM., J.—[1892] 3 Ch. 159; 61 L. J. Ch. 696; 67 L. T. 171.

31. *Undertaking as to damages—Corporation—Interlocutory injunction.*—Where an *interim* injunction is granted at the instance of a corporation, the court will in a proper case allow the usual undertaking in damages to be given by the corporation itself, and not require the undertaking to be given by some responsible individual on behalf of the corporation; and the same practice may apply where the plaintiff is a local board.—*East Molesey Local Board* v. *Lambeth Waterworks Co.*, CH.D. KEK., J.—[1892] 3 Ch. 289; 62 L. J. Ch. 82; 67 L. T. 493.

32. *Undertaking as to damages—Interlocutory injunction—Married woman—Sufficiency of undertaking.*—Where an interlocutory injunction is granted upon the application of a married woman her sole undertaking as to damages is sufficient.

A married woman living and carrying on business apart from her husband brought her action for specific performance of an alleged agreement to grant a lease, and moved for an interlocutory injunction to restrain the defendant from dealing with the property. The defendant alleged that the plaintiff had not sufficient separate property to satisfy her present liabilities, and that her undertaking in damages would be illusory, and asked for the undertaking of some responsible person.

Held, that, since a married woman was for the purpose of suing in the same position as a *feme sole*, no distinction could be made between her and a male plaintiff; and that, therefore, her sole undertaking for damages was sufficient.—*Pike* v. *Cave*, CH.D. KEK., J.—68 L. T. 650.

33. *Undertaking as to damages—Form of order—Interlocutory injunction.*—The defendants in an action for the alleged infringement of a patent moved for an injunction to restrain the plaintiff until the trial of the action or further order from continuing the publication of newspaper advertisements threatening legal proceedings or liability in respect of any manufacture, use, sale, or purchase of the patented articles. On the 12th of May an injunction was granted. The registrar prefaced the order by an undertaking in damages on the part of

the defendants in the ordinary form. The defendants now moved to vary the minutes of the order by omitting the undertaking as to damages.

Held, that the object in insisting on an undertaking as to damages is, that if, from the court not knowing all the facts, it turns out that an injunction was granted on an interlocutary application which ought not to have been granted, then the respondent is entitled to compensation; and that, the order being in the nature of a final order, an undertaking as to damages ought not to be inserted.—*Fenner* v. *Wilson & Co.*, CH.D. KEK., J.—[1893] 2 Ch. 656; 68 L. T. 748.

INTERPLEADER—

34. *Affidavit by sheriff—Costs of—Application by sheriff for interpleader summons—R. S. C.*, 1883, *ord.* 57, *rr.* 2, 16, 17.—In applying for an interpleader summons a sheriff need not, as a general rule, file an affidavit in support of his application, such affidavit being wholly unnecessary, and if he does so file an affidavit he will not be entitled to the costs of the same.

His proper course is to wait and see if an affidavit is necessary, in which case he can ask for and obtain an adjournment for an affidavit to be filed. —*Stocker* v. *Heggarty*, Q.B.D.—67 L. T. 27.

35. *Collusion—Interest in subject-matter—R. S. C.*, 1883, *ord.* 57, *r.* 2 (a), (b).—Where an applicant for relief by way of interpleader, though he does not claim any specific portion of the sum in dispute, has agreed with one of the claimants to do what he can to oppose the claim of the other, he claims an interest in the subject-matter in dispute within ord. 57, r. 2 (*a*), and he "colludes" with one of the claimants within r. 2 (*b*), and cannot apply for relief. —*Murietta* v. *South American, &c., Co.*, Q.B.D.—62 L. J. Q. B. 396.

JOINDER OF ACTIONS—

36. *Action for recovery of possession of premises for breach of covenant—Claim for injunction—Joinder of separate causes of action—Leave of court—R. S. C., ord.* 18, *r.* 2; *ord.* 36, *r.* 58.—A writ was issued claiming (1) recovery of possession of premises, (2) arrears of rent and mesne profits, (3) an injunction to restrain nuisance or damage, (4) damages, and (5) costs. The defendants entered an appearance and served notice of motion asking that the writ might be set aside, on the ground that the leave of the court had not been obtained for the joinder of the two causes of action relating (1) to the injunction, and (2) to the recovery of possession of the premises.

Held, that though a perpetual injunction might be relief inconsistent with the terms of ord. 18, r. 2, yet an interlocutory injunction was within the terms of the rule, being a substitute for damages which might be assessed for the continuing breach between the issue of the writ and the trial of the action.—*Read* v. *Wotton*, CH.D. STI., J. 556—[1893] 2 Ch. 171; 62 L. J. Ch. 481; 68 L. T. 209.

37. *Claim against executor as such—Claim against executor for personal wrong—Right to join such claims—Ord.* 18, *r.* 5.—The earlier paragraphs of a statement of claim in an action against executors alleged that, in consideration of certain services which the plaintiff performed for their testator in his lifetime and at his request, the testator had promised the plaintiff to bequeath him the sum of £5,000, but that the testator had not done so. Then came two paragraphs claiming the same sum in the alternative, as against the defendants personally, on the ground that the defendants had, by undue influence and fraud, induced the testator to break his contract with the plaintiff as to leaving the plaintiff the above sum.

Held, that these two paragraphs, as they showed a cause of action against the defendants in their private capacity, and without any reference to the estate of the testator, could not, under ord. 18, r. 5, be joined with the claim against the executors as such.—*Whitworth* v. *Darbishire*, Q.B.D. 317—68 L. T. 216.

JUDGMENT—

38. *Joint debt—Summons under order* 14—*Judgment against one defendant—Leave to other defendant to defend—Part payment of debt by the one defendant —Plea of* res judicata *by the other—Ord.* 14, *r.* 5.—In an action against two defendants to recover a debt in which one defendant submits to judgment and pays part of the debt, but the other defendant obtains leave to defend upon a summons under order 14, the plaintiff may, under ord. 14, r. 5, proceed with the action against the remaining defendant, and on obtaining judgment may issue execution for so much of the debt as remains unpaid.—*Weall* v. *James*, C.A.—68 L. T. 515.

PARTICULARS—

39. *Order for particulars—Non-compliance—Order to dismiss action if particulars not delivered within certain time—Ord.* 19, *r.* 7—*Action shown by particulars to be frivolous or vexatious—"The pleadings" —Ord.* 25, *r.* 4.—An order made on a plaintiff to deliver particulars of his claim under ord. 19, r. 7, may include the term that the action shall be dismissed unless the particulars are delivered within a certain time.

Semble, the words "the pleadings" in ord. 25, r. 4, include particulars.—*Davey* v. *Bentinck*, C.A. 181 —[1893] 1 Q. B. 185; 62 L. J. Q. B. 114; 67 L. T. 742.

PARTIES—

40. *Action for the recovery of land—Title of plaintiff—Equitable title—Person in whom legal estate vested not a party—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-sections* 1 *and* 4; *s.* 25, *sub-section* 11.—A person who seeks to recover possession of land upon an equitable title must make the person in whom the legal estate is vested a party to the action.—*Allen* v. *Woods*, C.A.—68 L. T. 143.

40a. *Death of one of several defendants—Change of parties—Action remitted to county court—Application by administrator of deceased defendant to High Court—Summons to proceed or dismiss—Jurisdiction of High Court—Validity of order of remitter—R. S. C.*, 1883, *ord.* 17, *r.* 8—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 65.—An action was brought in the High Court against several defendants, whom it was sought to make severally liable on a contract. One of the defendants having died, the plaintiffs obtained an order remitting the action to the county court under section 65 of the County Courts Act, 1888. The action was tried in the county court against the other defendants, and judgment was given in their favour. The administrator of the deceased defendant applied to the High Court under ord. 17, r. 8, for an order that the plaintiffs might be compelled to proceed with the action against him, or that, in default, the action might be dismissed against him.

Held (affirming the decision of the Divisional Court), that, the action having been remitted to the county court, the High Court had no jurisdiction to make an order.

The order remitting the action was not void; *semble*, it was not irregular.—*Duke* v. *Davis*, C.A. 673—[1893] 2 Q. B. 260.

41. *Deceased person—No legal personal representative—Proceeding in absence—R. S. C.*, 1883, *ord.* 16, *r.* 46.—On the true construction of ord. 16, r. 46, it is necessary, in order to bind the estate of a deceased person who has no legal personal representative, that the order of the court should state that the judge has proceeded in the absence of any person representing or entitled to represent the estate of the deceased person, or has appointed some person to represent such estate.—*In re Richerson, Scales* v. *Heyhoe*, CH.D. CHI., J. 583—62 L. J. Ch. 708.

42. *Joinder of defendant—R. S. C.*, 1883, *ord.* 16, *r.* 11—*Foreigner resident out of jurisdiction—Order to add as defendant—Discretion*—3 & 4 *Will.* 4, *c.* 42, *s.* 8.—Where there are two joint contractors, and an action is brought against one only, the other being a foreigner resident out of the jurisdiction, the defendant is not entitled as of right, under ord. 16, r. 11, to have the other joint contractor added as a defendant.

Held, further, that, upon the facts, the court ought not to order that the other joint contractor should be added as a defendant.

Semble, that, under ord. 16, r. 11, the court has a discretion to order other defendants to be added, but that such discretion ought to be exercised as nearly as possible in accordance with the principles upon which a plea in abatement would, before the Judicature Act, have succeeded or failed.—*Wilson, Sons, & Co.* v. *Balcarres Brook Steamship Co.*, C.A. 486—[1893] 1 Q. B. 422; 62 L. J. Q. B. 245; 68 L. T. 312.

43. *Joinder of plaintiffs—Action for slander—Claims for several slanders spoken of different persons—Ord.* 16, *r.* 1.—By ord. 16, r. 1, "all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative."

Two plaintiffs joined in an action for slander, and delivered a statement of claim alleging several different slanders, some of one plaintiff, and some of the other.

Held, that the plaintiffs were improperly joined, and that they must elect which plaintiff would proceed, and that so much of the statement of claim as related to the other plaintiff must be struck out.

Booth v. *Briscoe*, 2 Q. B. D. 496, and *Gort* v. *Rowney*, 17 Q. B. D. 625, discussed.—*Sandes* v. *Wildsmith*, Q.B.D.—[1893] 1 Q. B. 771; 62 L. J. Q. B. 404.

44. *Non-joinder of plaintiffs—Action by one tenant in common for injury to reversion—Action for breach of covenant—Severance of reversion after demise.*—One tenant in common of a reversion is entitled to maintain an action for injury to the reversion without joining his co-tenants as plaintiffs.

Pleas in abatement being abolished, it can only be a question for the discretion of the judge at chambers whether the non-joinder of such co-tenants ought to be a ground for staying the action until they are joined.

An action may be maintained by one tenant in common of a reversion for breach of a covenant running with the land, without joinder of his co-tenants in common as plaintiffs, where the severance of the reversion takes place after the demise.—*Roberts* v. *Holland*, Q.B.D. 494—[1893] 1 Q. B. 665.

45. *Representation—Trade union—Action of tort—Action against defendant as representing all the members—"Having the same interest in one cause or matter"—Ord.* 16, *r.* 9.—The plaintiff sued the defendants, who were the presidents and officers of certain trade unions, "as well on their own behalf as on behalf of and as representing all the members of each of the societies to which they respectively belong," for maliciously and wrongfully inducing certain persons to break their contracts with the plaintiff, and claimed damages and an injunction.

Held (affirming the decision of the Queen's Bench Division), that the members of the trade unions had not "the same interest in one cause or matter" within the meaning of ord. 16, r. 9, and the words above set out must be struck out.

The words of ord. 16, r. 9, only extend to persons who have or claim some beneficial proprietary right which they are asserting or defending in the cause or matter.—*Temperton* v. *Russell and Others*, C.A. 321—[1893] 1 Q. B. 435; 62 L. J. Q. B. 300; 68 L. T. 425.

46. *Representation—Persons having the same interest in one cause—Order authorizing one or more to defend on behalf of all—Ord.* 16, *r.* 9.—By one of the rules of a labour protection league it was provided that any member who became permanently disabled by an accident was entitled to have a levy made for his benefit on all the members of the league.

The plaintiff brought an action against the president and secretary of the league for the purpose of enforcing his rights under the rule, and applied to the judge in chambers for an order authorizing the defendants to defend the action on behalf of all the other members of the league, who numbered about 4,000. The application was opposed by the defendants, but the judge made the order.

Held, that the order was rightly made.—*Wood* v. *McCarthy*, Q.B.D. 523—[1893] 1 Q. B. 775; 62 L. J. Q. B. 373.

PLEADING—

47. *Slander—Embarrassing defence.*—The defendant in an action of slander denied by his defence having spoken the words alleged in the statement of claim, and set out in his defence other words which he admitted having spoken, and which he alleged were true in substance and in fact.

Held, that this pleading was embarrassing, and that the paragraphs containing the words admitted by the defendant ought to be struck out.—*Rassam* v. *Budge*, Q.B.D. 377—[1893] 1 Q. B. 571; 62 L. J. Q. B. 312; 68 L. T. 717.

48. *Striking out pleading—Statement of claim seeking relief not asked by writ—R. S. C.*, 1883, *ord.* 19, *r.* 27; *ord.* 20, *r.* 4.—By the writ in a partnership action the plaintiff claimed an account of the partnership dealings between himself and the defendant, and an injunction restraining the defendant from dealing with the partnership assets. The plaintiff delivered a statement of claim, in which he alleged that the defendant had made certain representations to him, on the faith of which he paid to the defendant a premium of £1,500. He also alleged a course of conduct on the part of the defendant entitling him to damages, and claimed, in addition to the relief sought by the writ, the return of the said premium, and damages.

Held, that the statement of claim was irregular, inasmuch as it sought relief substantially different from that claimed by the writ, and operated to prevent a reference to arbitration; that it was not an alteration, modification, or extension of the writ within the meaning of ord. 20, r. 4; and that it must be struck out.—*Cave* v. *Crew*, CH.D. KEK., J. 359—62 L. J. Ch. 530; 68 L. T. 254.

RECEIVER—

49. *Equitable execution—Future salary or earnings*

—*Judicature Act*, 1873, *s.* 25, *sub-section* 8.—The court has no jurisdiction to appoint a receiver of the future salary or earnings of a judgment debtor.—*Holmes* v. *Millage*, C.A. 354—[1893] 1 Q. B. 551; 62 L. J. Q. B. 380; 68 L. T. 205.

SALE BY COURT—

50. *Shares in company—Order for sale—R. S. C.*, 1883, *ord.* 50, *r.* 2.—The expression "goods" in the Rules of the Supreme Court, 1883, ord. 50, r. 2, includes shares in a limited company, and if, for "any just and sufficient reason," it is desirable to have them sold at once, they may be sold under the rule in a pending action.—*Evans* v. *Davies*, CH.D. KEK., J. 687—[1893] 2 Ch. 216; 62 L. J. Ch. 661; 68 L. T. 244.

SECURITY FOR COSTS—

51. *Counter-claim—Foreigner—Defendant residing out of jurisdiction — Counter-claim arising out of same matter as claim.*—Where a counter-claim arises out of the same matter as the claim, so that the counter-claim is in reality in the nature of a defence to the claim, the court will not, in its discretion, order the defendant to give security for the costs of the counter-claim merely because he is a foreigner resident out of the jurisdiction.—*Neck* v. *Taylor*, C.A. 486—[1893] 1 Q. B. 560; 68 L. T. 399.

52. *New trial — Security for costs of motion—Foreigner resident abroad.*—The plaintiff, a foreigner resident abroad and having no property within the jurisdiction, was ordered to give security for the costs of an action brought by him in the Queen's Bench Division. At the trial with a jury the verdict and judgment were entered for the defendants. The plaintiff moved for a new trial, and the defendants applied that the plaintiff should be ordered to give security for the costs of the motion for a new trial.

Held, that the proper practice was to make the application in the first instance at chambers, subject to an appeal direct to the Court of Appeal.—*Bentsen* v. *Taylor, Sons, & Co.*, C.A. 593—[1893] 2 Q. B. 193.

STRIKING OUT PLEADINGS—

53. *Frivolous action—Motion to dismiss—Rules of Supreme Court*, 1883, *ord.* 25, *r.* 4.—The plaintiff claimed as heir-at-law of a testator who died in 1774, and alleged that the defendants were in possession as trustees of the testator's will. Some of the defendants traversed this allegation by their defence, whilst the remainder, without delivering a defence, put in evidence in denial. On a motion by all the defendants to dismiss the action,

Held, that, as the evidence in support was not distinct and conclusive, and that as some of the defendants had put in a defence, the motion failed.—*Fletcher* v. *Bethom*, CH.D. KEK., J. 621—68 L. T. 438.

54. *Pleading raising question of law—Ord.* 25, *r.* 4.—Applications under ord. 25, r. 4, to strike out pleadings or stay proceedings on the ground that the pleadings disclose no reasonable cause of action or defence, are not intended to supply the place of demurrers, except in frivolous cases, and the court will not entertain such an application if the pleading raises an important question of law.

An application to strike out a statement of claim or stay proceedings may be made by the defendant in a proper case before filing his defence.—*Attorney-General of the Duchy of Lancaster* v. *London and North-Western Railway Co.*, C.A.—[1892] 3 Ch. 274; 62 L. J. Ch. 271; 67 L. T. 810.

55. *Striking out claim—Delay.*—The court refused an application by the defendant to strike out the statement of claim as frivolous and vexatious upon the ground of delay, the pleadings having closed and the action having been set down for trial—*Cross* v. *Earl Howe*, CH.D. NOR., J.—62 L. J. Ch. 342.

See also PRACTICE, 47, 48.

TRIAL—

56. *Notice of trial—Change of venue by order—Party entitled to ten days' notice from date of order—Ord.* 20, *r.* 5; *Ord.* 36, *rr.* 1, 14.—By ord. 36, r. 1, where no place of trial is named in a statement of claim, the place of trial shall be Middlesex unless otherwise ordered by the court or a judge.

The plaintiff commenced an action in the Liverpool District Registry, and delivered a statement of claim in which no place of trial was named. No order as to the place of trial was applied for. On the 16th of March, 1892, the plaintiff gave the defendant notice of trial at Liverpool Assizes, the commission day for which was fixed for the 26th of March.

Upon a summons for directions taken out by the plaintiff, the district registrar on the 19th of March made an order for the trial of the action by a jury, and that the plaintiff's notice of trial at Liverpool should stand.

Held, that the notice of trial for Liverpool was a nullity, and although the registrar had jurisdiction to change the venue from Middlesex to Liverpool, he had no power thereby to deprive the defendant of his right to ten days' notice of trial, or to put him under terms to take short notice.—*Laskier* v. *Tekeian*, Q.B.D.—67 L. T. 121.

57. *Notice of trial—No reply delivered—Giving notice of trial before expiration of time for reply—Right of plaintiff to give such notice of trial—R. S. C.*, 1883, *ord.* 27, *r.* 13; *ord.* 36, *rr.* 11, 15.—A plaintiff who has not delivered a reply cannot give notice of trial of the action until the expiration of the time allowed for delivering a reply—that is, until the expiration of twenty-one days after the defence; because, no reply having been delivered under rule 13 of order 27, the pleadings are not closed until the expiration of the time allowed for reply, and no notice of trial can be given until after that time.—*Robinson* v. *Caldwell and Another*, Q.B.D. 364—[1893] 1 Q. B. 519; 62 L. J. Q. B. 252; 68 L. T. 218.

See also PRACTICE, 7.

58. *Place of trial—Local venue provided by statute—Abolition of local venues—Ord.* 36, *r.* 1.—By ord. 36, r. 1, "There shall be no local venue for the trial of any action, except where otherwise provided by statute."

Held, that, all existing local venues having been abolished by the Judicature Act, 1875, the exception in ord. 36, r. 1, operates only in favour of local venues created by statutes passed since the Judicature Act, 1875, and does not have the effect of reviving local venues created by statutes passed prior to that Act.—*Buckley* v. *Hull Docks Co.*, Q.B.D.—[1893] 2 Q. B. 93; 62 L. J. Q. B. 449.

WRIT—

59. *Service — Foreign corporation — Shareholders resident in England—Service on agent in England—Setting aside—R. S. C.*, 1883, *ord.* 9, *r.* 8.—A foreign corporation, though having the majority of its shareholders resident in England, and having a London agent with a London office, but carrying on no principal or material part of its business in this country, is not liable to be sued in an English court.

Service of a writ of summons on the agent in

London set aside on the ground of want of jurisdiction.—*Badcock* v. *Cumberland Gap Park Co.*, CH.D. STI., J. 204—[1893] 1 Ch. 362; 62 L. J. Ch. 247; 68 L. T. 155.

60. *Service—Foreign corporation—Head officer—R. S. C., ord.* 9, *r.* 8.—The decision of the Divisional Court (67 L. T. N. S. 309) that the person served with the writ was not a "head officer" of the defendants within ord. 9, r. 8, affirmed.—*Golding* v. *Order of La Sainte Union des Sacrées Cœurs*, C.A. —67 L. T. 605.

61. *Service—Foreign defendant—"Person carrying on business in name other than his own"—Foreigner residing abroad—Claim for injunction—Issue of concurrent writ for service out of jurisdiction—R. S. C.*, 1883, *ord.* 11, *r.* 1 (f); *ord.* 48a, *r.* 11.—By ord. 48*a*, r. 11, "Any person carrying on business within the jurisdiction in a name or style other than his own name may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules relating to proceedings against firms shall apply."

A foreigner resident abroad was the proprietor of a newspaper called the *New York Herald*, printed and published at New York. He had an office within the jurisdiction, over the door of which was the name of the newspaper, the office being occupied by a telegraphic correspondent for the purpose of transmitting news to New York. At the head of one of the columns of the newspaper were the words, "*New York Herald*—James Gordon Bennett, proprietor." Copies of the newspaper were occasionally sold there. The plaintiff issued a writ of summons against the *New York Herald*, claiming damages for an alleged libel which had been published in the newspaper, and an injunction against any future publication.

Held, by the Queen's Bench Division, that ord. 48*a*, r. 11, did not apply so as to allow service of the writ of summons upon the proprietor of the newspaper abroad, even if he were carrying on business within the jurisdiction under a name or style other than his own name, and that leave ought not to be given under ord. 11, r. 1, to issue a concurrent writ for service upon him out of the jurisdiction, although an injunction to restrain the publication of the libel was claimed, no grounds being shown for apprehending that the publication of the libel would be repeated.

Held, by the Court of Appeal, that the proprietor of the newspaper did not carry on business within the jurisdiction in a name or style other than his own name, and that, therefore, ord. 48*a*, r. 11, did not apply.—*De Bernales* v. *New York Herald*, C.A. 481—[1893] 2 Q. B. 97n; 62 L. J. Q. B. 385; 68 L. T. 658.

62. *Service—Foreign defendant—"Person carrying on business within the jurisdiction in a name or style other than his own name"—Foreigner resident abroad —Service on manager at place of business within the jurisdiction—R. S. C.*, 1883, *ord.* 48*a*, *r.* 11.—The defendant was a foreigner residing and carrying on business abroad, but also "carrying on business within the jurisdiction in a name or style other than his own name."

Held, that, on the authority of *Russell* v. *Cambefort*, 37 W. R. 701, 23 Q. B. D. 526, ord. 48*a*, r. 11, did not apply to a foreigner resident abroad; and therefore the writ could not be served, under rule 3, on the defendant's manager at his place of business within the jurisdiction.—*St. Gobain, Channy, and Cirey Co.* v. *Hoyermann's Agency*, C.A. 563—[1893] 2 Q. B. 96.

63. *Service of concurrent writ out of the jurisdiction—Action of tort—R. S. C.*, 1883, *ord.* 11, *r.* 1 (g). —By R. S. C., 1883, ord. 11, r. 1, service out of the jurisdiction of a writ of summons may be allowed (*g*) whenever any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

Held, that clause (*g*) applies to an action of tort.

The plaintiff, an undischarged bankrupt, brought an action for malicious prosecution against K. & Co. (Limited) and K. The prosecution of which the plaintiff complained had been carried on at the instance of K. & Co. (Limited); K., who was the manager of a London depôt of K. & Co. (Limited) having laid the information against the plaintiff.

The registered office of K. & Co. (Limited), a company incorporated under the Companies Act, 1862, was in Belfast. K. had been duly served within the jurisdiction with the writ in the plaintiff's action.

Held, that leave ought to be granted to serve a concurrent writ on K. & Co. (Limited) at their registered office in Ireland.—*Croft* v. *King*, Q.B.D. 394—[1893] 1 Q. B. 419; 62 L. J. Q. B. 242; 68 L. T. 296.

64. *Service out of the jurisdiction—Action against defendant within the jurisdiction and defendant out of the jurisdiction—Concurrent writ—Action properly brought against defendant within the jurisdiction—Ord.* 11, *r.* 1 (g).—A stevedore, while engaged in discharging the cargo of a ship, fell through a hatchway, in consequence, as was alleged, of the negligence of those in charge of the ship, and sustained injuries from which he died. His widow brought an action, under Lord Campbell's Act, against the brokers of the ship, who carried on business in London, and the owners of the ship, who carried on business and resided in Scotland. The writ having been served on the brokers, the plaintiff obtained an order at chambers, under ord. 11, r. 1 (*g*), giving her leave to issue a concurrent writ for service out of the jurisdiction, and to serve the same on the owners in Scotland.

The Court of Appeal, considering that the plaintiff had made the brokers defendants to the action merely for the purpose of being able to sue the Scotch owners in the English Court, held that the action was not "properly brought" against the brokers within the meaning of ord. 11, r. 1 (*g*), and, therefore, that service on the owners in Scotland ought not to be allowed.—*Witted* v. *Galbraith, Pembroke, & Co.*, C.A. 395—[1893] 1 Q. B. 577; 62 L. J. Q. B. 248; 68 L. T. 421.

65. *Service out of the jurisdiction—Contract "which, according to the terms thereof, ought to be performed within the jurisdiction"—Ord.* 11, *r.* 1 (e).—The plaintiff, a civil engineer carrying on business at Newcastle, was employed by the defendants, who had undertaken to construct docks in Spain, to design and superintend the construction of the same. By the terms of the contract between the plaintiff and the defendants the plaintiff was to prepare drawings and specifications, to take out quantities, and to superintend the construction of the docks in consideration of a commission of £5 per cent. on the total cost of the works. He was not to be required to be constantly in attendance, but was to visit the works during their construction once in every three months, and to have a competent assistant constantly in attendance to superintend the construction. He was to be paid travelling expenses in connection with his visits (say, £40 British sterling per visit), and the agreed commission was to be payable in cash as follows:—

viz., £1 10s. per cent. upon the contract price of each contract as and when it was made, and the remaining £3 10s. per cent. at the expiration of every three months on the value of the work done during three such months, subject to the retention of a certain amount as security for the performance of the plaintiff's duties, which amount was to be paid to the plaintiff within seventy-five days after the works had been finally completed to the defendants' satisfaction. The contract did not in express terms provide where these payments were to be made. The plaintiff sued for a balance payable to him under the contract.

Held, that the true construction of the contract and the circumstances under which it was entered into was that the payments to the plaintiff were to be made at Newcastle; and therefore leave might be given to issue a concurrent writ in the action, and serve notice thereof upon one of the defendants, a foreigner resident out of the jurisdiction, under ord. 11, r. 1 (*e*).—*Thompson* v. *Palmer*, C.A.—[1893] 2 Q. B. 80.

66. *Service out of the jurisdiction—Foreign defendant—Service of notice of writ—Appearance under protest.*—A foreign defendant resident out of the jurisdiction was served with notice of a writ of summons. He appeared to the writ under protest, the appearance containing on the margin a memorandum that it was entered under protest in order to preserve the defendant's right to object to the jurisdiction.

Held, that the defendant could properly enter an appearance under protest without losing his right to object to the jurisdiction.—*Firth & Sons* v. *De Las Rivas*, Q.B.D. 493—[1893] 1 Q. B. 768; 62 L. J. Q. B. 403.

67. *Specially-indorsed writ—Appearance—Amendment of indorsement — Summons for judgment — R. S. C.*, 1883, *ord.* 3, *r.* 6; *ord.* 14, *r.* 1. — A plaintiff commenced an action by serving upon the defendant a writ indorsed with a claim for a sum of money lent, and for interest in the nature of unliquidated damages. The defendant entered an appearance to this writ. On a summons for judgment under ord. 14, r. 1, unconditional leave to defend was granted. The plaintiff then by leave amended his indorsement by striking out the claim for interest, so as to make his writ specially indorsed within ord. 3, r. 6, and afterwards obtained leave to enter final judgment upon a new summons under ord. 14, r. 1.

Held, that the defendant's appearance to the original writ must stand as an appearance to the amended writ, and that, the defendant having appeared to a specially-indorsed writ, the master had jurisdiction to give leave to enter final judgment.

Gurney v. *Small*, [1891] 2 Q. B. 584, 40 W. R. Dig. 192, discussed. — *Paxton* v. *Baird*, Q.B.D. 88 —[1893] 1 Q. B. 139; 62 L. J. Q. B. 176; 67 L. T. 623.

68. *Specially-indorsed writ—"Bank charges"—Liquidated demand — Bills of Exchange Act*, 1882, (45 & 46 *Vict. c.* 61), *s.* 57—*Ord.* 3, *r.* 6; *ord.* 14, *r.* 1.—In an action on a bill of exchange the writ was specially indorsed under ord. 3, r. 6, with a claim for the amount of the bill, and also 2s. 9d. "bank charges."

Held, that by the expression "bank charges" expenses of noting were referred to, and that as expenses of noting are made liquidated damages by section 57 of the Bills of Exchange Act, 1882, this was a good special indorsement.—*Dando* v. *Boden*, Q.B.D. 285—[1893] 1 Q. B. 318; 62 L. J. Q. B. 339; 68 L. T. 90.

69. *Specially-indorsed writ—Condition precedent—No averment of performance—Ord.* 3, *r.* 6; *ord.* 14, *r.* 1.—The defendant agreed to pay £210 to the plaintiff if he would deliver to the defendant's husband certain bills. In an action to recover the £210, the writ, which was specially indorsed under ord. 3, r. 6, did not aver that the plaintiff had delivered the bills to the defendant's husband.

Held, that, notwithstanding the non-averment of performance of the condition precedent, it was a good special indorsement.—*Bradley* v. *Chamberlyn*, Q.B.D. 300—[1893] 1 Q. B. 439; 68 L. T. 413.

70. *Specially-indorsed writ—Dishonoured cheque—Notice of dishonour—Ord.* 14, *r.* 1.—To entitle the holder of a cheque to sign final judgment against the drawer under ord. 14, r. 1, upon a writ indorsed with a claim for the amount of the cheque, which has been dishonoured, the indorsement must contain an allegation of notice of dishonour to the drawer or of facts dispensing with it.—*Frühauf* v. *Grosvenor*, Q.B.D—61 L. J. Q. B. 717.

71. *Specially-indorsed writ — Promissory note payable by instalments—Ord.* 3, *r.* 6.—The plaintiffs indorsed their writ against the defendants as follows: "The plaintiffs' claim is against the defendants as makers of a joint and several promissory note dated the 11th of April, 1892, for £36 6s., and payable by certain instalments in respect whereof default has been made. Particulars.—To balance of moneys owing upon the said promissory note, £24 6s."

Held, that this was not a good special indorsement.—*Manchester Advance and Discount Bank* v. *Walton*,, Q.B.D.—62 L. J. Q. B. 158; 68 L. T. 167.

See also ADMIRALTY, 1-3; BANKRUPTCY, 22; COMPANY, 36; DIVORCE, 14-20; LANDLORD AND TENANT, 10; LIMITATIONS, STATUTE OF, 2; LUNATIC, 4; MORTGAGE, 4-6; PARLIAMENT, 2-5; PATENT, 4; PROBATE, 18-22.

PRACTICE (IRELAND):—

1. *Appeal—Case stated by justices—Appeal to Court of Appeal*—20 & 21 *Vict. c.* 43, *s.* 6—*Judicature (Ireland) Act*, 1877, *s.* 24.—Section 24 of the Judicature Act does not repeal the definite prohibition of appeal which was previously enacted by particular statutes. No appeal, therefore, lies from the decision of the Divisional Court as to what is the proper answer to be given to the questions raised by a case stated by justices to take the opinion of the Divisional Court in a civil matter.—*Harvey* v. *Copeland*, C.A. (Ir.)—32 L. R. Ir. 419.

2. *Appeal—"Criminal cause or matter"—Jurisdiction of Court of Appeal—Judicature (Ireland) Act*, 1877, *s.* 50.—An order made by the Queen's Bench Division attaching a constable for refusing to aid the sheriff in the execution of a writ is a judgment in a "criminal cause or matter," and no appeal lies to the Court of Appeal.—*Attorney-General* v. *Kissane*, C.A. (Ir.)—32 L. R. Ir. 220.

3. *Appeal—Death of respondent—Continuing proceedings—Appellant neglecting to proceed— Ord.* 17, *r.* 8.—The plaintiff, in an action for specific performance, appealed from a judgment dismissing the action. After the notice of appeal was served the defendant died. The plaintiff took no steps to revive the action; thereupon the heir and personal representative of the deceased defendant revived the action. The plaintiff failed to proceed with the appeal, and the new defendants applied to the Court of Appeal to direct the plaintiff to proceed

therewith, and in default that the appeal be dismissed.

Held, that the proper course for the new defendants to have adopted was to have given the order reviving the action to the registrar, and that on this being done the appeal would have been listed in its turn.—*Nolan* v. *Marquis of Drogheda*, C.A. (Ir.)—31 L. R. Ir. 84.

4. *Costs—Counsel—Contempt of court—Election petition—Motion for attachment—Costs of three counsel—Corrupt and Illegal Practices Act*, 1883 (46 & 47 *Vict. c.* 51), *s.* 44, *sub-section* 3.—There is no fixed rule absolutely limiting for the purposes of taxation, as between party and party, the number of counsel to two upon a motion in the Common Law Division.

A motion for attachment for contempt of court by interfering with the trial of a pending election petition is an originating motion in the Queen's Bench Division, and the costs of it are taxable accordingly, and are not governed by section 44, sub-section 3, of the Corrupt and Illegal Practices Act, 1883.

An order made upon such a motion is an order of the Queen's Bench Division, not an order in the election petition matter, and is properly signed by the registrar of the division.—*In re South Meath Election Petition*, Q.B.D. (Ir.)—32 L. R. Ir. 407.

5. *Costs—Costs levied after notice of appeal—Reversal of judgment—Liability of solicitor to refund.*—Where after service of notice of appeal the successful party levied his costs, and the judgment was afterwards reversed,

Held, that the party's solicitor was responsible for repayment of the costs in default of his client refunding them.

In such a case an order for repayment should be asked for at the hearing of the appeal, and the costs of a motion for the purpose will not be allowed.—*Fitzmaurice* v. *Jordan*, C.A. (Ir.)—32 L. R. Ir. 112.

6. *Costs—Crown—Action to establish right to seashore—Plaintiffs' right proved—Attorney-General not contesting—Costs of Crown.*—In an action against the Attorney-General and other defendants to establish the plaintiffs' right to seashore the Attorney-General did not actively contest the plaintiffs' claim, but did not admit the same until their right had been established by evidence at the trial.

Held, that the Attorney-General was not entitled to be paid his costs of action by the plaintiffs.—*Kilmorey* v. *Attorney-General*, V.C. (Ir.)—29 L. R. Ir. 320.

7. *Costs—Taxation between party and party—Costs of action—Costs of one issue—Third counsel—Refreshers.*—Taxation of costs referred back to the taxing master for allowance of certain items.—*Mahalm* v. *M'Cullagh*, V.C. (Ir.)—31 L. R. Ir. 147.

8. *Costs of discovery—Certificate of judge at trial—Ord.* 31, *r.* 24.—Applications for a certificate under ord. 31, r. 24, as to costs of discovery cannot be granted by the judge who presided at the trial unless made to him at the trial before he leaves the court or its precincts.—*Aaron's Reefs Co.* v. *Twiss*, Q.B.D. (Ir.)—30 L. R. Ir. 616.

9. *Death of defendant—Order to carry on proceedings against personal representative—Time—Order* 17; *ord.* 28, *r.* 7.—An order that further proceedings in an action be carried on against the personal representative of a deceased defendant is an order for leave to amend within ord. 28, r. 7, and must be acted on, if no time is therein limited for so doing, within fourteen days from its date.—*Brown* v. *Owen*, V.C. (Ir.)—31 L. R. Ir. 94.

10. *Notice of trial—Service—Computation of time—Ord.* 64, *r.* 9.—Where an order made in court on a Saturday gave liberty to the plaintiffs to serve a notice of trial on that day, and where the service of such order was not made at the Dublin offices of the defendant's solicitor until after 2 p.m. on the same day,

Held, that under the circumstances ord. 64, r. 9, did not invalidate the service. That order only applies where it is essential to find a *terminus a quo* for the computation of subsequent periods of time.—*Browne* v. *Reid*, Q.B.D. (Ir.)—30 L. R. Ir. 619.

11. *Originating summons—Service—Indorsement of service—Affidavit—R. S. C.*, 1891, *ord.* 9, *r.* 16; *ord.* 67, *r.* 6.—Ord. 67, r. 6, applies to the service of an originating summons, which should be indorsed after service in the manner provided by ord. 9, r. 16, and the affidavit of service should verify the making of such indorsement.—*Browne* v. *Browne*, V.C. (Ir.)—29 L. R. Ir. 368.

12. *Originating summons—Service out of jurisdiction—Ord.* 11, *rr.* 4, 10.—The court has power under ord. 11, rr. 4, 10, to give liberty to issue a concurrent originating summons for service out of the jurisdiction.—*In re Herdman's Trusts*, M.R. (Ir.)—31 L. R. Ir. 87.

13. *Parties—Third party—Application for leave to serve—Ord.* 16, *r.* 49.—An application in the Chancery Division for leave to serve a third party notice under ord. 16, r. 49, should be made by motion on notice to the parties in the action.—*Maquay* v. *Adair*, V.C. (Ir.)—29 L. R. Ir. 369. [See also *Deane* v. *Bunbury*, 29 L. R. Ir. 416.]

14. *Parties—Third party—Covenants in leases of adjacent plots—Indemnity—Ord.* 16, *rr.* 49, 53.—A.'s predecessor in title demised lands to B. in 1872, and covenanted to make a new street beside them. In 1890 A. demised adjacent lands to C., and in this lease C. covenanted with A. to complete and finish all new streets on lands abutting on these lands, so far as A. was bound to do, subject to certain terms. B. brought an action against A. claiming damages for breach of the covenant in the lease of 1872. A. sought to join C. as a defendant under ord. 16, r. 49.

Held, that A. under the circumstances was not entitled to do so.

Application for directions under ord. 16, r. 53, should be made by motion on notice, and not by summons—*Morris* v. *Kennedy*, Q.B.D. (Ir.)—30 L. R. Ir. 461.

15. *Pleading—New assignment—Reference in reply to "particulars" previously furnished—R. S. C.*, 1891, *ord.* 19, *rr.* 6, 17; *ord.* 23, *r.* 6.—In an action against a solicitor, as fiduciary agent and trustee of the plaintiff, for loss sustained by negligent and improper investment of funds belonging to the plaintiff, the defendant pleaded (*inter alia*) the Statutes of Limitation. The plaintiff in his reply alleged that the defendant had committed a fraudulent breach of trust, and that he was not entitled as trustee to the benefit of the statutes, and said that "full particulars of such fraudulent breaches of trust have been furnished to the defendant by the plaintiff."

Held, that that the reply was bad and should be set aside, first, because it was either an unnecessary repetition of the statement of claim or an attempt to make a new case; and, secondly, because it did not comply with ord. 19, r. 6, which requires the particulars to be stated on the face of the plead-

ings.—*Kingston* v. *Corker*, V.C. (Ir.)—29 L. R. Ir. 364.

16. *Receiver—Discharge—Surcharge of accounts—Jurisdiction.*—Notwithstanding the discharge of a receiver, the court has jurisdiction to surcharge his accounts.—*In re Edwards (Minors)*, L.J. (Ir.)—31 L. R. Ir. 242.

17. *Receiver—Equitable execution—Deposit receipt in joint names of defendant and another—"Just or convenient"—Ord.* 50, *r.* 27.—A receiver was appointed by way of equitable execution of the interest of a judgment debtor in a deposit receipt held in the joint names of the judgment debtor and another, even though the whole beneficial interest in the fund was in the judgment debtor.—*O'Donovan* v. *Goggin*, Q.B.D. (Ir.)—30 L. R. Ir. 579.

18. *Receiver — Equitable execution — Judgment debtor's money in bailee's hands.*—There is no need to appoint a receiver of a sum of money due to a judgment debtor in a bailee's hands, as the money can be seized by the sheriff under a writ of *fi. fa.*—*Morris* v. *Taylor*, C.A. (Ir.)—32 L. R. Ir. 14.

19. *Security for costs—Plaintiff permanently resident out of jurisdiction, but having real estate within it—Affidavit as to defence on the merits—Common Law Procedure (Ireland) Act*, 1853 (16 & 17 *Vict. c.* 113), *s.* 52.—A plaintiff permanently resident out of the jurisdiction may be compelled to give security for the costs of the action, although he has real estate within the jurisdiction; and for the purposes of an application for such security the existence of a defence is sufficiently shown if the affidavit states that the defendant "has a defence upon the merits," without disclosing his case. Where the affidavit is made by a defendant whose knowledge is personal, and against whose veracity there is no suggestion, such affidavit is fairly "satisfactory" within section 52 of the Common Law Procedure Act, 1853.—*Casey* v. *Cork Gas Consumers' Co.*, C.A. (Ir.)—30 L. R. Ir. 713.

20. *Sequestration—Peer—Enforcement of order of Chancery Division in England*—41 *Geo.* 3, *c.* 90, *s.* 5—*Ord.* 43, *rr.* 5, 7.—An order to account was made against the defendant, an Irish peer, by the Chancery Division of the High Court of Justice in England, and an exemplification of it enrolled in Ireland pursuant to 41 Geo. 3, c. 90, s. 5. An application was made for leave to appoint a sequestrator over the estates of the defendant in Ireland.

Held, that the order could only be enforced by the process of attachment prescribed by the statute, and that, although that remedy was not available against the defendant by reason of his being a peer, there was no jurisdiction to issue a sequestration to enforce obedience to the order.—*Viscount Kilworth* v. *Lord Mountcashell*, M.R. (Ir.)—31 L. R. Ir. 81.

21. *Writ—Service out of jurisdiction—Defendant resident in England—Offer and acceptance by post—Ord.* 11, *r.* 1 (e) (f).—The defendant, who was floating a company in England, wrote to D., a stockbroker in Dublin, offering him a specified fee and commission in consideration of the company going to allotment and D. allowing his name to be used as broker. D. accepted the offer by signing his name at foot, and sent it by post from Dublin, addressed to the defendant's agent in England, along with a letter in which he stated that his asseptance was on the distinct understanding that H. (an English firm of stockbrokers) also joined. The company's prospectus was issued, and H.'s name did not appear upon it as the company's English broker; but, notwithstanding this, D. did not withdraw his name, and acted as Dublin broker until the company went to allotment. D., having been adjudicated bankrupt, his assignees brought an action in Ireland to recover the agreed remuneration.

Held, that the court had power under ord. 11, r. 1 (*f*), to give leave to serve the writ in England, there being a concluded contract entered into within the jurisdiction by the posting of D.'s acceptance in Dublin, and there being evidence from which a jury might infer that he had waived the term requiring the appointment of H. as brokers in England; and, further, that, under the circumstances of this case, the balance of convenience was in favour of the action being tried in Dublin.—*Maconchy* v. *Trower*, Q.B.D. (Ir.)—30 L. R. Ir. 480.

22. *Writ — Special indorsement — "Statement of claim"—Signature —Ord.* 3, *r.* 6; *order* 14.—In order to enable a plaintiff to obtain final judgment on a specially-indorsed writ, the indorsement of the claim must be headed "statement of claim," and must be signed at the foot.—*Cassidy* v. *M'Alone*, C.A. (Ir.)—32 L. R. Ir. 368.

PRESCRIPTION.—See LIGHT, 2-4; WAY, 2.

PRINCIPAL and AGENT:—

1. *Estate agent—Authority—Sale of land—Specific performance.*—An estate agent has no authority to enter into a contract for sale of real estate unless he has express authority from the vendor to sign such contract.—*Chadburn* v. *Moore*, CH.D. KEK., J. 39—61 L. J. Ch. 674; 67 L. T. 257.

2. *Sale of land—Vendor and purchaser—Payment of deposit to vendor's solicitor—Recovery of deposit on sale going off—Liability of solicitor—Following trust money.*—Upon a sale of land the purchaser, in accordance with the conditions of sale, paid to the vendor's solicitor, as agent for the vendor, a deposit upon the purchase-money. The vendor being unable to make a good title, the sale went off, and the purchaser sued the vendor's solicitor to recover the deposit-money.

Held, that, as the solicitor received the money solely as agent of the vendor, the action would not lie against him at the suit of the purchaser.—*Ellis* v. *Goulton*, C.A. 411—[1893] 1 Q. B. 350; 62 L. J. Q. B. 232; 68 L. T. 144.

3. *Undisclosed principal—Liability for contracts of agent—Secret limitation of agent's authority—Credit given to agent alone.*—The ordinary rule of law that a principal is liable for the acts of his agent which are within the authority usually confided to an agent of that character, notwithstanding secret limitations upon that authority, applies also where the existence of any principal was unknown to the person contracting with, and giving credit to, the agent alone.

W. supplied goods to an agent H., on H.'s sole credit, in ignorance that H. had principals. F. & Co., who were in fact H.'s principals, had allowed H. to appear as ostensible principal while managing their business, with secret instructions not to buy goods. H. failing to pay, W. sued F. & Co. for the price of goods supplied, which were such as were ordinarily dealt in and supplied to such a business.

Held, that F. & Co. were liable.—*Watteau* v. *Fenwick*, Q.B.D. 222—[1893] 1 Q. B. 346; 67 L. T. 831.

See also INSURANCE (ACCIDENT), 2; POWER OF ATTORNEY; STOCK EXCHANGE.

PRINCIPAL and SURETY:—

1. *Contribution by co-surety—Right of surety to contribution after judgment and before payment—*

Unascertained liability to contribute—Statute of Limitations.—A surety, against whom judgment has been obtained by the principal creditor for the full amount of the guarantee, but who has paid nothing in respect thereof, can maintain an action against a co-surety to compel him to contribute towards the common liability; and for this purpose the allowance of a claim by the principal creditor against the estate of a deceased surety is equivalent to a judgment; and where the principal creditor is a party to the action, the surety may obtain an order upon the co-surety to pay his proportion to the principal creditor. Where the principal creditor is not a party, he may obtain a prospective order directing the co-surety, upon payment by the surety of his own share, to indemnify the latter against further liability.

The Statute of Limitations does not begin to run against a surety suing a co-surety for contribution until the liability of the surety is ascertained—*i.e.*, until the claim of the principal creditor has been established against him; although at the time of the action for contribution the statute may have run as between the principal creditor and the co-surety.—*Wolmershausen* v. *Gullick*, CH.D. WRI., J.—[1893] 2 Ch. 514; 68 L. T. 753.

2. *Discharge of surety—Novation—Release of principal debtor.*—Where a creditor released his principal debtor and accepted a third party as full debtor in his stead, and the surety for the former debtor agreed to give a guarantee for the latter, and to continue his former guarantee until he did so, and then died without having done so,

Held, in an action by the creditor against his executors, that, the former debt having been extinguished by the release, the remedy against the deceased was gone.

Novation of debt operates as a complete release of the original debtor, and cannot be construed as a mere covenant not to sue him.—*Commercial Bank of Tasmania* v. *Jones*, P.C.—[1893] A. C. 313; 68 L. T. 776.

3. *Discharge of surety—Release of co-surety.*—In a suit against one of five joint and several sureties to recover the amount guaranteed, it appeared that the plaintiff had, without the defendant's knowledge and consent, released another of the sureties "from all debts due by him to the bank at this date."

Held, that the plaintiff could not recover, and that the legal effect of the release could not be modified by evidence of verbal negotiations prior to the release for the purpose of showing an agreement to reserve rights against the sureties.—*Mercantile Bank of Sydney* v. *Taylor*, P.C.—[1893] A. C. 317.

4. *Fraud of principal—Liability of surety—Building contract—Certificate obtained by fraud of contractor.*—An alteration in the position of a surety brought about by the act of an employer does not discharge the surety, if the act of the employer has been caused by the fraud of an *employé* whose honesty the surety has guaranteed.

The plaintiffs entered into a contract with a firm of contractors for the construction of certain works. The defendants were parties to the contract as sureties for the contractors. The contract provided that the liability of the sureties should continue until the engineer of the plaintiffs should have given his final certificate of completion. A certain sum of money was to be retained by the plaintiffs, and not paid over to the contractors until six months after the granting of the final certificate of completion. The certificate was obtained by fraud on the part of the contractors, and the retention money was paid over to the contractors.

Held (affirming the decision of Grantham, J.), that the certificate, having been obtained by the fraud of the contractors, whose honesty the defendants had guaranteed, did not operate as a discharge of the defendants' liability under their contract of suretyship; that the payment over of the retention money, even if it had not been brought about by the contractors' fraud, would not have discharged the defendants, there being no evidence that the payment of the retention money had caused any alteration in the position of the defendants.—*Mayor, &c., of Kingston-upon-Hull* v. *Harding*, C.A. 19—[1892] 2 Q. B. 494; 62 L. J. Q. B. 55; 67 L. T. 539.

5. *Guarantee—Parol—Recital in will—"Note or memorandum in writing"—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4.—A testator, being in partnership with the two defendants, and his son being indebted to the firm, verbally agreed to "guarantee" such indebtedness. By his will he recited that his son was indebted to the firm, and that he had "guaranteed" the firm against loss in respect of such debt, and he directed that his son should stand released from all personal liability for it. By a codicil he confirmed the "guarantee."

Held, that, if there was such a guarantee as the 4th section of the Statute of Frauds referred to at all, there was in the will and codicil a sufficient note or memorandum in writing, within the meaning of the section, to take the case out of the operation of it.

Semble, that a promise to pay made by a person to himself and others was not a guarantee at all within the Statute of Frauds.

Decision of Kekewich, J., reversed.—*In re Hoyle, Hoyle* v. *Hoyle*, C.A. 81—[1893] 1 Ch. 84; 62 L. J. Ch. 182; 67 L. T. 674.

6. *Guarantee—Agreement with some co-sureties—Payment—Bankruptcy—Proof for full amount due—Banker—Appropriation of sum deposited.*—Several persons, including W., had become guarantors to the appellant bank for the discharge of £6,250. Some of the guarantors, not including W., subsequently entered into an arrangement by agreement with the bank, that their liability, as between them and the bank, should be limited, so that, in lieu of their personal liability to pay the entire sum guaranteed in case of default of the principal debtor, there should be substituted a deposit of £3,000 in the bank to a suspense account. The bank had the power of appropriating the £3,000 towards the payment of the principal debt, but had not done so. W. became bankrupt.

Held, that the agreement did not amount to payment, and that, apart from bankruptcy, the carrying out of such an arrangement in no way affected the liability of W.; and, further, that the bankruptcy of W. could make no difference as to the amount of W.'s liability; so that the bank were entitled to prove in W.'s bankruptcy for the full sum of £6,250, without making the deduction of the £3,000.—*Commercial Bank of Australia* v. *Official Assignee of John Wilson & Co.*—P.C. 603—[1893] A. C. 181; 62 L. J. P. C. 61; 68 L. T. 540.

7. *Guarantee—Construction—Mortgage—Running of time—Statute of Limitations* (21 *Jac.* 1, *c.* 16).—On the 20th of January, 1881, E. P., in consideration of an advance of £2,000, mortgaged certain real estate to G. H., and covenanted to pay £2,000 and interest at 5 per cent. per annum on the 20th of July, 1881, and to pay interest at the like rate half-yearly on the £2,000, or so much of it as should

for the time being remain owing, until the same should be fully paid. On the 9th of May, 1882, C. F. P. executed a document in the following terms: "I, C. F. P.," for the consideration therein mentioned, "do hereby guarantee to the said G. H. repayment of the sum . . . of £2,000, and interest for the same" at 5 per cent. per annum. This guarantee was referred to in the correspondence relating to the execution thereof as "the guarantee of E. P.'s mortgage." Interest was regularly paid by E. P. until the 20th of July, 1891. E. P. died on the 13th of September, 1891, and the proceeds of his estate and the property comprised in the mortgage were sufficient to pay £600 only of the mortgage debt. Upon non-compliance by C. F. P. with a notice to pay the balance of £1,400 and interest, the mortgagee brought an action against C. F. P., and thereby sought to recover from him £1,400 and interest, as sums payable by him under his guarantee.

Held, that the liability of C. F. P. was confined to the payment of £2,000 and interest, in accordance with the terms of the mortgage deed.

Held, that, in the absence of an agreement not to sue for a definite time, the mortgagee could at the most be presumed to have agreed not to sue for a reasonable time; that such time had elapsed prior to the commencement of six years before the bringing of the action, and that consequently the mortgagee's claim against C. F. P. was barred by the Statute of Limitations.—*Henton* v. *Paddison*, CH.D. STI., J.—68 L. T. 405.

8. *Rights of surety—Right to compel principal debtor to pay off debt.*—When there is an actual accrued debt, and the surety is liable and admits liability for the amount guaranteed, he has a right to compel the principal debtor to relieve him from liability by paying off the debt.

In order to support such an action it is not necessary to prove that the creditor has refused to exercise his right to sue the principal debtor.

The suggested limitation, in *Padwick* v. *Stanley*, 9 Hare, 627, on the right of the surety, disapproved.

Ranelagh v. *Hayes*, 1 Vern. 189, approved and followed.—*Mathews* v. *Saurin*, M.R. (Ir.)—31 L. R. Ir. 181.

See also BANKRUPTCY, 19; BILL OF EXCHANGE, 4; LIMITATIONS, STATUTE OF, 9; SETTLEMENT, 1.

PRIVY COUNCIL PRACTICE:—

1. *Appeal—Appealable amount—Plaintiff's right to appeal—Mesne profits.*—The measure of value for determining a plaintiff's right of appeal is the amount for which the defendant has successfully resisted a decree. Mesne profits, if demanded by the plaint, must enter into a calculation of the appealable value.—*Mohideen Hadjiar* v. *Pitchey*, P.C.—[1893] A. C. 193.

2. *Appeal in criminal case—Leave to appeal refused.*—Her Majesty will not be advised to grant leave to appeal in criminal cases where it is not even suggested or surmised that substantial and grave injustice has been done, either through a disregard of the forms of legal process, or by some violation of the principles of natural justice. —*Ex parte Deeming*, P.C.—[1892] A. C. 422.

3. *Appeal in criminal case—Leave to appeal refused—Indian Penal Code, s.* 511.—Although in very special and exceptional circumstances leave to appeal in criminal cases may be granted, misdirection by a judge, either in leaving a case to a jury where there is no evidence, or founded on an incorrect construction of the Penal Code, even if established, is insufficient for that purpose, especially where no miscarriage of justice has resulted. —*Ex parte Macrea*, P.C.—[1893] A. C. 346.

PROBATE:—

1. *Administration bond—Legacy to infant—Failure to provide for payment—Condition to well and truly administer—Breach—Sureties—Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 81.—An administration bond was executed by administratrixes with the will annexed, and by two sureties, by which the administratrixes were to "well and truly administer" the personal estate of the deceased—"(that is to say) do pay the debts of the deceased which he did owe at his decease, and then the legacies contained in the said will annexed to the said letters of administration so to them committed, as far as the personal estate and effects will thereto extend, and the law charge them." The testator left a legacy of £50 to a person who was then, and at the time the action was brought, an infant. The administratrixes paid the debts and legacies, except this legacy of £50, and distributed the residue to those entitled under the will, at the same time handing over £50 to their brother-in-law to pay the legacy to the infant. The brother-in-law did not pay the £50, and had disappeared. In an action against the sureties by an assignee of the bond, suing on behalf of the infant, to recover the legacy of £50,

Held, that there had been a breach of the bond on the part of the administratrixes in distributing the whole of the estate without retaining sufficient to pay the legacy to the infant upon its attaining twenty-one, and that the sureties were therefor liable.—*Dobbs* v. *Brain*, C.A. 7—[1892] 2 Q. B. 207; 61 L. J. Q. B. 749; 67 L. T. 371.

2. *Administration bond—Sureties—Fund in court—Order to dispense with sureties.*—The court dispensed with sureties upon an administration bond, where the whole estate of the deceased was in court, and where the applicant had been appointed by the Chancery Division guardian of an infant, who was the sole surviving beneficiary.—*In the Goods of Wilcocks*, P.D. & A.D.—67 L. T. 528.

3. *Administration bond—Will of foreigner resident abroad—Administration with will annexed—Foreign sureties.*—The testator, a French subject resident in France, made a will there by which he constituted a domiciled French subject his universal and residuary legatee. Part of the estate was in the English funds, and there were no debts in this country.

Held, on application for administration with the will annexed, that the administratrix might give an administration bond with two foreign sureties.—*In the Goods of De Beaufort*, P.D. & A.D.—[1893] P. 231.

4. *Administration, grant of—Creditors—Prior petens—Grant to creditor for largest amount.*—In an insolvent estate the court made a grant to the creditor for the largest amount, in preference to one who claimed for a much smaller sum, but who was prior petens.—*In the Goods of Smith*, P.D. & A.D.—67 L. T. 503.

5. *Administration, grant of—Joint grant—Citation of next of kin—Special circumstances—Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.—Where the only next of kin and persons interested in the personal estate of a deceased intestate were her brother and certain nephews and nieces, some of whom were residing out of the jurisdiction of the court,

The court (with the consent of those residing within the jurisdiction) made a joint grant of

administration to the brother and one of the nephews without requiring those residing out of the jurisdiction to be cited.—*In the Goods of Wash*, P.D. & A.D.—61 L. J. P. D. & A. 123.

6. *Administration, grant of—Lost will—Grant until will found—Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.—Where it appeared that a will had been duly executed by the testator, but it could not be found after his death, and his widow, who had made a statement to the effect that it had been accidentally destroyed, on being served with a notice to attend and be examined concerning the contents of the will, disobeyed the order, and was believed to have left the country, and it was necessary, for the purpose of selling certain leasehold property, valued at between £300 and £400, the court made a grant of letters of administration to the testator's only son, with the consent of the remaining next of kin, limited to the property in question, and without requiring the widow to be cited.—*In the Goods of Wright*, P.D. & A.D. 318—[1893] P. 21; 62 L. J. P. D. & A. 31; 68 L. T. 25.

7. *Administration, grant of—Lost will—Evidence that will dealt only with realty—Intestacy as to personalty.*—Where after the death of the testator the will was lost, and there was evidence that the will dealt only with realty, the court granted administration to the applicant upon the ground that the deceased died intestate as regards personalty.—*In the Goods of Attlay*, P.D. & A.D.—67 L. T. 502.

8. *Administration, grant of—Specific fund—Testator entitled to no beneficial interest—Executors dead—Limited grant to executors of deceased beneficiary—Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.—The surviving trustee of a fund being dead, and no one having been appointed to administer his estate, the next of kin having failed, after citation, to have his will proved,

The court made a grant of administration, under section 73, limited to a specific fund over which the deceased tenant for life had power to dispose, and did dispose, by her will, and by the said will appointed the applicants executors.—*In the Goods of Price*, P.D. & A.D.—67 L. T. 503.

9. *Administration, grant of—Wife's estate—Lapse of time—Grant to next of kin—Concealment—Right of husband to revocation of grant—County court—Appeal—Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *ss.* 54-58—*Court of Probate Act*, 1858 (21 & 22 *Vict. c.* 95), *ss.* 10, 11—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 100.—A husband and wife separated in 1863. The wife died in 1881, and the executors of her father's will took out letters of administration of her estate in her maiden name, describing her as a spinster, without notice to the husband, although they knew of the marriage, and that the husband was alive. In 1888 the husband first heard of his wife's death, and, after inquiries, brought an action in the county court for revocation of the grant, and regrant to himself.

The county court judge held that, in the absence of fraud, he was not justified in revoking the grant after so long a lapse of time.

Held, on appeal (Jeune, P., and Barnes, J.), that it was not necessary to show fraud, and that the grant must be revoked and a grant made to the husband.

Semble, that the appeal was not under the County Courts Act, 1888, but under the Court of Probate Acts, 1857 and 1858, and that, although section 11 of the Act of 1858 repeals section 54 of the 1857 Act, which confers the jurisdiction on the county courts, and the Act of 1858, whilst giving jurisdiction to the county court, contains no reference to appeals, yet the Acts of 1857 and 1858 must be read together, and the appellate jurisdiction under section 58 of the 1857 Act remains.

Held, that, even if the appeal were not under the Court of Probate Acts, the question of law was sufficiently raised to comply with the requirements of section 120 of the County Courts Act, 1888.—*Copeland* v. *Sinister*, P.D. & A.D. 269—[1893] P. 16; 62 L. J. P. D. & A. 38; 68 L. T. 257.

10. *Administration with will annexed—Two wills—No executor named in second—Wife sole beneficiary—Grant to wife—Securities dispensed with—Personal bond only required.*—A testator having duly executed a will, placed it among his papers, and being unable to find it, subsequently executed a second will. By both wills he made his wife his universal legatee, and in his first will he appointed her his sole executrix; but in the second will he made no appointment of executrix.

Held, on a motion for probate of both wills, that administration ought to be granted to the widow, with the last will annexed, but that she might give her personal bond without being required to find securities.—*In the Goods of Allen*, P.D. & A.D.—[1893] P. 184; 68 L. T. 462.

11. *Administration with will annexed—Widow a lunatic—Only other legatee renounced—Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73—"*Special circumstances*"—*Grant to nominee of guardians.*—By his will the testator appointed his widow sole executrix, and left her all his property, subject to a legacy of £10. The widow did not prove, became of unsound mind, and was confined in an asylum as a pauper lunatic. The legatee and creditors, and all the next of kin of the widow, save two, who were abroad, renounced administration.

The court granted administration, with the will annexed, to the nominee of the guardians for the use and benefit of the lunatic widow, the guardians undertaking, by their counsel, to secure the legacy of £10 to any proper representative of the legatee who should appear to claim it, the legatee herself being now dead.—*In the Goods of Sharland*, P.D. & A.D.—67 L. T. 501.

12. *Bankrupt executor out of England—Testator's desire to change executor—Wish not carried out—Grant to widow—Citation—Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.—A sole executor named in a will during the lifetime of the testator left England under an assumed name, after selling all his effects to his landlord, and was subsequently adjudicated bankrupt.

The testator, on hearing of the facts, desired to alter his will by removing the name from the executorship, but, owing to illness and the inaccessibility of the will at the time, died without carrying out his intention.

The court, on motion, granted letters of administration with the will annexed to the testator's widow under section 73 of the Probate Act, 1857, and dispensed with citation of the absent executor.—*In the Goods of Crawshay*, P.D. & A.D. 303—[1893] P. 108; 68 L. T. 260.

13. *Codicils—Words of revocation included in will without the knowledge of testatrix—Omission.*—A testatrix by her will constituted her illegitimate son her universal legatee and one of her executors. After the execution of the will, and shortly before her death, she expressed a wish to bequeath part of her furniture and other personal effects to her sister, her sole next of kin and heiress-at-law, and

proceeded to write out a bequest giving effect to such wish on a printed form of will, which was duly executed. The form commenced by a clause of revocation, but the testatrix did not fill up the blanks in this part of the form, and the clause was not read over to her at the time of execution, though the rest of the will was, and there was no evidence that she knew of such clause.

Held, that under the circumstances probate might be granted of the paper omitting the clause of revocation as a codicil to the original will.—*In the Goods of Moore*, P.D. & A.D.—[1892] P. 378; 62 L. J. P. D. & A. 9.

14. *Execution—Attestation*—1 *Vict. c.* 26, *s.* 9.—The two attesting witnesses to a will were father and son, both working at the same workshop, but on different floors. The testator produced his will first to the father alone telling him it was his will, and asked him to sign it as witness. The testator's signature was already on the will, and the father signed it. The son, who was working on the floor above, was then called in and signed as witness, all three being present.

Held, that the will was not duly executed.—*Wyatt* v. *Berry*, P.D. & A.D.—[1893] P. 5; 62 L. J. P. D. & A. 28; 68 L. T. 416.

15. *Execution—Foot or end—Lord St. Leonards' Act* (15 *&* 16 *Vict. c.* 24), *s.* 1.—The whole of the disposing portion of a will was written on the first side of a sheet of foolscap; the second and third sides were blank; and the attestation clause with the signatures of the testator and the witnesses were on the fourth side.

Held, that the will was duly executed.—*In the Goods of Fuller*, P.D. & A.D.—[1892] P. 377; 62 L. J. P. D. & A. 40; 67 L. T. 501.

16. *Executor according to the tenor—Trustees.*—Trustees nominated by a testator "to carry out this will," and "for the due execution of this my will,"

Held, to be thereby constituted executors according to the tenor and entitled to probate.—*In the Goods of Russell, In the Goods of Laird*, P.D. & A.D.—[1892] P. 380; 62 L. J. P. D. & A. 15; 67 L. T. 504.

17. *Married woman, will of—Consent of husband not obtained—No separate property—Probate to husband.*—The testatrix was married in 1872, and died in 1874. She made a will in 1873, to which her husband's consent was not obtained. Under a settlement of 1846, made upon the marriage of her parents, she was entitled to a share of certain property in reversion. Part of this interest became an interest in possession some months after her death in 1874, and the remainder in 1890.

The court declined to grant administration to the husband as upon intestacy, but made the ordinary grant of probate to him.—*In the Goods of Williams*, P.D. & A.D.—67 L. T. 502.

18. *Practice — Attachment — Non-compliance with citation to bring in probate of will—Motion for attachment—Affidavits not served along with notice of motion — Application dismissed.* — The affidavits intended to be used by the applicant, upon a motion for attachment, must be served at the same time as the notice of motion.—*Evans* v. *Evans*, P.D. & A.D.—67 L. T. 719.

19. *Practice — Citation — Compromise — Attorney-General cited to give his sanction.*—A testator by his will bequeathed the residue of his real and personal estate for the establishment of an agricultural college. The will was disputed by one of his next of kin, who was also heiress-at-law; but a compromise was agreed to, by which the will was to be proved in solemn form without opposition. The Attorney-General, as interested in the disposal of the residue, was cited, and appeared at the hearing to give his sanction to the compromise.—*Boughey* v. *Minor*, P.D. & A.D.—[1893] P. 181.

20. *Practice—Costs—Plea of undue influence not established — Costs out of the estate.* — If the mode in which a testator has executed his will raises in the minds of those who are interested in contesting it reasonable grounds for suspicion, and really give rise to litigation ensuing thereon, the court is justified, in the exercise of its discretion, in ordering the costs of both plaintiff and defendant to be paid out of the estate, notwithstanding the fact that undue influence has been pleaded but not proved.—*Williams* v. *Coker*, P.D. & A.D.—67 L. T. 626.

21. *Practice—Costs—Plea of undue influence not established—Costs out of the estate.*—The widow of the testator propounded his last will, which was disputed, upon the ground of testamentary incapacity, by the defendant, his brother, who also pleaded that it was obtained by the undue influence of the widow, and counter-claimed probate of an earlier will. The court found for the plaintiff, the widow, upon both issues, and pronounced for the last will; but, being of opinion that there were reasonable grounds for the litigation, and there being evidence of certain expressions used by the widow just prior to the making of the will, upon which the plea of undue influence appeared to have been founded, the court, upon the authority of *Orton* v. *Smith*, L. R. 3 P. & D. 23, and the principles therein enunciated, allowed costs of both parties out of the estate.—*Shortman* v. *Shortman*, P.D. & A.D.—67 L. T. 717.

22. *Practice—Testamentary capacity—Lunatic so found by inquisition—Reports of Chancery visitors—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 184, 185, 186—*Costs.*—In an action to obtain probate of the will of a lunatic so found by inquisition two of the next of kin opposed probate on the ground of her insanity at the date of the will. The Chairman of the Board of Chancery Visitors was examined on behalf of the defendants, and admitted that the reports made by himself and his colleagues were still in existence, but refused to produce them on the ground that he was precluded by section 186 of the Lunacy Act, 1890, from making them public.

Held, by Barnes, J. (after consultation with Lord Esher, M.R., Lindley, Bowen, Lopes, and Kay, L.JJ.), that the reports must be treated as non-existent, and that no order could be made for their production.

The jury having found for the will, probate of it was granted, and on the authority of *Davies* v. *Gregory*, L. R. 3 P. & D. 28, the costs of all parties were allowed out of the estate.—*Roe* v. *Nix*, P.D. & A.D.—[1893] P. 55; 62 L. J. P. D. & A. 36; 68 L. T. 26.

23. *Revocation—Intention—Implied revival—Grant of probate refused on motion.*—A testator executed two wills, one in 1872 and the other in 1892. By the first he left all his property to his wife, and by the second he made no provision for her. Shortly before his death he asked that the two wills might be brought to him, and directed his wife to burn the later will, which she did, and he then handed to her the earlier will, saying, "Now you will be mistress of all."

After his death letters of administration were granted to his widow, upon the assumption that the destruction of the will of 1892, which revoked all previous wills, had caused an intestacy.

Held, that, inasmuch as there were infants interested under the earlier will who could not consent, the court would not revoke the letters of administration and grant probate of the later will on motion, but would require such will to be propounded.—*In the Goods of Andrews*, P.D. & A.D.—[1893] P. 14; 62 L. J. P. D. & A. 25; 68 L. T. 259.

24. *Revocation of will—Effect of words of revocation—Previous wills—Erroneous explanation.*—If a testator employs another to convey his meaning in technical language, and that other person makes a mistake in doing it, the mistake is the same as if the testator had employed the technical language himself.

A lady, after making a previous will and codicil, desired to make a special disposition of a small sum of money payable under a policy of life insurance. She asked the insurance agent to draw up a will carrying out her intentions. He procured a form beginning with the words "I hereby revoke all wills by me at any time heretofore made," and, on his reading out these words, the testatrix objected to them, on the ground that she did not wish to revoke her previous will and codicil, but he assured her that, as the will in question related only to the insurance money, these words would not have the effect of revoking the other instruments, and, if struck out, might invalidate this will, and he believed what he stated to her. She accordingly executed the will with these words in.

The plaintiffs, executors of all three documents, commenced an action asking for probate of all these testamentary papers, but with the words of revocation in the last omitted.

Held, that on the authority of *Guardhouse* v. *Blackburn*, 14 W. R. 463, L. R. 1 P. & D. 109, and *Morrell* v. *Morrell*, 30 W. R. 491, 7 P. D. 68, the testatrix, having had the will read over to her, must, in the absence of fraud, be held to have approved as well as known the contents thereof, and probate of the last will only, with the words of revocation, granted.—*Collins* v. *Elstowe*, P.D. & A.D. 287—[1893] P. 1; 62 L. J. P. D. & A. 26; 67 L. T. 624.

25. *Will and codicils—Practice—Writing on back of codicil—Blank piece of paper pasted over codicil—Order of removal.*—A testatrix left a will and two codicils duly executed. She had made various alterations in the codicils, and among others she had written some words at the back of the first codicil, and had subsequently pasted a piece of blank paper over them.

The court made an order that the paper should be removed to ascertain what the words were.—*In the Goods of Gilbert*, P.D. & A.D.—[1893] P. 183; 68 L. T. 461.

See also EXECUTOR, 2.

PROBATE DUTY.—See REVENUE, 3, 4.

PROBATE (IRELAND):—

1. *Administration, grant of—Joint grant to one of next of kin and to a nominee refused—Joint grant to four next of kin—Security*—20 & 21 *Vict. c.* 79. *s.* 78.—An intestate died leaving a nephew and three nieces her sole next of kin. The court refused to make a joint grant of administration to the nephew and the mother of the nieces under a power of attorney from them, but made a joint grant to the four next of kin upon their entering into a bond and giving justifying security in a separate bond.—*In the Goods of M'Grossan*, P. & M.D. (Ir.) — 29 L. R. Ir. 412.

2. *Costs — Administration with will annexed — Action to recall grant and have will condemned—Want of capacity—Grant of administration to creditor—R. S. C.*, 1891, *ord.* 13, *r.* 11; *ord.* 27, *r.* 10; *ord.* 36, *r.* 2.—Where a next of kin wishes to recall a grant of administration with the will annexed, and have the will condemned on the ground of want of capacity, the proper course is to proceed by action and have the will condemned at the trial.

A creditor taking out administration with a supposed will annexed does so, though acting innocently, at his own risk, and will not be allowed his costs in a successful action to condemn the will.—*Ross* v. *Wallace*, P. & M.D. (Ir.)—29 L. R. Ir. 330.

3. *Costs—Taxation—Instructions to act and intervene—Witnesses' expenses—Costs of counsel—Rules of April*, 1878, *ord.* 7, *schedule* 75a; *ord.* 10, *rr.* 1, 8, 8a, 30.—In an important probate action the court refused to interfere with the taxation of costs in respect of instructions to act and intervene, instructions for brief, &c., and witnesses' expenses, though it was of opinion that one of the largest items was excessive.

A party to a probate action, to whom costs were given out of the estate, was not allowed on taxation: (*a*) the costs of counsel appearing on a motion not in the cause, *e.g.*, an application before the receiver judge; (*b*) the costs of two counsel on a proceeding in chambers; (*c*) the costs of an application for discovery of documents where no certificate had been given by the judge at the trial.—*Rooney* v. *Langtry*, P. & M.D. (Ir.)—31 L. R. Ir. 175.

4. *Execution—Attestation clause—Refusal of witnesses to make affidavit—Ord.* 79, *rr.* 4, 7.—Each of two attesting witnesses to a will (the attestation clause of which was insufficient) refused to make an affidavit as to its due execution. The two executors named in the will made affidavits under ord. 79, r. 7, as to its due execution in their presence.

Held, that the court had jurisdiction to dispense with the affidavits of the attesting witnesses, and would grant probate on the affidavits of the executors.—*In the Goods of Ovens*, P. & M.D. (Ir.)—29 L. R. Ir. 451.

5. *Publican's licence—Freehold premises—Heir in possession on death of owner intestate—Property in licence—Valuation for personal estate.*—The owner of a freehold licensed house died intestate. His heir entered, and his daughter took out administration to the deceased. The heir obtained at quarter sessions a transfer of the licence to himself. An order for administration of the assets of the deceased having been made, an application was made for an order that the licensed interest and the goodwill of the business formed part of the personal estate of the deceased.

Held, reversing the decision of Porter, M.R., that there was no property in the licence or goodwill apart from the ownership of the premises to which the licence was attached.—*Kelly* v. *Montague*, C.A. (Ir.)—29 L. R. Ir. 429.

PROHIBITION.—See PRACTICE, 5.

QUO WARRANTO:—

Acceptance of incompatible office—Churchwarden and vestry clerk—Non-corporate office.—The defendant, while holding the office of churchwarden, was proposed for the office of vestry clerk, and declared elected. He published a letter thanking the electors, but never acted as vestry clerk.

Held, that the defendant had not exercised the office of vestry clerk in such a way as to render the remedy by *quo warranto* applicable.

Reg. v. *Jones*, 28 L. T. N. S. 270, 21 W. R. Dig.

210, followed.—*Reg.* v. *Tidy*, Q.B.D. 128—[1892] 2 Q. B. 179; 61 L. J. Q. B. 791; 67 L. T. 319.

RAILWAY:—

1. *Abandonment of undertaking—Parliamentary deposit—Release of deposit—Jurisdiction—Parliamentary Deposits and Bonds Act*, 1892 (55 & 56 *Vict. c.* 27), *s.* 1.—Summons by the persons who had made a parliamentary deposit on behalf of a railway company for a transfer of the deposit. The company had acquired no land and raised no capital. Their powers of compulsory purchase had expired. They had passed a resolution to abandon the undertaking. The time limited by their Acts for the completion of the undertaking had still three years to run.

Held, that, under the Parliamentary Deposits and Bonds Act, 1892, s. 1, the court had no jurisdiction to order a transfer of the deposit fund until the time limited for the completion of the undertaking had arrived.—*In re South Hampshire Railway and Pier Act*, 1891, *Ex parte Chambers*, CH.D. NOR., J. 170—[1893] 1 Ch. 47; 62 L. J. Ch. 78; 67 L. T. 647.

2. *Fencing—Liability to fence as against adjoining land—Sufficiency of fence—Injury to cattle—Railways Clauses Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 68-73.—In 1862 a railway company acquired lands under their statutory powers, and, in constructing their line, fenced it off from the adjoining lands occupied by the plaintiff by a ditch or gripe, and bank with posts and rails on top; the ditch being on the plaintiff's side, the bank on the railway side, of the fence. In 1890 the plaintiff's cow slipped into, and was found dead in, the ditch.

Held, that the fence was properly and sufficiently constructed by the company, and that the company were not liable in damages for the loss of the cow. —*Ryan* v. *Great Southern and Western Railway Co.*, Q.B.D. (Ir.)—32 L. R. Ir. 15.

3. *Minerals—Custom of working usual in district—Minerals worked by quarrying—Statutory right of mine owner to enter upon and break up surface land of railway—Trespass—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 77-79.—The respective rights under the Railways Clauses Act, 1845, of a railway company, as owner of land compulsorily taken, and as the owner of minerals under such land, are different from, and are not governed by the principles of law applicable to, the respective rights of land surface owners and mineral owners in other cases.

The owner of minerals lying under or near the land and line of a railway company, which, according to the usual manner of working in the district, are won by open quarrying is, by section 79 of the Railways Clauses Act, 1845, if desirous of working such minerals, and if the railway company are not willing to purchase the same, entitled to enter upon and break up the surface of the land of the railway company for the purpose of winning the minerals, even though the consequence be the destruction of the railway.—*Ruabon Brick and Terra Cotta Co.* v. *Great Western Railway Co.*, C.A. 418—[1893] 1 Ch. 427; 62 L. J. Ch. 483; 68 L. T. 110.

4. *Negligence—Breach of duty to passenger—Theft by fellow-passenger—Liability of company.*—The plaintiff, by his statement of claim, alleged that he had suffered damage through being robbed while a passenger on the defendants' railway, and through the refusal of the defendants' servants to afford him facilities for arresting the persons who had robbed him, and for recovering the stolen property.

Held, that the statement of claim disclosed no cause of action.—*Cobb* v. *Great Western Railway Co.*, C.A. 275—[1893] 1 Q. B. 459; 62 L. J. Q. B. 339; 68 L. T. 483.

5. *Passenger—Condition on ticket—Ticket used for station other than that for which it is available—Action to recover full fare to station at which passenger alighted—Penalty.*—The defendant, a passenger on the plaintiffs' railway, took a ticket to S., for which he paid 8s. The ticket contained a condition that if used for any other station it would be forfeited and the full fare charged. He alighted at F., a station short of S., to which the fare was 9s., he then took a ticket from F., to his destination on a branch line. He did not give up at F. the ticket he had originally taken. The plaintiffs brought an action in the county court, claiming to be entitled to recover 9s., the full fare to F., or 1s. if the defendant was entitled to be credited with the 8s. paid by him for his original ticket; but they were nonsuited, on the ground that they were suing for a penalty, which was only recoverable before justices.

Held, that the plaintiffs were not suing to recover a penalty, but to recover a fare, under the terms of the contract entered into with the defendant; that the action was therefore maintainable and the nonsuit was wrong.

London, Brighton, and South Coast Railway v. *Watson*, 4 C. P. D. 118, distinguished.—*Great Northern Railway Co.* v. *Winder*, Q.B.D.—[1892] 2 Q. B. 595; 61 L. J. Q. B. 608; 67 L. T. 422.

6. *Passenger—Failure to produce ticket—Detention pending inquiry as to name and address—Railways Regulations Act*, 1889 (52 & 53 *Vict. c.* 57), *s.* 5, *sub-section* 2.—A railway company are not authorized, under section 1, sub-section 2, of the Railways Regulations Act, 1889—which empowers any officer of a company or any constable to detain a passenger who, having failed to produce or to deliver up his ticket or to pay his fare, refuses to give his name and address, until he can be brought before a justice —to detain a passenger pending an inquiry whether the name and address given by him are correct when the name and address turn out upon inquiry to have been correctly given.—*Knights* v. *London, Chatham, and Dover Railway Co.*, Q.B.D.—62 L. J. Q. B. 378.

7. *Scheme of arrangement—Creditors—Sale of undertaking—Bill in Parliament—Petition to sanction scheme—Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *s.* 18.—A petition was presented by a railway company asking that the scheme of arrangement between the company and its creditors might be confirmed by the order of the court. Another railway company had agreed to purchase the undertaking of the petitioning company, and a Bill was prepared to be presented in the session of 1893 to carry the sale into effect.

Held, that the court ought not, on behalf of unsecured creditors, to approve a scheme on the hypothesis that a Bill before Parliament would pass into law.

Held, therefore, that the petition must stand over, with liberty to apply.—*In re Eastern and Midlands Railway Co.*, CH.D. KEK., J.—67 L. T. 711.

See also LOCAL GOVERNMENT, 2.

REGISTRY ACTS (YORKSHIRE):—

"*Assurance*"—*Contract for sale of land—Registration—Priority—Yorkshire Registries Act*, 1884 (47 & 48 *Vict. c.* 54), *ss.* 3, 4, 14.—The owner of land in Yorkshire made an agreement in writing with the plaintiff, by which the former agreed, in consideration of £200 paid to him by the plaintiff, to complete certain buildings on the land, and the plain-

tiff agreed to purchase the buildings when completed for £750, less the £200 already paid. This agreement was registered under the Yorkshire Registries Act, 1884.

Held, that this agreement was not an "assurance" within the meaning of the Act so as to be entitled to be registered, and that, therefore, it had not priority over a prior mortgage to the defendants registered subsequently.—*Rodger* v. *Harrison and Others*, C.A. 291—[1893] 1 Q. B. 161; 62 L. J. Q. B. 213; 68 L. T. 66.

RENT-CHARGE:—

Personal liability of grantor—Possession of land—Receipt of rents and profits—Payment of prior incumbrances—No surplus for payment of rent-charge.—W. was owner in fee of certain lands subject to outstanding mortgages, and by deed dated December 19, 1881, granted an annual rent-charge to the plaintiffs. From a recital it appeared that the object of the deed was the benefit of the lands by promoting the construction of a railway. There was no express covenant to pay the rent-charge, but it was provided that it might be recovered by the same means as if it were a rent-charge created by the Improvement of Land Act, 1863. There was a recital that the lands were subject to the incumbrances which were set out in the schedule to the deed. Since the execution of the deed the rents and profits of the lands were insufficient to pay the paramount outgoings and incumbrances, and no rents were received out of the lands applicable to the payment of the rent-charge. W. had appointed an agent or receiver over the rents, who accounted for the receipts to the incumbrancers, and paid over whatever he received according to the interest of those entitled, no surplus at any time coming to W. W. used a portion of the lands, which were untenanted, as a home farm, and it was stocked and worked by him; but any profits he received were paid to the mortgagees.

Held, (1) that the legal position of W. was that of tenant at will or bailiff to the mortgagees, and that he was not pernor of the profits of the lands so as to be personally liable to pay the rent-charge; (2) that the fact of his being himself the grantor of the rent-charge charged upon the lands did not render him personally liable to pay the rent-charge.

Neither by analogy to the old writ of annuity nor by virtue of the grant itself is there now necessarily involved any personal liability on the part of the grantor of an annuity charged upon lands.—*Sligo, Leitrim, and Northern Railway Co.* v. *Whyte*, M.R. (Ir.)—31 L. R. Ir. 316.

RESTRAINT of TRADE:—

1. *Covenant—Severability—Validity—Sale of business—Business in the nature of a trade secret—Restraint co-extensive with area of business—No limit of space.*—In 1888 the defendant covenanted with the plaintiff company, which carried on (*inter alia*) the business—formerly carried on by the defendant and sold by him to a company with which the plaintiff company was afterwards amalgamated—of the manufacture of quick-firing and other guns and ammunition, that he "should not, during the term of twenty-five years from the date of the incorporation of the company, if the company should so long continue to carry on business, engage, except on behalf of the company, either directly or indirectly, in the trade or business of a manufacturer of guns, gun mountings or carriages, gunpowder explosives or ammunition, or in any business competing or liable to compete in any way with that for the time being carried on by the company."

In pursuance of a further agreement the defendant acted as one of the plaintiff company's two managing directors. The defendant in 1890 having, owing to disputes, resigned his office in the plaintiff company, and having entered into arrangements with a foreign company for carrying on business in competition with the businesses of the plaintiff company, the plaintiff company commenced an action asking that the defendant might be restrained by injunction from so acting in breach of the covenant.

Held, that the covenant was severable, and was valid and must be enforced so far as it related to the business of the manufacture of guns, gun mountings or carriages, gunpowder explosives or ammunition; for that, so restricted, it was not, although unlimited in space, contrary to public policy or wider than was reasonably necessary for the protection of the interests of the covenantee.

Semble, that the covenant would be too wide, and therefore invalid, in its application to any business which the company might carry on during twenty-five years.

Decision of Romer, J., reversed.

The law as to "general restraints" and "partial restraints" reviewed.

Per Bowen, L.J.—The rule as to general restraint of trade ought not to apply where a trader or manufacturer finds it necessary, for the advantageous transfer of the goodwill of a business in which he is interested and for the adequate protection of those who buy it, to covenant that he will retire altogether from the trade which is being disposed of, provided always that the covenant is one the tendency of which is not injurious to the public.—*Maxim Nordenfelt Guns and Ammunition Co.* v. *Nordenfelt*, C.A. 604—[1893] 1 Ch. 630; 62 L. J. Ch. 273; 68 L. T. 833.

2. *Covenant—Validity—Reasonableness.*—By an agreement dated August, 1880, and made between the plaintiff, who was described as an agent or commission merchant carrying on business under the style of M. & Co., of the one part, and the defendant F. of the other part, the defendant agreed to enter the plaintiff's service as clerk at a certain salary. Clause 4 of the agreement provided as follows: "In case the aforesaid employment of the said F. shall be determined by any cause whatever, he shall not during the period of five years thence next following carry on or engage in, either as principal, agent, clerk, or otherwise, any trade or business in the United Kingdom in connection with any kind of goods of Continental manufacture which the said firm of M. & Co. shall have dealt in at any time previously to such determination." In 1892 the defendant left the plaintiff's employment and embarked in a rival business, and the plaintiff applied for an injunction restraining him from carrying on any business in contravention of the above agreement. The defendant contended that the agreement was unreasonable and oppressive, and was void, as being in restraint of trade.

Held, that the words "any trade or business" in the covenant did not refer to any retail trade in which such Continental goods might happen to be sold, but to trade or business of a commission merchant; that, having regard to the plaintiff's business, the restriction that the defendant should not carry on such business in the United Kingdom was not unreasonably wide; that the words "at any time previously" meant during the time of the defendant's employment; and therefore that the restraint was not wider than was reasonably necessary for the plaintiff's protection, and the covenant was not void.

Decision of Stirling, J., affirmed.—*Moenich* v. *Fenestre*, C.A.—61 L. J. Ch. 737; 67 L. T. 602.

3. *Covenant — Reasonableness — Injunction.* — The defendant was by an agreement in writing employed by the plaintiff as a commercial traveller for ten years, and the defendant agreed that he would not within twelve years from the date of the agreement, or for two years after the termination of his employment, if the same should continue beyond ten years, engage in business similar to that carried on by the plaintiff or act as commercial traveller for any person or body carrying on a similar business, provided that such restriction should only extend to such counties in Ireland as the defendant should travel in for the plaintiff at any time during his employment.

Held, a reasonable agreement, and therefore valid.

Held, also, that the court in granting an injunction had a discretion to limit the extent of the injunction, and under the circumstances of the case granted it for two years only.—*Cussen* v. *O'Connor*, EX.D. (Ir.)—32 L. R. Ir. 330.

4. *Covenant—Unreasonable covenant.*—R., a brewer, engaged M. as a traveller for procuring orders for and selling malt liquors, and also, if required by R., aerated waters, to the class known as wholesale purchasing agents in a certain district. M. agreed that for two years after the determination of his employment he would not be concerned in selling malt liquors or aerated waters within a certain district. R. never dealt in aerated waters, nor required M. to obtain orders for them. M., after leaving R.'s employment, became a traveller to rival brewers within the prescribed district. R. brought an action, and applied for an injunction. M. insisted that the restriction was too wide, and therefore void. Stirling, J., construed the restriction as only prohibiting M. from selling wholesale, and held that the stipulation as to aerated waters was severable, and granted an injunction limited to selling malt liquors wholesale.

Held, on appeal, that the agreement must be construed as prohibiting M. from selling wholesale or retail within the limit, and that the restraint was not greater than was necessary for the reasonable protection of R., for that selling wholesale and retail were not two distinct businesses, but only different modes of carrying on the one business of selling malt liquors; that the selling of malt liquors either wholesale or retail within the district might affect R.'s business, and that R. was entitled to restrain M. from selling malt liquors in any way within the district.

Held, also, affirming the decision of Stirling, J., that the stipulation as to aerated waters was severable.—*Rogers* v. *Maddocks*, C.A.—[1892] 3 Ch. 346; 62 L. J. Ch. 219.

5. *Covenant—Limitation as to time or space—Reasonableness—Validity—Public policy.*—Where a covenant in restraint of trade is general—that is, without qualification—it is bad, as being unreasonable and contrary to public policy; where it is partial—that is, subject to some qualification either as to time or space—then the question is whether it is reasonable, and, if reasonable, it is good in law.

In considering the question of reasonableness the points to which the attention of the court is specially directed are the limits of time and of space, and the protection required for the trade of the covenantee, this latter point involving the examination of the nature and extent of the trade.—*Badische Anilin und Soda Fabrik* v. *Schott, Segner, & Co.*, CH.D. CHI., J—[1892] 3 Ch. 447; 61 L. J. Ch. 698; 67 T. 281.

6. *Covenant—Covenant not to keep a coffee-house—Sale of refreshments by grocer—Ancillary business.*—The defendants were bound by a covenant in the lease of their house not to use the same as a coffee-house. The defendants were dealers in tea, coffee, and other groceries, but they proposed, as ancillary to their business, and for the convenience of their customers, to sell light refreshments consisting of cups of tea and coffee, bread and butter, pastry, ham sandwiches, and pork pies, to be consumed on the premises.

Held (affirming the decision of North, J.), that the sale of light refreshments was carrying on the business of a coffee-house keeper, and was a violation of the covenant, and an injunction was granted accordingly.

Buckle v. *Fredericks*, 44 Ch. D. 224, followed.

Stuart v. *Diplock*, 43 Ch. D. 343, distinguished.—*Fitz* v. *Iles*, C.A.—[1893] 1 Ch. 77; 62 L. J. Ch. 258; 68 L. T. 108.

REVENUE :—

INCOME TAX—

1. *Exemption—Free library—Assessment of corporation in respect of free libraries—"Building the property of any literary or scientific institution"—5 & 6 Vict. c. 35, Schedule A, s. 61, r. 6.*—Free libraries, established by corporations or commissioners under the Free Libraries Acts, 1855 and 1866 (18 & 19 Vict. c. 70 and 29 & 30 Vict. c. 114) are not within the class of institutions entitled to exemption from duty under schedule A., s. 61, r. 6, of the Income Tax Act, 1842.—*Andrews* v. *Mayor, &c., of Bristol*, Q.B.D.—61 L. J. Q. B. 715; 67 L. T. 618.

2. *Profits or gains—Life assurance—Deductions for annuities paid—Income Tax Act*, (5 & 6 *Vict.* c. 35), *s.* 100, *Schedule D, Case* 1, *r.* 4; *s.* 102.—One branch of a life assurance society's business consisted in the sale of annuities to the public. A lump sum was paid down in the case of an immediate annuity, and for a deferred or contingent annuity either a lump sum or a series of periodical payments. In making up the balance-sheet for three years for the purpose of ascertaining the profits and gains on which income tax was to be assessed under Schedule D of the Income Tax Acts, the society deducted from its gross income the sum paid in discharge of its annuity contracts. The assessment was for the year 1885-6.

Held, that the society was not liable to be assessed for the amount paid by it for these annuities.

Decision of the Court of Appeal, 38 W. R. 696, 25 Q. B. D. 351, reversed.—*Gresham Life Assurance Society* v. *Styles*, H.L. (E.) 270—[1892] A. C. 309; 62 L. J. Q. B. 41; 67 L. T. 479.

PROBATE DUTY—

3. *Residuary devisee—Specific legatee—Residuary legatee—Incidence of duties—Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict.* c. 12), *ss.* 27, 41—*Customs and Inland Revenue Act*, 1889 (52 & 53 *Vict.* c. 7), *s.* 5.—A testatrix, who died in 1891, by her will, made in 1870, after making certain pecuniary bequests and specific gifts of real and leasehold property, and disposing of the residue of her real property and certain specified sums of stock and investments, gave the residue of her personal property to A. B. absolutely.

Held, that the stamp duty payable under section 27 of the Customs and Inland Revenue Act, 1881, and the estate duty payable under section 5 of the Customs and Inland Revenue Act, 1889, were not payable in part out of the property specifically

given, but must be borne entirely by the general residuary personal estate.

The principle of the decision in *In re Croft, Deane* v. *Croft*, 40 W. R. 425, [1892] 1 Ch. 652, not applicable as between specific and residuary legatees.—*In re Bourne, Martin* v. *Martin*, CH.D. STI., J. 70—[1893] 1 Ch. 188; 62 L. J. Ch. 69; 67 L. T. 586.

4. *Valuation—Under-estimate of value—Close of administration—Subsequent discovery of true value—"Person acting in the administration of the estate"—Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *ss.* 32, 37.—Upon the death of a testator, who died in 1883, a valuation for probate purposes of (*inter alia*) certain paintings, forming part of the estate, was made by a competent valuer, and the executors delivered an affidavit of account stamped on the basis of such valuation, and obtained probate. In 1886 the executors had fully administered and distributed the testator's estate, and since that date they had not any part of the testator's estate in their hands or under their control as executors. In 1888 it was for the first time discovered that the paintings had been considerably undervalued. No suggestion was, however, made of any *mala fides* or negligence on the part of either the executors or the valuer. Upon an information claiming to recover from the executors further duty upon the true value of the pictures, under section 32 of the Customs and Inland Revenue Act, 1881,

Held, that the words "the person acting in the administration of such estate and effects" in section 32 meant the person who is acting in the administration of the estate when the mistake as to undervalue is discovered; that, in the present case, the executors, having fully administered the estate at the time when the mistake as to the undervalue of the paintings was discovered, were not persons acting in the administration of the estate within the meaning of section 32; and, accordingly, that the Crown had no remedy against them.

Decision of the Divisional Court (Hawkins and Wills, JJ.), reported 40 W. R. 671, [1892] 2 Q. B. 289, affirmed.—*Attorney-General* v. *Smith*, C.A. 245—[1893] 1 Q. B. 239; 62 L. J. Q. B. 288; 68 L. T. 6.

SUCCESSION DUTY—

5. "*Succession*"—*Succession of a value exceeding* £10,000—36 *Geo.* 3, *c.* 52, *s.* 12—*Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 1, 2, 10, 32—*Customs and Inland Revenue Act*, 1889 (52 & 53 *Vict. c.* 7), *s.* 5, *sub-sections* 1, 4, 5; *s.* 6, *sub-sections* 1, 2, 4.—Under a marriage settlement, upon the death of the settlor, the father of the wife, a fund of more than £10,000 became vested in the trustees in trust for the wife for life with remainder to the younger children of the marriage in equal shares absolutely.

Held, that the effect of section 6, sub-section 4, of the Customs and Inland Revenue Act, 1889, was to incorporate into sub-section 1 the definition of "succession" contained in section 1 of the Succession Duty Act, 1853, and that by virtue of section 12 of 36 Geo. 3, c. 52, and sections 10 and 32 of the Succession Duty Act, 1853, the fund constituted a "succession" of a value exceeding £10,000, upon which estate duty was payable.—*Attorney-General* v. *Lord Aberdare*, Q.B.D.—[1892] 2 Q. B. 684; 61 L. J. Q. B. 615; 67 L. T. 588.

6. "*Succession*"—*Acceleration of succession—Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 15, 20, 38.—By a marriage settlement a sum of money was settled upon trustees upon trust to pay the income to the wife during her life, and after her death to pay the income to the husband, if he should survive her, during his life, with remainder, in default of issue, to the wife absolutely The husband died leaving the wife surviving him, and there was no issue.

Held, that, on the death of the husband, the widow became entitled in possession to a succession, and that succession duty was payable on the amount of the fund, less the value of her life interest therein.—*Attorney-General* v. *Robertson*, C.A. 241—[1893] 1 Q. B. 293; 62 L. J. Q. B. 282; 68 L. T. 371.

RIVER:—

Pollution—Causing sewage to flow into stream—Sewer vested in local authority—Joint offenders—Discretion—Rivers Pollution Prevention Act, 1876 (39 & 40 *Vict. c.* 75), *ss.* 3, 10, 11—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 13, 15, 17, 19, 27—*Practice—Appeal from county court—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 120, 124.—The defendants discharged sewage from their premises into a sewer which was vested in the plaintiffs, the local sanitary authority. The sewer communicated with a stream, which become polluted by the sewage from the defendants' premises. The plaintiffs applied to a county court for an order under section 10 of the Rivers Pollution Prevention Act, 1876, to restrain the defendants from polluting the stream. The county court judge made the order.

Held (affirming the decision of the Divisional Court), that the plaintiffs and the defendants had both committed offences against the Act, the defendants by causing the sewage to flow into the stream, and the plaintiffs by permitting them to do so; that the making of the order was discretionary, and that, under the circumstances, no order ought to be made at the instance of the plaintiffs.

Appeals from county courts under the Rivers Pollution Prevention Act, 1876, are properly made by way of motion.—*Kirkheaton District Local Board* v. *Ainley*, C.A. 99—[1892] 2 Q. B. 274; 61 L. J. Q. B. 812; 67 L. T. 209.

See also LOCAL GOVERNMENT, 12; NUISANCE, 3; SCOTCH LAW, 6.

RULES of COURT:—

Ord 3, r 6—See PRACTICE, 67-69, 71; MORTGAGE, 6
Ord 7, r 3—See PRACTICE, 11
Ord 9, r 8—See PRACTICE, 59, 60
Ord 11, r 1 (*e*)—See ADMIRALTY, 3; PRACTICE, 65: r 1 (*f*), PRACTICE, 61: r 1 (*g*), PRACTICE, 63, 64
Ord 14, r 1—See PRACTICE, 38, 67-70; MORTGAGE, 6
Ord 14, r 5—See PRACTICE, 38
Ord 16, r 1—See PRACTICE, 43
Ord 16, r 8—See MORTGAGE, 5
Ord 16, r 9—See PRACTICE, 45, 46
Ord 16, r 11—See PRACTICE, 42
Ord 16, rr 22-24—See PRACTICE, 4
Ord 16, r 46—See PRACTICE, 41
Ord 17, r 8—See PRACTICE, 40a
Ord 18, r 2—See MORTGAGE, 4; PRACTICE, 36
Ord 18, r 5—See PRACTICE, 37
Ord 19, r 7—See PRACTICE, 39
Ord 19, r 27—See PRACTICE, 48
Ord 20, r 4—See PRACTICE, 48
Ord 20, r 5—See PRACTICE, 56
Ord 21, r 16—See PRACTICE, 21
Ord 23, r 4—See PRACTICE, 21
Ord 25, r 4—See LIMITATIONS, STATUTE OF, 2; PRACTICE, 39, 53, 54
Ord 25, r 5—See HARBOURS AND DOCKS
Ord 27, r 11—See PRACTICE, 21, 22
Ord 27, r 15—See PRACTICE, 57
Ord 31, r 1—See PRACTICE, 23
Ord 31, r 7—See PRACTICE, 27

Ord 31, r 12—See PRACTICE, 23, 24
Ord 31, r 14—See PRACTICE, 26
Ord 31, r 20—See PATENT, 4
Ord 36, r 1—See PRACTICE, 56, 58
Ord 36, r 11—See PRACTICE, 57
Ord 36, r 14—See PRACTICE, 56
Ord 36, r 15—See PRACTICE, 57
Ord 36, r 50—See ARBITRATION, 5
Ord 36, r 58—See PRACTICE, 36
Ord 39, r 8—See PRACTICE, 7
Ord 41, r 5—See DIVORCE, 19
Ord 42, rr 23, 24—See PRACTICE, 28
Ord 42, r 32—See PRACTICE, 29
Ord 44, r 2—See PRACTICE, 8, 10
Ord 46, r 1—See LUNATIC, 4; PRACTICE, 14
Ord 48a, r 11—See PRACTICE, 61, 62
Ord 50, r 2—See PRACTICE, 50
Ord 50, r 3—See PRACTICE, 26
Ord 52, r 4—See PRACTICE, 9
Ord 54, r 12—See PRACTICE, 14
Ord 57, r 2—See PRACTICE, 34, 35
Ord 57, rr 9, 11—See PRACTICE, 2
Ord 57, rr 16, 17—See PRACTICE, 34
Ord 59, r 8—See COUNTY COURT, 5
Ord 59, r 12—See COUNTY COURT, 4
Ord 64, r 8—See ARBITRATION, 8
Ord 64, r 13—See PRACTICE, 28
Ord 65, r 1—See PRACTICE, 8, 17, 18, 20
Ord 65, r 27 (48)—See PRACTICE, 19
Ord 67, r 4—See PRACTICE, 10
Ord 69, r 1—See DEBTORS ACT, 3
Ord 70, r 1—See DEBTORS ACT, 3; PRACTICE, 9

SALE of FOOD and DRUGS ACTS.—See ADULTERATION.

SALE of GOODS:—

1. *Sale by sample—Place for delivery—Place for inspection—Contract—When property in goods sold passed.*—The plaintiff, a farmer, sold by sample to the defendant, a corn dealer, a quantity of barley. In accordance with the terms of the contract the plaintiff, at his own expense, delivered the barley in sacks at T., a small roadside railway station. The plaintiff, at the time of the sale to the defendant, was aware that the defendant would resell the barley to brewers or maltsters, but had no knowledge when or to whom such resale would take place, nor to whom the defendant would consign the barley. The defendant, in fact, on the same day resold the barley to a firm of brewers carrying on business at S. The defendant, on hearing of the arrival of the barley at T. station, directed the stationmaster to take and forward him a sample, and this the stationmaster did. The defendant, after inspection of the sample, ordered the stationmaster to send on the barley to the defendant's sub-vendees, the brewers at S. The defendant subsequently rejected the barley as inferior to sample. There was evidence to show that the bulk of the barley could be inspected in the sacks in the trucks at T. station.

Held, on these facts, that there was nothing to displace the *primâ facie* presumption that T. station, the place of delivery by the plaintiff (vendor), was also the place for inspection, and that the property in the barley passed when the defendant took possession of the barley at T. station and ordered it to be sent on to his sub-vendees at S.; and, consequently, that the defendant was not entitled afterwards to reject the barley.—*Perkins* v. *Bell*, C.A. 195—[1893] 1 Q. B. 193; 62 L. J. Q. B. 91; 67 L. T. 792.

2. *Stoppage* in transitu—*End of transit.*—Certain goods were ordered from R. & Co. by G. and were delivered at the docks, marked, as required by G., J. H. A. & Co., Trinidad. With the goods were forwarded shipping instructions from G. directing the goods to be placed on board the s.s. *MacGarel*. A receipt signed by the dock superindent was given for them to R. & Co. as follows:—"Bought of R. & Co., J. H. A. & Co., 500 boxes. S s. *MacGarel*, on account G., Trinidad."

The goods were shipped for Trinidad, and while on their way, G. having become bankrupt, R. & Co. gave notice to stop them in transit. The goods were afterwards delivered under the orders of the Trinidad Court to J. H. A. & Co., who paid the trustee in bankruptcy of G. £75 for them. R. & Co. claimed this money.

Held, that the transit was determined when the receipt was given; that there was no stoppage of the goods in transit; and that therefore the trustee, and not R. & Co., was entitled to the £75.—*In re Gurney, Ex parte Hughes*, Q.B.D., BKCY.—67 L. T. 598.

See also TROVER.

SCHOOL BOARD.—See EDUCATION ACTS.

SCOTCH LAW:—

1. *Bankruptcy—Vesting of heritable estate in bankrupt's trustee—Latent trust in bankrupt—Doctrine* tantum et tale—*Bankruptcy (Scotland) Act*, 1856 (19 & 20 *Vict. c.* 79), *s.* 102.—Heritage was held by a bankrupt on an unqualified *ex facie* absolute disposition registered in his own name; but it appeared that he held it only as a trustee for the right owners, to whom he had given an unrecorded acknowledgment of the trust.

Held, reversing the decision of the Court of Session (18 Ct. Sess. Cas., 4th series, 1166), that the heritage did not vest in, or pass to, the bankrupt's trustee for the benefit of general creditors of the bankrupt.—*Heritable Reversionary Co.* v. *Millar*, H.L. (Sc.)—[1892] A. C. 598.

2. *Church—Contract—Minister's stipend—Obligation to provide a legal and competent stipend not under a certain sum—Extent of obligation—Surplus from seat rents—Trust.*—By decree of the Teind Court, dated the 15th of July, 1741, obtained at the instance of the baron, baillie, and certain of the feuars of the burgh of Greenock, for themselves and in the name of its whole inhabitants, the burgh was disjoined and erected into a new parish. The sum of £1,000 had already been subscribed and invested in heritable security for the purpose of building a kirk for the new parish and endowing the minister with a competent stipend of not less than 950 merks; and the pursuers had likewise undertaken to contribute certain yearly sums for a period of fifteen years in order to complete a fund for the stipend.

These facts were fully set out in the summons, but were not referred to either in the conclusions of the summons or in the decree, which simply ordained the baillie, feuars, and inhabitants of the burgh to provide the minister of the new church with a competent legal stipend not under 950 merks.

Held, affirming the decision of the Court of Session (19 Ct. Sess. Cas., 4th series (Rettie), 643), that the decree of the Court of Teinds imposed a direct liability upon the burgh of Greenock to pay the minister a competent and legal stipend according to the varying circumstances from time to time, and that a minimum payment of 950 merks would not fulfil the obligation; nor was the obligation impaired by any loss of the funds or deficiency in the expected contributions.—*Provost, &c., of Greenock* v. *Peters*, H.L. (Sc.)—[1893] A. C. 258.

3. *Conveyance—Sale of superiority—General words of description in dispositive clause—Construction—Subsidiary clauses—Right to coals.*—By the law of Scotland the dispositive clause of a deed in implement of a sale of land rights is the governing clause, and if its terms are express and unambiguous they cannot be contradicted or cut down by inference drawn from other parts of the deed; but if the dispositive clause contain general words of description susceptible of more than one meaning, other clauses of the deed may be referred to as showing the sense in which these general words are used.

The appellant raised this action for declarator that he was entitled to the exclusive right of the coals within the respondents' lands of H., L., and B. These coals had never been worked. In 1796 the Duke of Argyll, then owner of the barony of which these lands formed a part, disposed of the *dominium utile* of H., L., and B. to the predecessor in title of the respondents, reserving the coals. The superiority of these lands, and the reserved coals, were acquired in 1808 from the Argyll family by C. T. By deed in 1837 C. T.'s trustee in bankruptcy, on the narrative that he had offered for sale the "superiorities and feu duties" of these lands, conveyed by the dispositive clause to the respondents' predecessor in title, the owner of the *dominium utile*, "all and whole the town and lands of H., with mosses, muirs, and all and singular pertinents used and wont pertaining and belonging thereto, all as at present possessed by the said" respondents' predecessor. L. and B. were conveyed in similar words. In 1860 the barony, with the coals, was purchased by the appellant's predecessor in title from C. T.'s trustee.

Held, reversing the decision of the majority of the whole Court of Session (19 Ct. Sess. Cas., 4th series (Rettie), 700), that the estate of coal was not conveyed by the deed of 1837, the narrative clause showing that the words "all and whole the lands" were meant to apply to the vassal's estate, and not to land and minerals belonging in fee to the superior.

Lee v. *Alexander*, 8 App. Cas. 853, distinguished.

Fleeming v. *Howden*, 6 Ct. Sess. Cas., 3rd series (Macpherson), 782, approved.—*Orr* v. *Mitchell*, H.L. (Sc.)—[1893] A. C. 238.

4. *Negligence — Injury to workmen resulting in death after action brought — Competency of second action by mother for solatium for same injury.*—A workman having been injured through the fault, as he alleged, of his employers, brought an action against them for damages. While the action was pending he died, intestate and unmarried. His mother was appointed his executrix, and she raised a second and concurrent action for solatium for her son's death, and asked that the second action should be remitted to the same jury who were to try the first action.

Held, affirming the decision of the court (18 Court Sess. Cas., 4th series (Rettie), 1164), that the second action was incompetent.—*Wood* v. *Gray & Sons*, H.L. (Sc.)—[1892] A. C. 576; 61 L. T. 628.

5. *Railway — Statutory agreement to stop all ordinary trains at temporary station — Subsequent agreement to make station permanent—Right to have trains stopped.*—The House, reversing the decision of the Court of Session (20 Court Sess. Cas., 4th series (Rettie), 409), held that all ordinary trains must stop at the station in question.—*Gilmour* v. *North British Railway Co.*, H.L. (Sc.)—[1893] A. C. 281.

6. *River—Pollution—Prescriptive right, extension of—Concurrent findings of fact.*—A riparian proprietor who has a prescriptive right to take, in a particular way and at a particular place, water from a river, and to return such water to the river in a polluted condition, is not entitled to take the water in any other way or place, nor use even his common law right of taking it in such a way as to add to the pollution of the stream. — *McIntyre Brothers* v. *McGavin*, H.L. (Sc.)—[1893] A. C. 268.

7. *Succession—Marriage contract—Vesting*—Conditio si sine liberis decesserit—*Discharge of trustees.*—The rule is, "*si sine liberis decesserit*" applies to ante-nuptial marriage contracts.

By ante-nuptial contract of marriage the wife conveyed the sum of £4,000 to trustees, first, to pay the wife during the life of the spouses the interest for her alimentary use exclusive of the *jus mariti*; secondly, in the event of the predecease of the wife leaving a child or children of the marriage, the trustees were to pay the income to the husband during his life for "his alimentary use only," his right to assign and claims of creditors being excluded; and on his death to pay the capital of the fund over to the said "child or children" after their attaining majority, &c. And if there were no children alive at the dissolution of the marriage by the wife's predecease, or, though there should then exist a child or children, in the case of the death of all of them before the term of payment of their provisions, then the interest was still, as provided, to be paid to the surviving husband, but the capital was to be at the wife's disposal by will, to be conveyed to the disponees on the husband's death, and, failing any will, then to the wife's nearest heirs and executors, but with power to the trustees to pay over the capital at any time after the death of the predeceasing wife and "failure of issue" on obtaining, *inter alia*, the consent of the surviving husband. Thirdly, in the event of the predecease of the husband, and a child or children being then in existence, the trustees were to pay the interest to the wife for her alimentary use only, and, after her death, the capital to the children on majority; but declaring always if such child or children should all die before the wife or should "die before majority and without leaving issue," the trustees were still to pay the interest for the wife's alimentary use only, and in the event of the wife surviving the husband and "failure of issue" she was to have the same power as above of disposing by will of the capital. It was further provided that the provision of the children should not become vested interests until after the death of the survivor of the spouses and until the children attained majority.

The wife died, leaving by will all she possessed to her husband, by whom she was survived, and by one child, a son, stated to have been born subsequently to the wife's will. The son had no children. The husband and son claimed from the trustees immediate payment of the capital, on the ground that it must inevitably belong to one or the other.

Held, reversing the decision of the Court of Session (18 Court Sess. Cas., 4th series, 319), that the husband and son were not entitled to immediate payment, the trustees being bound to keep alive the trust for the protection of the alimentary provision to the husband, and the right of possible children born to the son.—*Hughes* v. *Edwards*, H.L. (Sc.)—[1892] A. C. 583.

8. *Superior and vassal—Whether composition or relief payable by the vassal on entry—Entry by trustees—Effect of confirmation of prior infeftments by superior.*—An ancestor of the appellant acquired three several parcels of land, D., W., and T., by purchase, in all of which his authors were infeft

and entered with the superior. He took base infeftment in one of these parcels, W.; but with the exception of the appellant none of the series of heirs upon whom his succession devolved expede a feudal title, or were entered with the superior. In 1810, one of these heirs, the grandfather of the appellant, conveyed these three parcels to trustees for the purpose of paying the truster and his wife an annuity; the truster's debts; and in the event of the truster's death before the debts were paid to carry out any deed of settlement he might leave. Power was given to the trustees to sell with the truster's consent. When the debts were paid, or if demanded in 1814, the trustees were to reconvey.

The truster died in 1811. In 1815 the trustees were entered in the lands of D. and W. with the superior whose charter confirmed previous infeftments. In 1828 the trustees were entered in the other lands of T. On each entry they paid a composition of a year's rent.

Held, affirming the decision of the Court of Session (18 Ct. Sess. Cas., 4th series, 587), that the appellant was liable to the superior in a composition; because (*a*) assuming the trust to be simply an incumbrance, he would not have been in a position to enter as heir; (*b*) that the appellant's implied entry in 1874 was not enfranchised by the entry of his grandfather's trustees; and (*c*) that the confirmation in 1815 had not the effect of making the appellant's ancestor an entered vassal, the confirmation having no operation other than to safeguard the investiture of the trustees.

Stuart v. *Jackson*, 17 Ct. Sess. Cas., 4th series, 85; *Duke of Athole* v. *Stewart*, 17 Ct. Sess. Cas., 4th series, 724; and *Duke of Athole* v. *Menzies*, 17 Ct. Sess. Cas., 4th series, 733, assuming them to be correct, must be taken to be not applicable.—*Johnstone* v. *Duke of Buccleuch*, H.L. (Sc.)—[1892] A. C. 625.

See also DIVORCE, 13; DOMICIL.

SEDUCTION:—

Master and servant—Parent and child—Evidence of service.—In an action by a parent for the seduction of her daughter, it appeared that the daughter had been married, and lived with her husband for eight years, up to his death, which took place two years before the commencement of the action. She was then in the employment of a third party, which occupied her time each weekday from 9.30 a.m. to 8 p.m. She resided in lodgings rented by herself, but was in the habit during the time which remained at her disposal of coming to her mother's house and helping her by the discharge of household duties which were of such a nature as would be usually performed by a servant.

Held (by Palles, C.B., and Andrews, J.; Murphy, J., dissenting), that there was evidence to go to the jury in support of the plaintiff's case, and that the verdict for the plaintiff must stand.—*O'Reilly* v. *Glavey*, EX.D. (Ir.)—32 L. R. Ir. 316.

SETTLED ESTATES ACT.—See LANDLORD and TENANT, 13.

SETTLED LAND ACTS:—

1. *Equitable tenant for life—Right to possession of estate—Custody of title deeds—Settled Land Acts*, 1882 (45 & 46 *Vict.* c. 38), *and* 1884 (47 & 48 *Vict.* c. 18).—The powers granted to, and the duties imposed on, a tenant for life by the Settled Land Acts raise a presumption, in favour of his title to possession, not before existing, and render it incumbent on the court to provide that, if the estate and trustees can be adequately protected by reasonable safeguards, an equitable tenant for life should be let into possession.

An equitable tenant for life is entitled to the custody of the title deeds.—*In re Wythes, West* v. *Wythes*, CH.D. KEK., J. 375—[1893] 2 Ch. 369; 62 L. J. Ch. 663; 68 L. T. 520.

2. *Heirlooms—Sanction of court to sale—Proviso in restraint of sale of land—Settled Land Act*, 1882 (45 & 46 *Vict.* c. 38), *ss.* 37, 51.—A testator by his will settled real estate and bequeathed chattels as heirlooms. He directed his trustees to hold a sum of £4,000 on trust to keep up part of the estate, and to pay the surplus income to the person for the time being entitled to possession, with a proviso that, if such person alienated the property, the £4,000 was to fall into the residue. The tenant for life, under the provisions of the Settled Land Act, sold the estate. He also sold some of the heirlooms. On summons to obtain the sanction of the court to the sale of the heirlooms, and declare the rights of the parties in the £4,000,

Held, that the court could not, *ex post facto*, sanction the sale of the heirlooms already sold, under section 37 of the Settled Land Act, 1882; and that the provision in the will directing the £4,000 to fall into the residue on alienation was void under section 51.—*In re Ames, Ames* v. *Ames*, CH.D. NOR., J. 505—[1893] 2 Ch. 479; 62 L. J. Ch. 685; 68 L. T. 787.

3. *Improvements — Rent-charges — Redemption — Capital moneys—Right of tenant for life to repayment —Improvement of Land Act*, 1864 (27 & 28 *Vict.* c. 114), *s.* 49—*Settled Land Act*, 1882 (45 & 46 *Vict.* c. 38), *s.* 21, *sub-sections* 2, 3—*Settled Land Act*, 1887 (50 & 51 *Vict.* c. 30), *s.* 1—*Settled Land Act*, 1890 (53 & 54 *Vict.* c. 69), *s.* 15.—A tenant for life had paid certain instalments of rent-charges which had, between 1885 and 1890, been created under the Improvement of Land Act, 1864, to secure money borrowed by him for improvements on the settled estates. On an application to the court to authorize, under section 15 of the Settled Land Act, 1890, the repayment to him by the trustees, out of capital moneys in their hands, of the instalments paid by him before March, 1892, when he first called upon the trustees to provide for the instalments,

Held, that the case did not come within section 15 of the Act of 1890, but within section 1 of the Act of 1887, and that the application must be refused.—*In re Dalison's Settled Estate*, CH.D. STI., J. 15—[1892] 3 Ch. 522; 61 L. J. Ch. 712.

4. "*Improvements*" — *Application of* "*capital money*"—*Mansion-house—Alterations with a view to let*—"*Rebuilding*"—"*Annual rental of the settled land*"—*Settled Land Act*, 1890 (53 & 54 *Vict.* c. 69), *ss.* 13 (*iv.*) (*ii.*), 15—*Settled Land Act*, 1882 (45 & 46 *Vict.* c. 38), *ss.* 22 (5) (6), 25.—By the Settled Land Act, 1890, s. 13, "improvements authorized by the Act of 1882" include "making any additions to, or alterations in, buildings reasonably necessary or proper to enable the same to be let," and "the rebuilding of the principal mansion-house on the settled land, provided that the sum to be applied thereunder "shall not exceed one-half of the annual rental of the settled land."

In calculating the amount of such annual rental, the income of capital money arising under the Settled Land Act, 1882, must be included.

The expression "rebuilding of the principal mansion-house" will be construed strictly, and improvements, to amount to a rebuilding within the above enactment, must be something more than structural alterations, however extensive.

There must be a present intention of, if not an actual contract for, letting, for additions or alterations to constitute improvements authorized by the Act of 1882 under the above enactment.—*In re De Teissier's Settled Estates*, CH.D. CHI., J. 184—[1893] 1 Ch. 153; 62 L. J. Ch. 552; 68 L. T. 275.

5. *Improvements—Tenants for life—Scheme approved by trustees—Payment—Capital money arising under the Act—No capital money in hands of trustees—Prospective authorization of payment out of money to arise in the future—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 26.—Under section 26 of the Settled Land Act, 1882, the court has no power to prospectively authorize payment for improvements out of capital money to arise in the future, when the trustees have no capital money in their hands at the time.

Decision of Kekewich, J., affirmed.—*In re Millard's Settled Estates*, C.A. 577—62 L. J. Ch. 761.

6. *Improvements—Tenant for life—Obligation to make payments to sinking fund—Validity—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 25, 26, 33, 51, 56.—Under a settlement made in 1877 trustees were enabled, at the request of the tenant for life, to raise certain sums of money for improvements which were, to a large extent, those authorized by the Settled Land Act, 1882, and to hand them over to him to be applied by him for such improvement purposes, without any liability on the part of the trustees to see to their application. The tenant for life was, according to the terms of the settlement, under an obligation to replace out of income the moneys so handed over to him by annual instalments of 1-25th of each sum handed over to him. He received moneys from the trustees, applied them for improvements, and paid several contributions to the sinking fund.

Held, that the obligation to recoup did not in any way affect the right of the tenant for life to exercise any of the powers of the Settled Land Act, 1882, and, consequently, did not contravene section 51 of that Act.—*In re Sudbury and Poynton Estates, Vernon* v. *Vernon*, CH.D. STI., J. 585—[1893] 3 Ch. 74; 62 L. J. Ch. 539; 68 L. T. 707.

7. *Incumbrances—Power to mortgage settled land to pay off incumbrances—Interest of parties entitled under the settlement—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 53—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 11.—Under the Settled Land Act, 1882, ss. 2 (1) (3) (4), 20, 21, and the Settled Land Act, 1890, ss. 2, 3, 11, the tenant for life of a settled estate has power to mortgage the whole of the settled estate to pay off an incumbrance upon part of it.

Held, further, that, upon the facts of the case, the tenant for life could not properly exercise the power, having regard to section 53 of the Settled Land Act, 1882, at least until it had been ascertained that no sale at a proper price could be effected; and that the court ought to restrain him from exercising the power, upon the ground that its exercise would be a breach of trust, although he was acting *bonâ fide*.

Decision of Kekewich, J., reversed.—*Hampden* v. *Earl of Buckinghamshire*, C.A. 516—[1893] 2 Ch. 531; 62 L. J. Ch. 643; 68 L. T. 695.

8. *Mansion-house—Sale by tenant for life—Sanction of the court—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 3, 15, 50, 53—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 10 (2).—It is the duty of the court, on an application under the Settled Land Acts, 1882-1890, for permission to sell the mansion-house and lands usually occupied therewith, to consider the interests of the estate itself, in addition to the wishes and interests of the remaindermen.

A young tenant for life under a settlement of an old family estate, who had heavily mortgaged his life interest, and was unable to keep up the establishment, applied for an order sanctioning a proposed sale of the mansion-house and demesne lands for an adequate price. The remaindermen opposed.

Held (affirming the decision of the Court of Appeal, 40 W. R. 243, [1892] 1 Ch. 506), that the sale should be allowed.—*Bruce* v. *Marquis of Ailesbury*, H.L. (E.) 318—[1892] A. C. 356; 62 L. J. Ch. 95; 67 L. T. 490.

9. *Tenant for life—Suspension or cesser of life estate—Person having powers of tenant for life—Trust for accumulation of income for payment of debts—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-sections* 2, 5, 7; *s.* 58, *sub-section* 1 (*vi.*)—A testator devised real estate to trustees upon trust to permit his daughter to receive the rents, issues, and profits thereof during her life for her separate use, and directed that, if a claim for £1,000, settled on the marriage of his daughter, should be enforced for payment, "then all her interest and benefit from the estate" should "cease until all the debts and claims on the same" should be paid. After the testator's death the trustees of the daughter's settlement demanded payment of the £1,000. The personal estate of the testator was insufficient for the payment of the debts due from, and claims against, his estate. The testator's daughter, who was his heiress-at-law, claimed to have the powers of a tenant for life under the Settled Land Act, 1882.

Held, that the daughter's life estate was suspended only; that the trustees might properly have received the income and paid it over from time to time in reduction of the debts; and that there was, in substance, an estate for life subject to a trust for accumulation of income for payment of debts; and

Held, therefore, that the testator's daughter was a person having the powers of a tenant for life within the meaning of the Act.—*Williams* v. *Jenkins*, CH.D. KEK., J. 489—[1893] 1 Ch. 700; 62 L. J. Ch. 665; 68 L. T. 251.

10. *Tenant for life—Sale free from incumbrances—Settlement—Jointures created under prior settlements—Restraint on anticipation—Settled Estates Act*, 1877 (40 & 41 *Vict. c.* 18), *s.* 2—*Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 5—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2, 3, 10, 20-22, 31 (*sub-section* 3), 44.—The S. Estate was by deed in 1826 settled to such uses as C., Marquis of A., and G., afterwards Marquis of A., should jointly appoint, with remainder in default of appointment to the use of C., Marquis of A., for life, with powers of jointuring a future wife, with remainders over. In 1833 and 1836 jointure rent-charges were, in exercise of these powers, created in favour of M., Marchioness of A. The estate was, in exercise of the joint power of appointment, by deed in 1837 settled, subject to the jointure rent-charges, to the use of C., Marquis of A., for life, with remainder to G. for life, with remainder to his first and other sons in tail male, with remainder to the use of E., afterwards Marquis of A., for his life, with remainder to his first and other sons in tail male. G. B. was the eldest son of E., and by a deed in 1863 the estate was limited to the use of E. for life, with remainder to the use of G. B. for life, with remainder to the uses for securing a jointure rent-charge to Lady E. C. for life, with remainder to the first son of G. B. in tail male. G. B. died in 1868,

leaving the present marquis his only son. In 1884 the present marquis converted his estate tail into a base fee, which was in June, 1885, enlarged into a fee simple. In July, 1885, the estate was by deed limited to the use of E. for life, in restoration of his former life estate, with remainder to the use of the present marquis for life. E. died in 1886, and the present marquis had contracted, as tenant for life, to sell the estate.

Held, that the present marquis was tenant for life of the settlement created by the series of deeds executed between 1826 and 1885; and that he had power, under section 20 of the Settled Land Act, 1882, to convey the estate discharged from the jointure rent-charges,—*In re Marquis of Ailesbury and Lord Iveagh, Riddell* v. *Riddell*, CH.D. STI., J. 644—[1893] 2 Ch. 345; 62 L. J. Ch. 713; 69 L. T. 101.

See also LANDLORD AND TENANT, 13.

SETTLEMENT:—

1. *Annuities charged on lands — Indemnity — Principal and surety—Arrears—Interest.*—In 1868, on the marriage of A., certain estates to which he was absolutely entitled were settled upon A. for life, with remainder to his first and other sons in tail male, and were charged with the payment of an annual sum of £3,000 for the intended wife during the joint lives of herself and her husband, and a like sum as jointure in case she should survive her husband, and also with portions for younger children. These settled lands were charged with certain annuities created prior to 1868, set out in the schedule to the deed. The settlement contained a proviso that the settled lands should be indemnified against the annuities and against all charges and incumbrances prior to the date of the deed by certain unsettled estates to which A. was entitled in fee, which were thereby "charged and made chargeable with the said incumbrances, and every of them, in exoneration of the lands and hereditaments hereby granted and conveyed." In 1875 A. mortgaged his life estate in the settled lands and his absolute interest in the unsettled estates to the plaintiffs as security for money advanced to him. A. died in 1876, leaving his wife surviving. After his death and up to 1887 the annuities were paid out of the settled estate, and all the rents and profits of the unsettled estates were applied in keeping down the interest on the plaintiffs' mortgage. The lands mortgaged to the plaintiffs proved a deficient security, and in 1888 they brought an action for the administration of the real and personal estate of A. The plaintiffs had notice of all the transactions in reference to the settlement. The surviving trustee of the term created by the settlement to secure the wife's jointure and portions for children filed a claim to rank as a creditor on the unsettled estates of A. in the priority of the settlement of 1868 for all principal sums paid on foot of the annuities since A.'s death, together with arrears of interest thereon.

Held, that those persons interested in the settled estate under the settlement had the right, when the annuitants had obtained payment out of the settled estate, to have these payments severally made good as charges upon the unsettled estate, and to have the settled estate exonerated.

Held, that they were entitled to principal for the full period claimed, and also for interest; but as to the latter, subject to the six years' limitation.

A surety, who has paid a gale of an annuity by virtue of suretyship, becomes a creditor in respect of what he has paid, just as if, instead of an annuity, it were a sum in gross he had paid, and he is not limited to the recovery of six years' arrears of the annuity.—*Scottish Provident Institution* v. *Conolly*, M.R. (Ir.)—31 L. R. Ir. 329.

2. *Construction—Power to appoint to children—Limitation in default of appointment to heirs of settlor—Implied trust for children.*—By a marriage settlement real estate of the wife was settled on the husband and wife for their respective lives, with remainder to such children as the husband or wife might appoint, and in default of appointment, "or there being no issue of the said intended marriage," then to the right heirs of the wife. There was issue of the marriage, one son and four other children. The husband and wife died without having made any appointment.

Held, that there was no implied trust for the children in default of appointment, and that the eldest son took the property as heir of the wife.

Goldring v. *Inwood*, 8 Jur. N. S. 206, followed.—*In re Regan's Estate*, L.J. (Ir.)—31 L. R. Ir. 246.

3. *Powers—Jointure and portions—Exercise of power—Devise of real estate and bequest of personal estate for purchase of land subject to same powers—Liability of devised estate to charges.*—Real estate was settled with powers to the tenant for life to charge jointure and portions. On his marriage he in part exercised these powers and charged the settled estate, but not to the full extent authorised. At a subsequent period a testator devised real estate and bequeathed his residuary personal estate to be laid out in the purchase of land, to such of the uses and subject to such of the powers declared of the settled estate as should be subsisting at his death, but not so as to increase or multiply any charges or powers of charging. The tenant for life and the tenant in tail of the settled estate executed after the testator's death a disentailing assurance of all the properties subject to the settlement.

Held, that the devised estate and the residuary personal estate were not subject to the charges existing at the date of the testator's death; that a release of his still existing powers of charging ought to be executed by the tenant for life; and that the trustees of testator's will were thereupon bound to pay the residuary personalty to the tenant for life and the tenant in tail on their joint receipt.—*In re Berners, Berners* v. *Calvert*, CH.D. NOR., J. 188—67 L. T. 849.

4. *Powers—Leasing power—Power to lease for thirty-five years at the best rent—Validity of lease—Estoppel.*

Held, by the Court of Appeal, that a certain lease for thirty-one years, purporting to be made under a power in a settlement, at an annual rent of £100 (the jury having found that it was the "best rent") was binding.—*Harold* v. *Daly*, C.A. (Ir.)—30 L. R. Ir. 697.

5. *Repairs—Expenditure of trust money—Tenant for life in possession—Infants—Jurisdiction.*—T. by his will made a legal devise of real estate, including a mansion-house, to several tenants for life in succession, the last of whom was an infant, without impeachment for waste, with remainders over.

T. lived in the house till his death, when it was found to be in a very dilapidated condition. Divers repairs and improvements were considered necessary to make the house habitable, including the repair of damage caused by dry rot. On an application by the trustees of the will,

Held, that there was no jurisdiction to allow the necessary expenditure out of a fund representing capital moneys under the Settled Land Act; for assuming that disposition of such moneys otherwise than as the Settled Land Acts provided was

not excluded by the Acts, there was no settled doctrine of the court under which the expenditure could be sanctioned. The circumstances did not amount to a case of salvage or preservation of the inheritance, and the court had no inherent jurisdiction to charge or sell an infant's estate upon the notion that such a proceeding would be beneficial to the infant.

Hibbert v. *Cooke*, 1 Sim. & St. 552, followed as to the repair of the damage from dry rot.

In re Jackson, 21 Ch. D. 786, 31 W. R. Dig. 204, and *Conway* v. *Fenton*, 37 W. R. 156, 40 Ch. D. 512, distinguished.—*In re De Teissier's Trusts, De Teissier* v. *De Teissier*, CH.D. CHI., J. 186—[1893] 1 Ch. 153; 62 L. J. Ch. 552; 68 L. T. 275.

See BANKRUPTCY, 25-27; DIVORCE, 22-24; INFANT, 7; MARRIED WOMAN, 4-6; POWER OF APPOINTMENT; VENDOR AND PURCHASER, 13.

SHERIFF:—

1. *Execution of writs by night—Protection of police—Right of sheriff*—Posse comitatus—*Contempt of court.*—The sheriff in his sole discretion has the right to require the protection and assistance of the constabulary, as part of the power of the county, in the execution of writs of *fi. fa.* of the superior courts, whether by night or day, and a refusal to give that protection and assistance will be punished as a contempt of the court whence the writ issued. —*Attorney-General* v. *Kissane*, Q.B.D. (Ir.)—32 L. R. Ir. 220.

2. *Fees and expenses—Fees for levy—Several writs of* fi. fa.—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11—*Order under Sheriffs Act*, 1887, *table of fees* 2.—Where a sheriff makes a seizure in one place and subsequently has another writ of *fi. fa.* delivered to him for execution, he is not entitled to charge a fee or mileage for a second seizure under the second writ unless there is, in fact, a fresh seizure in a different place.—*In re Wells, Ex parte Sheriff of Kent*, Q.B.D., BKCY.—68 L. T. 231.

3. *Fees and expenses—Claim against execution creditor—Bankruptcy of execution debtor after seizure, but before sale — Order* 3 (1885).—Where after seizure on foot of a writ of *fi. fa.*, but before sale, the execution debtor becomes bankrupt, and the messenger of the Court of Bankruptcy takes possession of the goods so seized, the sheriff is entitled to recover from the execution creditor the amount of expenses necessarily and properly incurred by him, according to the scale laid down by order 3 (1885).—*Kirk* v. *Purchase*, Q.B.D. (Ir.)—32 L. R. Ir. 359.

4. *Refusal to act—Remedy*—Mandamus.—Where a sheriff, duly appointed, refuses to act or to take the oath of office, the appropriate remedy is by information *ex officio* or indictment, and a *mandamus* will not be granted.

Quære, Will *mandamus* issue at the suit of the Crown?—*Reg.* v. *Hutchinson*, Q.B.D. (Ir.)—32 L. R. 142.

See also BANKRUPTCY, 10, 11; BILL OF SALE, 6; PRACTICE, 34.

SHIP:—

BILL OF LADING—

1.—*Chartered ship—Liability of owner of chartered ship on bills of lading signed by master—Principal and agent—Master and servant.*—The owner of a ship registered as such and as the managing owner under the Merchant Shipping Act, 1876, who has parted with the possession and control of the ship, under a charter-party to the charterer, is not liable for the loss of goods shipped under bills of lading signed by the captain, who is the servant of the charterer, and not of the owner, and who has no authority from the owner to pledge his credit, although the shipper of the goods has no notice of those facts.

The owner of a ship, registered as such, and also registered as the managing owner, under the Merchant Shipping Act, 1876, let her by charter-party for a term of four months. The charter-party provided that the captain, officers, and crew should be paid by the charterer; that the captain should be under the orders of the charterer as regards employment, agency, or other arrangements; that the charterer should indemnify the owner from all liabilities arising from the captain signing bills of lading; and that the owner should maintain the ship in a thoroughly efficient state in hull and machinery for the service, and should pay for the insurance on the ship.

The charterer took possession of the ship and appointed the captain, officers, and crew, except the chief engineer, who was appointed by the owner, in exercise of the option given him by the charter-party. The charterer sent the ship to New Orleans, where goods were shipped under bills of lading, some of which were signed by the captain and some by the agents of the charterer. Neither the captain nor the charterer's agents had any authority in fact from the owner to pledge his credit. The bills of lading contained no reference to the charter-party, and the shippers had no notice of its terms. The goods having been lost at sea during the currency of the charter, owing (as was alleged) to the unseaworthiness of the ship, the shippers sued the owners for the loss.

Held, affirming the decision of the Court of Appeal, [1892] 1 Q. B. 253, that the captain not being the servant or agent of the owner, and having no authority to pledge his credit, was not liable.—*Baumwoll Manufactur Von Carl Scheibler* v. *Furness*, H.L. (E.)—[1893] A. C. 8; 62 L. J. Q. B. 201; 68 L. T. 1.

2. *Delay in unloading — Demurrage — Reasonable time—Strike.*—Where the terms of a bill of lading contain no stipulation as to the time within which the consignee is to discharge the ship's cargo, the obligation on him is to discharge within a reasonable time under the circumstances existing at the time of unloading.

Should the existing circumstances be extraordinary, owing to a strike preventing the obtaining of necessary labour, the consignee (provided the delay was not due to any act or default on his part) under such a bill of lading is not liable to the shipowner for damages for detention of the ship.

Decision of the Court of Appeal (reported *sub nom. Hick* v. *Rodocanachi*, 40 W. R. 161, [1891] 2 Q. B. 626) affirmed.—*Hick* v. *Raymond & Reid*, H.L. (E.) 384—[1893] A. C. 22; 62 L. J. Q. B. 98; 68 L. T. 175.

3. *Excepted perils—"Act, neglect, or default of the pilot, master, or mariners in the navigation or management of the ship"—Negligent stowage of stevedore—Liability of shipowner.*—The plaintiff shipped a quantity of oranges on the defendants' vessel under a bill of lading which excepted "damage from any act, neglect, or default of the pilot, master, or mariners in the navigation or management of the ship." The oranges were damaged by the negligent stowage of the stevedore employed by the ship.

Held, that the exception did not apply, as the stevedore did not come within the list of persons enumerated therein, and the "management of the

ship" did not include improper stowage.—*The Ferro*, P.D. & A.D.—[1893] P. 38; 62 L. J. P. D. & A. 48; 68 L. T. 418.

4. *Excepted perils—Exemption of liability for default of master and crew in the navigation of the ship—Pipe left uncased—Damage to cargo—Seaworthiness.*—A cargo of jute was shipped under a bill of lading which contained an exception from liability for any act, neglect, or default whatsoever of the master and crew in the navigation of the ship in the ordinary course of the voyage. The ship during her voyage encountered stormy weather, and the pipe of the port water-closet was broken by the pressure of the cargo, whereby water entered the vessel and the jute was damaged.

In an action at the instance of the indorsees of the bill of lading, it was found (1) that the pipe was uncased at the sailing of the vessel; and (2) that the default came within the exemption. It was also found (1) that it was the usual practice to case such a pipe before loading a cargo of jute; (2) that when the cargo was loaded the pipe was not visible; and (3) that to case the pipe it would have been necessary to remove part of the cargo, but the evidence did not show how much.

Held, reversing the decision of the Court of Sessions (18 Ct. Sess. Cas., 4th series (Rettie), 569), that the findings of fact amounted to a verdict that the ship was not seaworthy on sailing, and, therefore, following *Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72, the exception in the bill of lading did not relieve the shipowners from liability.—*Gilroy, Sons, & Co.* v. *Price & Co.*, H.L. (Sc.)—[1893] A. C. 56; 68 L. T. 461.

CHARTER-PARTY—

5. *Custom—Cargo to be "taken from alongside ship at merchant's risk and expense"—To be discharged "according to custom"—Parol evidence.*—A charter-party provided that the plaintiff's steamer should load a cargo for the defendants, "the cargo to be taken from alongside the ship at merchant's risk and expense," and should proceed to a certain port or so near thereto as she might safely get, and deliver the same always afloat; "the cargo to be supplied as fast as steamer can load and stow same, and discharged as fast as steamer can deliver and according to the custom of the respective ports." On arrival at the port of discharge the vessel was moored fifteen feet from the quay, which was as near as she could lie afloat, and in consequence the cost of discharge was increased.

Held, that evidence of a custom that the shipowner must deliver on the quay was not admissible, as the two clauses were not inconsistent, the clause as to the cargo being "taken from alongside at merchant's risk and expense" dealing with the cost of the discharge, and the clause as to the discharge being "according to the custom of the port" dealing with the time and mode of discharge.—*The Nifa*, P.D. & A.D.—[1892] P. 411; 62 L. J. P. D. & A. 12.

6. *Demurrage—Delay in loading—Stevedore servant of owners—Duty of owners as to loading—Stowage—Liability of charterers.*—By a charter-party it was agreed that the ship should proceed to Leith and to London and there load cargo to be shipped by the charterers; and that a stevedore should be "appointed by the charterers in London only, but employed and paid for by owners."

Cargo was loaded at Leith by the charterers, no information as to the London cargo being then asked for by the captain. On the voyage to London, owing to bad weather, some of the cargo was damaged and some had shifted. After the arrival of the vessel at London it was necessary to land the damaged cargo to be reconditioned and to restow the cargo which had shifted. It also became necessary to shift some of the cargo to enable the London cargo to be properly stowed. Owing to these matters, and to some delay on the part of the stevedore who had been appointed under the terms of the charter-party, three days more than those allowed by the charter-party were occupied in loading at London.

Held, that the stevedore was the servant of the owners, and that the charterers were not liable for demurrage arising either from his delay or from the necessity of moving the cargo; and that the charterers were not liable for any of the expenses of moving the cargo because they were either expenses of stowage or of work done for the benefit of the cargo without the authority of the charterers.—*Harris* v. *Best, Ryley, & Co.*, C.A.—68 L. T. 76.

7. *Demurrage—"Steamer to be discharged as fast as she can deliver"—Custom for dock company to discharge cargo.*—By a charter-party it was agreed that the plaintiffs' steamer should proceed to a dock as ordered and there deliver her cargo, "Steamer to be discharged as fast as she can deliver."

The vessel was ordered to a certain dock, but as the berths were all occupied, the vessel was moored, under the direction of the dock officials, alongside another steamer, and there remained for three days until she could be hauled into a quay berth. It was customary at that dock for the whole of the discharge to be done by the dock company's servants at the quay; but owing to the quay being crowded with other cargo, the discharge was not commenced until two days afterwards, and (the intermediate days being Sunday and Bank Holiday) was not resumed until the following Tuesday. It was completed by 3 p.m. on the Wednesday, being the tenth day from the arrival of the vessel in the dock. The discharge, under ordinary circumstances, would occupy two days.

In an action for demurrage,

Held, that the defendants were not liable, as the whole operation of the discharge was, by the custom of the dock, carried out by the dock company's servants at the quay, and the plaintiffs had failed to make out any breach of the contract to discharge as fast as the ship could deliver.—*The Jaederen*, P.D. & A.D.—[1892] P. 351; 61 L. J. P. D. & A. 89; 68 L. T. 266.

8. *Demurrage—Strike clause—Strike of labourers preventing discharge of lighters available for lighterage of cargo.*—The plaintiffs' ship was chartered to carry a cargo of timber to Sharpness and there deliver the same under a charter-party by which it was provided that the cargo should be discharged with the customary steamer discharge of the port, any time lost by reason of strikes, lock-outs, or combinations of workmen, whether partial or general, not to count as part of the aforesaid discharging time, and that if, through any default of the merchants or charterers, who were to observe the usual custom of the wood trade, the vessel be longer detained, demurrage to be paid at the rate of fivepence per gross register ton per like day, and *pro rata* per hour for any part of the last of such days. The vessel arrived at Sharpness, which is within the port of Gloucester, at a time when there was a strike in the port of Gloucester amongst the labourers in the shipping trade, and owing to the continuance of such strike all the timber lighters which would otherwise have been

available to take on board the cargo and take it up the canal to Gloucester were detained at Gloucester with the loads of timber they had last taken up the canal still laden on board them, so that nothing could have been done to discharge the plaintiffs' ship until the strike had come to an end. After the strike had come to an end the discharge of the plaintiffs' ship duly commenced, and was completed with all reasonable despatch, except on one day, when the discharge was delayed by matters bearing no reference to the strike. The plaintiffs, as the owners of the ship, instituted an action in a county court having admiralty juristiction against the charterers to recover for over five days' demurrage for the alleged detention of the ship at Sharpness; but the county court judge, being of opinion that the strike clause in the charter-party operated to free the defendants from liability for demurrage during the continuance of the strike above mentioned, gave the plaintiffs judgment for demurrage only in respect of the day the delay on which had had no relation to the strike. The defendants appealed.

Held, on appeal, that, as four days and twenty-two hours out of the entire number of days and hours in respect of which the plaintiffs had claimed demurrage had been lost by the strike, the judgment of the court below was right, and must be affirmed.—*The Alne Holme*, P.D. & A.D. 572—[1893] P. 173; 62 L. J. P. D. & A. 51; 68 L. T. 862.

9. *Excepted perils—Obligation to complete voyage where damage to ship reparable.*—The exceptions of perils of the sea contained in a charter-party will not relieve the shipowner from his obligation to complete the voyage by carrying the cargo to the port of destination in the chartered ship if the damage caused by such perils is capable of repair within a reasonable time and at a cost not exceeding the value of the ship when repaired.—*Assicurazioni Generali* v. *SS. Bessie Morris Co.*, C.A. 83—[1892] 2 Q. B. 652; 61 L. J. Q. B. 754; 67 L. T. 218.

COLLISION—

10. *Barge without man in charge—Barge sunk while moored in dock — Negligence.*—The man in charge of a barge left her moored in a dock, which was well lighted, for a few hours in the evening. A steam tug, used in shifting craft in the dock, ran into her and sank her.

Held, that the absence of a man in charge in no way contributed to the collision, and the steam tug was alone to blame.—*The Hornet*, P.D. & A.D.—[1892] P. 361; 68 L. T. 516.

11. *Fog—Regulations for Preventing Collisions at Sea, art.* 18.—By article 18 of the Regulations for Preventing Collisions at Sea, "Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or stop and reverse if necessary."

During a fog the whistle of the steamship *A.*, bound eastward, was first heard by the master of the steamship *L.*, bound westward, a point or a point and a half on his starboard bow, and the sound of the whistle gradually broadened until it reached two and a half to three points on that bow. As the next whistle did not seem to broaden, the master of *The L.* stopped his engines. The next whistle satisfied him that *A.* was porting and closing on his starboard bow, and he thereupon reversed his engines. The two vessels came into collision; but if *A.* had not ported they would have passed starboard to starboard on nearly parallel and opposite courses.

Held, by the Court of Appeal (affirming the judgment of Barnes, J.), in an action of damage, that *The L.* was to blame for the collision as well as *The A.*

The Ceto, 14 App. Cas. 670, followed.—*The Lancashire*, C.A. 327—[1893] P. 47; 62 L. J. P. D. & A. 34.

12. "*Making way*"—*Regulations of* 1884 *for Preventing Collisions at Sea, art.* 5, *sub-sections* (a), (c), (d).—This House will not disturb a mere finding of fact in which both the courts below have concurred unless it can be clearly shown that the finding was erroneous.

By article 5 of the Regulations of 1884 for Preventing Collisions at Sea, sub-section (*a*), a steamship "which from any accident is not under command shall at night carry," in place of the white light, "three red lights in globular lanterns." By sub-section (*c*) such a steamship, "when making way" through the water, shall carry the side lights. By sub-section (*d*) the lights "required to be shown by this article are to be taken by other ships as signals that the ship showing them is not under command, and cannot, therefore, get out of the way."

Owing to an accident to her machinery the speed of a steamship was reduced from eleven knots to between four and five knots. She was able to steer, but could not reverse and go astern as quickly as before. She hoisted three red lights in place of the white light, and went ahead; but it was found as a fact both in the Admiralty Division and in the Court of Appeal that she did not exhibit her red side light till the moment when she came into collision with another vessel. The courts below held that she thus misled the other vessel into the belief that she was stationary, and so caused the collision.

Held, that, as it could not be clearly shown that the finding of fact as to the red side light was erroneous, this House would not disturb it.

The decisions of the Admiralty Division ([1891] P. 313) and of the Court of Appeal ([1892] P. 191) affirmed, with observations by Lord Herschell, L.C., and Lord Watson as to the circumstances under which a steamship can be said to be "not under command" within the meaning of the regulations.

By Lord Herschell, L.C.: This ship being able to make way at between four and five knots, to steer, to stop and reverse, though less quickly than before, and the danger of the machinery ceasing to work at any moment not being imminent, the ship could not properly be said to be "not under command" within the meaning of the regulations.—*Owners of The P. Caland and Freight* v. *Glamorgan Steamship Co.; The P. Caland*, H.L. (E.)—[1893] A. C. 207; 62 L. J. P. D. & A. 41; 68 L. T. 469.

13. *Overtaken ship—Manœuvres for third vessel—Course—Regulations for Preventing Collisions at Sea, arts.* 20, 22, 23.—Where a vessel which is being overtaken by another deviates from her course, it becomes the duty of the overtaking ship to exercise reasonable care to keep out of the way of the former.

An overtaken vessel which finds it necessary to manœuvre for a third vessel is to blame if she deviates from her course more than is necessary to avoid immediate danger.—*The Saragossa*, C.A.—68 L. T. 400.

14. *Overtaking ship—Regulations for Preventing Collisions at Sea, Articles* 16, 20.—The steamship *M.* was proceeding down the Bristol Channel on a W. course, and gradually overhauled the steamship *B.*, which was proceeding on a W.½N. course.

When on the starboard beam of *The B.*, *The M.* altered her course to W.S.W., and a collision occurred.

The M. charged *The B.* with a breach of article 16. *The B.* charged *The M.* with a breach of article 20.

Held, that the obligation on *The M.* under article 20, as the "overtaking" ship, to keep out of the way continued, although she had ceased to be within the area lighted by the stern light, and had advanced into a position in which she could see the side light of the "overtaken" ship.—*The Molière*, P.D. & A.D.—[1893] P. 217.

15. *Pilot—Compulsory pilotage—Qualification of pilot—Order in Council, May* 1, 1855, *Regulation* 4.—A collision in the Thames within the London district was caused solely by the negligence of the pilot of the defendants' vessel. The defendants' vessel drew more than fourteen feet of water, but the pilot who was in charge was not licensed to take charge of a vessel drawing more than fourteen feet of water. It was admitted that when the pilot boarded the vessel no pilot qualified for vessels drawing more than fourteen feet was available.

Held, affirming the judgment of the President, that the defendants' plea of compulsory pilotage was good, as the effect of the clause in the Order in Council of May, 1855—"unless there shall be no qualified pilot to be obtained who has passed the said examination for ships drawing more than fourteen feet of water"—was to render the pilot qualified, and his employment compulsory.

Semble, a duly qualified pilot would have a right to supersede him, the latter being paid his fair proportion of the pilotage fees.—*The Carl XV.*, C.A.—[1892] P. 324; 61 L. J. P. D. & A. 111; 68 L. T. 49.

16. *Thames navigation—Pilot in charge by compulsion of law—Carrying anchor at the hawse pipe with stock above water within province of pilot—Order in Council, February* 5, 1872, *par.* 20 (*Thames Conservancy Bye-Laws*).—Whether the anchor of a steamer in the Thames should be carried at the hawse pipe with the stock above water is a matter within the province of the pilot, notwithstanding that the carrying of the anchor in such a position may be an infringement of rule 20 of the Thames Conservancy Bye-Laws for the Navigation of the River Thames, in force under the Order in Council of the 5th of February, 1872.

The Ripon, 33 W. R. 659, 10 P. D. 65, explained.—*The Monte Rosa*, P.D. & A.D. 304—[1893] P. 23; 62 L. J. P. D. & A. 20; 68 L. T. 299.

MASTER—

17. *Disbursements on account of the ship—Maritime lien—Master's authority—Merchant Shipping Act*, 1889 (52 & 53 *Vict.* c. 46), *s.* 1.—The appellant, as master of the steamship *Castlegate*, and agent for the charterers, obtained cash advances and coals from W. & Co., for which he paid by bills drawn in their favour upon the charterers. The bills were dishonoured, and W. & Co. recovered judgment against the appellant as drawer, who thereupon applied to the High Court of Admiralty for a declaration that he had a valid lien for his disbursements upon ship and freight. The charterers had undertaken to pay port dues, &c., and to provide and pay for coals, and the appellant had notice of these terms.

Held, that the appellant had no maritime lien given him by the Merchant Shipping Act, 1889, either on the ship or freight.

The decision of the Court of Appeal in Ireland (29 L. R. Ir. 55) affirmed.—*Morgan* v. *Castlegate Steamship Co.*, H.L. (Ir.) 349—[1893] A. C. 38; 62 L. J. P. C. 17; 68 L. T. 99.

18. *Thames navigation — Bye-laws — Watermen's and Lightermen's Amendment Act*, 1859 (22 & 23 *Vict.* c. 133), *bye-law* 99—*Thames Conservancy Act*, 1864 (27 & 28 *Vict.* c. 113), *bye-law* 36.—By the 99th bye-law under the Watermen's and Lightermen's Amendment Act, 1859, if the master, &c., of any steam vessel navigated on the Thames within a certain district "shall not (when practicable) remain, continue, and be on one of the paddle-boxes or on the bridge" of such vessel, or on the deck cabin adjoining, "or shall not cause and procure a proper look-out to be kept from the bow" of such vessel, he shall incur a penalty not exceeding five pounds.

By the 36th bye-law made under the Thames Conservancy Act, 1864, the master of every steam vessel navigating the river shall be and remain on one of the paddle-boxes or bridge, "and shall cause a proper look-out to be kept from the said vessel."

The appellant, the master of a steamboat, was convicted and fined for not having caused a proper look-out to be kept from the bow of the vessel, contrary to bye-law 99 of the first-mentioned Act.

Held (affirming the conviction), that the Watermen's and Lightermen's Amendment Act, 1859, and the Thames Conservancy Act, 1864, being intended to be read together, the bye-laws under the latter Act did not supersede generally those made under the former, and that the provisions in question of bye-law 99 of the former Act were not inconsistent with bye-law 36 of the latter, and remained, therefore, in force.—*Gosling* v. *Green*, Q.B.D. 141—[1893] 1 Q. B. 109; 62 L. J. M. C. 45; 67 L. T. 853.

MERCHANT SHIPPING ACTS—

19. "*Vessel used in navigation*"—*Electric launch not having certificate carrying passengers on an artificial lake—Merchant Shipping Act*, 1854 (17 & 18 *Vict.* c. 104), *s.* 318.—The appellants were convicted by the justices of Southport on a charge that they, being the owners of an electric launch, did ply with more than twelve passengers on board without having a duplicate of a certificate of the Board of Trade put up in a conspicuous part of the vessel, so as to be visible to all persons on board the same, contrary to section 318 of the Merchant Shipping Act, 1854. The vessel was an electric launch, owned by the appellants, in which passengers were taken for hire on pleasure trips on an artificial lake in a park also the property of the appellants.

Held, that the electric launch was not within section 2 of the Act, which enacts that the term "ship" shall include a "vessel used in navigation," and that the Act, therefore, did not apply, and the conviction was wrong.—*Mayor, &c., of Southport* v. *Morriss*, Q.B.D. 382—[1893] 1 Q. B. 359; 62 L. J. M. C. 47; 68 L. T. 221.

SALVAGE—

20. *Agent—Services rendered by—Authority to incur expenses—Principle upon which award based.*—An agent is not precluded from claiming as a salvor; but where the owners of the property in danger have requested him to render assistance and thereby have given him a right to some remuneration, though the operations prove unsuccessful, the assessment of the award for successful salvage services will be based upon the principle that the agent did not, like an independent salvor, run the risk of the loss of the entire expenditure if his efforts had proved

unsuccessful.—*The Kate B. Jones*, P.D. & A.D.—[1892] P. 366; 69 L. T. 197.

21. *Amount of award.*—In a case of salvage, where the services mainly consisted in towing a large steamer, disabled in her machinery, in the Atlantic Ocean in the winter for six and a half days into safety at Halifax, the values of the salved vessel, her cargo and freight, being £90,000, and the owners of the salving vessel having incurred expenses in consequence of deviation and delay, the court made a salvage award of £5,350; awarding to the owners of the salving vessel £4,225, to her master £375, and to her crew £750.—*The Edenmore*, P.D. & A.D. 654—[1893] P. 79.

22. *Apportionment—Agreement to participate in salvage remuneration in proportions previously determined—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 182—*Merchant Shipping Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 18.—In a case of apportionment of salvage it appeared that it had been stipulated by the articles that the salvors, the owners, master, and crew of a steam trawler, should participate in all sums awarded for salvage in proportion to a percentage set forth therein, and that, according to this proportion, the master of the trawler would be entitled to ten per cent. of all salvage awards, her mate to seven per cent., and her boatswain to three per cent. of the same.

Held, that the stipulation so embodied in the articles was not inequitable, and that the court would apportion shares of the salvage to the applicants, the master, mate, and boatswain of the trawler. in accordance with such stipulation.—*The Wilhelm Tell*, P.D. & A.D. 205—[1892] P. 337; 61 L. J. P. D. & A. 127; 69 L. T. 199.

23. *Apportionment — Classification of salvors — Non-navigation portion of crew—Surgeons, stewards, &c.*—A large steamer fell in, in the Atlantic, with another large steamer disabled by the breaking of her propeller shaft, and successfully brought her into port, after a towage of 757 miles, lasting five days. The owners of the disabled steamer settled the claim of the salving steamer by the payment of £12,000, and the owners, master, and crew of the salving steamer applied to the court to apportion this sum. Of the fifty-nine persons composing the crew of the salving steamer there were eleven non-navigating members, viz., the surgeon, four stewards, stewardess, two cooks, baker, and two cabin boys, who took no active part in rendering assistance to the disabled steamer.

In apportioning the above sum, and awarding £9,200 to the owners, £800 to the master, and the remaining £2,000 to the crew according to their rating,

The court held that the non-navigating members of the crew above specified were only entitled to a half share, according to their ratings.—*The Spree*, P.D. & A.D.—[1893] P. 147.

24. *Towage agreement—Risk to tug—Danger to tow—Conditions required before salvage engrafted on towage.*—The plaintiffs' tug was engaged, for a fixed sum, to tow from sea and dock the defendants' ship. Whilst the tug was, under the direction of the pilot, turning the ship round in order to enter the dock stern first, the tow-rope of another tug fast on the ship's quarter parted, and, through the effect of the wind and tide, the ship touched the ground. The plaintiffs' tug, by the direction of the pilot, then shifted her position, and proceeded to tow the ship into dock bow first. In so doing the ship came off. The plaintiffs claimed remuneration, alleging that their tug had rescued the defendants' ship from danger.

Held, that the plaintiffs were not entitled to salvage remuneration, as the ship was not in any immediate danger, and the tug had not run any risk or performed any duty, or rendered any services beyond what, in the contemplation of the parties, was reasonably to be expected of her during the continuance of the towage contract.—*The Liverpool*, P.D. & A.D.—[1893] P. 154; 68 L. T. 719.

See also ADMIRALTY; INSURANCE (MARINE); MASTER AND SERVANT, 5, 7.

SOLICITOR:—

1. *Charging order— Costs — Action on behalf of mortgagor—Charging order taking priority over interest of mortgagee—Attorneys and Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.—An action was commenced by the solicitors for the purchaser of a leasehold house for specific performance of the agreement for sale. In the course of the proceedings it transpired that the purchaser had mortgaged his interest in the agreement; but the mortgagee declined to release her interest, or to concur in the proceedings. Judgment was obtained in the action, ordering the defendants to assign the lease of the house to the plaintiff or his mortgagee. Plaintiff's solicitors applied by petition for a charging order on the leasehold house for their taxed costs, charges, and expenses as solicitors for the plaintiff in the action.

Held, that they were entitled to a charging order as prayed, and that it must not only bind the plaintiff's interest in the house, but take priority over the mortgage.—*Scholey* v. *Peck*, CH.D. ROM., J., 508--[1893] 1 Ch. 709; 62 L. J. Ch. 658; 68 L. T. 118.

2. *Charging order—Costs—"Property recovered and preserved"—Lapse of time*—39 & 40 *Vict. c.* 44, *s.* 3.—In 1883 K., acting as solicitor for M., succeeded in establishing the will of M.'s father in a suit in the Probate Court in which M. was declared entitled to her costs out of the assets. In August, 1884, M. changed her solicitor, and executed a mortgage of the assets, which consisted of leasehold property, to B. for £200. In December, 1884, K. obtained judgment against M. for the amount of his costs, which he registered as a mortgage against the property in the same month. In 1884 M. presented a petition for sale of the chattels real to the Landed Estates Court, and in 1886 an action was brought against her in the Chancery Division to administer the assets. In this latter action M. was found a debtor to the estate in the sum of £583, and the claims of the creditors were reserved for adjudication by the judge. In March, 1892, K., who had not been paid his costs of the suit in the Probate Court, applied for an order, under 39 & 40 Vict. c. 44, s. 3, for a charge on the assets for the amount of his costs.

Held, that, having regard to the lapse of time and the several events which had happened since the will was proved affecting the rights and interests of the parties interested in the assets, K. was not entitled to a charge for his costs.—*Roche* v. *Roche*, C.A. (Ir.)—29 L. R. Ir. 339.

3. *Costs—Agreement as to costs—Attorneys and Solicitors Act*, 1870 (33 & 34 *Vict. c.* 28), *s.* 4.—A solicitor wrote to a client on whose behalf he had done work and incurred expenses, saying, "If you are not prepared to settle the whole amount, I must ask at least for £100 on account." Receiving

no answer he wrote again, threatening proceedings unless the client "was prepared to send a cheque for the whole amount." Subsequently the client paid £100 on account, and, in consequence of communications made to him by a third party, wrote: "I am off to Scotland, and will send you a cheque for the whole amount on my return."

Held, that the letters did not disclose any agreement between solicitor and client within section 4 of the Solicitors Act, 1870, so as to deprive the client of his right to taxation.—*Pontifex* v. *Farnham*, Q.B.D. 238—62 L. J. Q. B. 344; 68 L. T. 168.

4. *Costs—Agreement as to costs—Signature of one party — Taxation after payment — Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *s.* 8.—An agreement for remuneration under sub-sections 1 and 2 of section 8 of the Solicitors' Remuneration Act, 1881, is sufficiently signed if signed by the person who seeks to repudiate it, and need not be signed by both parties.

Where such an agreement signed by the client is impeached by him as being, and evidence is brought forward showing that it is, unfair and unreasonable, it is competent to the court, upon a taxation summons by the client, although payment has been made under the agreement, to make an order for taxation, and to direct the taxing master to certify whether or not the agreement is unfair and unreasonable.

Dictum of Cotton, L.J., in *In re Palmer*, 38 W. R. 673, 45 Ch. D. 291, approved and acted on.—*In re Frape, Ex parte Perrett*, C.A. 417—[1893] 2 Ch. 284; 62 L. J. Ch. 473; 68 L. T. 558.

5. *Costs—Agreement as to costs—Application to set aside such agreement — Summons at chambers — Attorneys and Solicitors Act*, 1870 (33 & 34 *Vict. c.* 28), *s.* 8.—Since the Judicature Act, 1873, an application to set aside an agreement between a solicitor and his client as to costs may be made by a summons in chambers, notwithstanding section 8 of the Attorneys and Solicitors Act, 1870, which provides that such agreement may be enforced or set aside "on motion or petition" by the court in which the business was done, or a judge thereof.—*In re Thomas*, Q.B.D. 524—[1893] 1 Q. B. 670; 62 L. J. Q. B. 474; 68 L. T. 524.

6. *Costs—Agreement as to costs—"Fair and reasonable"—Attorneys and Solicitors Act*, 1870 (33 & 34 *Vict. c.* 28), *ss.* 4, 8, 9.—An agreement as to the remuneration of a solicitor, to be "fair and reasonable" within the meaning of the Attorneys and Solicitors Act, 1870, must be "fair" in the sense of having been fairly obtained, and "reasonable" in the sense of being reasonable in its terms.

A solicitor, who was retained by a client to attend on her behalf upon the taxation of a bill of costs, made an agreement in writing with his client under which the client was to pay him five per cent. on all costs taxed off the bill. The bill of costs when delivered amounted to about £5,000, and about £2,000 was taxed off, the greater part of this latter sum consisting of refresher fees paid to counsel which were largely in excess of the fees allowed by the rules. The client having applied, under sections 8 and 9 of the Attorneys and Solicitors Act, 1870, to have the agreement set aside as not being "fair and reasonable,"

Held, that, as the agreement was fully explained to the client, and its effect was understood by her before she entered into it, it could not be said to be unfair; but that, as the remuneration which the solicitor would receive under the agreement was largely in excess of that which he would receive for the work done apart from the agreement, the terms thereof were not reasonable, and the agreement must be set aside.—*In re Stuart, Ex parte Cathcart*, C.A. 614—[1893] 2 Q. B. 201.

7. *Costs—"Attendances"—Discretion of taxing master—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*General Order, Schedule* 2.—Under Schedule 2 of the General Order under the Solicitors' Remuneration Act, 1881, prescribing a charge of 10s. for an "ordinary" attendance, and giving the taxing master power in "extraordinary cases" to increase or diminish that charge "if for any special reasons he shall think fit," it is a question for the discretion of the taxing master whether or not a case is "extraordinary" as being more simple or more difficult than a normal fair average case. In extraordinary cases, where the taxing master increases or diminishes the "ordinary" charge, he must have special reasons for so doing, but he is not bound to state his special reasons till he formally answers the objections to his taxation.

Decision of North, J., 41 W. R. 37, affirmed.—*In re Mahon and Sayer*, C.A. 257—[1893] 1 Ch. 507; 62 L. J. Ch. 448; 68 L. T. 189.

8. *Costs—Preparation of lease and agreement for lease—"Business connected with lease"—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *ss.* 2, 4—*General Order under Solicitors' Remuneration Act*, 1881, *r.* 2; *Schedule I., Part II.*—The scale fee prescribed by Part II. of Schedule I. to the General Order made under the Solicitors' Remuneration Act, 1881, to be paid to a lessor's solicitor "for preparing, settling, and completing lease and counterpart" includes the solicitor's remuneration in respect of negotiations which lead up to, and the preparation of the agreement which precedes, the lease, and the solicitor cannot charge in respect of these negotiations or of the preparation of the agreement in addition to the scale fee.

In re Emanuel and Simmonds, 33 Ch. D. 40, approved.—*Savery* v. *Enfield Local Board*, H.L. (E.)—[1893] A. C. 218; 62 L. J. Ch. 674; 68 L. T. 722.

9. *Costs — Sale of property by public auction—Scale of charges for property sold in lot—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *General Order, Schedule I.*—Where property sold by public auction is divided into different lots, the scale of charges is to be a commission upon the aggregate sum realized by the whole of the property, and not upon the value of each different lot, although the lots be held by the vendor under different titles, and be sold to different persons.—*In re Onward Building Society*, Q.B.D. 107—[1893] 1 Q. B. 16; 62 L. J. Q. B. 80; 68 L. T. 443.

10. *Costs—Taxation—Solicitor co-mortgagee—Foreclosure action—Profit costs—Sale of mortgaged property—Solicitor mortgagee's firm acting for mortgagees.*—A solicitor mortgagee is not entitled, as against the mortgagor, to charge profit costs in respect of business relating to the mortgage transacted by the solicitor acting for himself and a co-mortgagee, or by a firm of solicitors of which he is a partner.

The rule established by *Cradock* v. *Piper*, 1 Mac. & G. 664—that where a solicitor or his firm appears in an action on behalf of himself and a co-trustee, and the expense has not thereby been increased, the solicitor is entitled to the usual costs—is not applicable to the costs of a solicitor mortgagee acting for himself and his co-mortgagees.

In re Donaldson, 27 Ch. D. 544, 33 W. R. Dig. 61, overruled.

F. (who was a solicitor) and A. were transferees of a mortgage created by D. D. died, and the transferees brought an action for administration of his estate, and obtained the usual administration judgment. Orders were subsequently made for the sale of the mortgaged property out of court, and that the purchase-money should be received by the plaintiffs, they undertaking to pay into court the balance after satisfying the mortgage debt. The sale took place, and the plaintiffs carried in for taxation two bills of costs delivered by the firm of F. & H., one for costs incurred upon the transfer of the mortgage, and the other for costs incurred in carrying out the sale. The taxing master disallowed all costs except costs out of pocket, on the ground that F., one of the mortgagees, was a member of the firm of F. & H., by whom the costs were claimed. The business charged for was transacted exclusively by H. and the clerks of the firm. The plaintiffs took out a summons to review the taxation.

Held, by Stirling J., that F. could not retain his share of the profit costs as against the estate of D., but that on principle there was nothing to prevent H. from receiving remuneration for his trouble, and the matter would, therefore, be remitted to the taxing master for reconsideration, with a direction to ascertain what would be properly chargeable against the estate of D. if an independent solicitor had been employed, and to allow such proportion of that amount as H. was entitled to in respect of the general profits of the partnership as between himself and F.

Two mortgagees, one of whom was a solicitor, brought an action for foreclosure, and obtained judgment. The mortgagees were represented in the action by the solicitor mortgagee. The taxing master disallowed as against the mortgagor all profit costs of the action.

Held, by the Court of Appeal (affirming the decision of Stirling, J.), that the taxing master was right, and that the costs were properly disallowed. —*In re Doody, Fisher* v. *Doody; Hibbert* v. *Lloyd*, C.A. 49—[1893] 1 Ch. 129; 62 L. J. Ch. 14; 68 L. T. 128.

11. *Costs—Taxation—Allowance by solicitor of part of bill—More than one-sixth taxed off—Special circumstances—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 37.—A firm of solicitors sent in to their clients, who were two surviving trustees, a detailed bill of their charges in respect of business connected with the trust for which they had been employed. The bill was for £44 2s. 8d., and there was added at the foot, "By allowance, £7 2s. 8d." The taxing master disallowed £10 19s. 4d. from the bill (of £44 2s. 8d.), but stated in his certificate that he treated the bill as one for £37, as he considered the £7 2s. 8d. allowance to be unconditional; many of the charges were disallowed on the ground that the trustees themselves ought to have performed the work in respect of which the disallowed charges were made, but it appeared that the solicitors had been expressly instructed by the acting trustee (since deceased) to perform it; and the taxing master considered the solicitors entitled to the costs of taxation.

Held (affirming the decision of the Chancellor of the Durham Palatine Court of Chancery), that the bill was properly taxable on £44 2s. 8d.

Held, also, that the facts were sufficient to justify the Chancellor in allowing, in the exercise of his discretion, the solicitors the costs of the taxation.

In re Carthew, In re Paull, 32 W. R. 940, 27 Ch. D. 485, followed.—*In re Mackenzie, Ex parte Short*, C.A. 530.

12. *Costs—Taxation—Counsel's fees—New trial motion.—Primâ facie* the costs of counsel disallowed between party and party should not be allowed as between solicitor and client.

If three counsel appear on a new trial motion in the Divisional Court and in the Court of Appeal, the principles of taxation which allow or disallow the costs of more than two counsel in either court should be equally applied to the costs in both courts; and in the absence of special circumstances counsel allowed in the one court will be allowed in the other. The costs of a third counsel may be allowed as between solicitor and client where important interests are involved, or where the client has authorized or subsequently assented to the employment of a third counsel.—*In re Barnhill's Estate*, L.J. (Ir.)—29 L. R. Ir. 396.

13. *Costs—Taxation—Preparation of petition in Landed Estates Court—Tenancy fee—Schedule of Fees* (*July* 18*th*, 1859), *item* 76.—To entitle the solicitor for a petitioner to the fee of two shillings for each tenancy set out in the first schedule, pursuant to item 76 of the Schedule of Fees (July 18th, 1859), there must be a real investigation of the tenures under which the tenants hold and the rents which they pay; and the cost of transcription only will be allowed for a mere transcript of the poor law valuation affording no practical information as to the tenancies.—*In re Temple's Estate*, L.J. (Ir.)—29 L. R. Ir. 461.

14. *Costs—Taxation—Mortgagee's solicitor—Scale fee—Past advance—Solicitors' Remuneration Act*, 1881 —*General Order*, 1884, *r.* 2, *Schedule I., Part I.*—The word "loan" in Schedule I., Part I., of the General Order under the Solicitors' Remuneration Act, 1881, means "mortgage," and does not imply that there must necessarily be a fresh advance on the occasion of a mortgage. Accordingly, where a mortgage is effected by a solicitor to secure a past debt, the scale fee applies.

Earl of Aylesford v. *Earl Poulett*, [1891] 1 Ch. 248, applied.—*D'Arcy* v. *White*, M.R. (Ir.)—31 L. R. Ir. 142.

15. *Disciplinary jurisdiction—Order for payment of money—Judgment debt.*—A solicitor received a sum of money for and on behalf of a client, but claimed to retain the whole, on the ground that his bill of costs amounted to a larger sum. The client sued the solicitor for the balance which he alleged to be due to him after making a proper deduction for costs, and obtained judgment. The judgment being ineffective, the client applied to the court for a summary order on the solicitor to pay over the money.

Held (reversing the decision of Grantham and Charles, JJ.), that the fact of a judgment having been obtained by the client against the solicitor did not prevent the court from exercising its disciplinary jurisdiction.

In re Corbet Davies, 15 W. R. 46, not followed.—*In re Grey*, C.A. 3—[1892] 2 Q. B. 440; 61 L. J. Q. B. 795.

16. *Lien for costs—Land agent—Policies—Payment of premiums by solicitor.*—By indentures of assignment a testator assigned to M. B. two policies on the life of the testator. The testator lived in England, but M. B. for many years acted as solicitor and land agent for the testator on his estate in Ireland. The policies were assigned by

the testator to M. B. as trustee to secure to mortgagees the repayment of a loan on the Irish property. M. B. acted as solicitor both for the testator and the mortgagees. M. B. died on the 19th of July, 1889, and the testator died on the 14th of March, 1890. C. B., widow and executrix of M. B., claimed in a creditor's action to have a lien on the proceeds of the policies in court for two sums of money: (1) in respect of professional charges of M. B. acting as solicitor to the testator; (2) partly for work done as a land agent, and partly for two insurance premiums paid by M. B. for the testator. The chief clerk allowed a claim made by the mortgagees, but disallowed the claim of C. B. to be entitled to a lien on the proceeds of the policies.

On summons by C. B. to vary the chief clerk's certificate,

Held, that the solicitor's lien could not be extended to the claim in respect of land agency; that C. B. was entitled to be repaid out of the fund in court the premiums paid by the late M.B.; and, as to the professional charges as solicitor, that M.B.'s lien was preserved subject to the mortgage, and the chief clerk's certificate must be varied by finding that C. B. was entitled to be paid the two sums, except in respect of the land agency, and must have her costs.—*In re Walker, Meredith* v. *Walker*, CH.D. KEK., J.—68 L. T. 517.

17. *Lien for costs—Company—Claim by solicitor as legatee—Issue of debentures as security—Costs previously due.*—Before 1866 C. acted as solicitor to a railway company, and there was a large sum due to him for costs. In 1866 C. was pressing for payment, and £4,000 debentures were issued to C. in March, 1867. These debentures were never paid, and C. commenced an action against the company in respect of them, but this action was discontinued and it was arranged that the claims for costs should be submitted to K., a solicitor, for "moderation or taxation." K. certified a sum as the net amount due for costs up to the 21st of February, 1871. These costs were not paid, but the costs subsequently incurred were paid from time to time. C. died in 1875, having bequeathed to his son, the respondent, the unpaid costs due to him from the company, and any security for them. After the father's death the respondent was appointed solicitor to the company, and all costs due to him as such solicitor were paid. He continued to act as their solicitor till March, 1892. In April, 1892, a petition was presented by the company praying that the respondent might be ordered to deliver up certain deeds and documents of the company in his possession. The respondent claimed a lien upon them in respect of the costs accrued due after the date of the issue of the debentures.

Held, that the submission to K. for taxation did not alter the effect of the transaction of March, 1867, and that the issue of the debentures amounted merely to giving security for costs previously due to C.; secondly, that the respondent, as legatee of his father, was entitled to a lien for the sum found due to C. by K.'s certificate between March, 1867, and the 21st of February, 1871.—*Enniskillen, Bundoran, and Sligo Railway Co.* v. *Collum*, M.R. (Ir.)—29 L. R. Ir. 421.

18. *Misconduct—Inquiry by the Incorporated Law Society — Charge withdrawn — Report not filed—Solicitors Act*, 1888 (51 & 52 *Vict. c.* 65), *s.* 13.—Charges of professional misconduct having been made against a solicitor, an inqury was instituted before the Incorporated Law Society under the Solicitors Act, 1888 (51 & 52 Vict. c. 65). Evidence having been given, the charges, at the suggestion of the chairman, were withdrawn, and the committee did not file any report. The solicitor applied for a *mandamus* to compel the committee to make and file a report in the High Court.

Held, that the committee could not be compelled to do so, as they had not arrived at any finding that could be reported, and no objection having been made at the hearing to the withdrawal, such course had been assented to.—*Ex parte Whitfield*, Q.B.D.—67 L. T. 856.

19. *Negligence—Sale of land—Unpaid instalments of redeemed tithe rent-charge — Particulars and conditions of sale—Land sold free from incumbrance.*—The plaintiff employed the defendant as his solicitor to prepare particulars and conditions of sale of lands which were liable to certain instalments in respect of the redemption of the tithe rent-charge. The plaintiff had forgotten the existence of the charge, though he had paid one instalment, and the defendant did not inquire whether tithe rent-charge or instalments of its purchase-money were payable out of the lands. The particulars and conditions of sale did not disclose the existence of the charge, and the lands were sold as free from incumbrance. The purchaser having claimed, on the authority of *Perrin* v. *Roe*, 25 L. R. Ir. 37, to have the charge redeemed out of the purchase-money, the plaintiff brought this action to recover damages for negligence in the preparation of the abstract of title, the particulars and conditions of sale, in that the same did not disclose the unpaid instalments. The jury having found a verdict for the plaintiff,

Held, by O'Brien, C.J., and Holmes, J., that there was no evidence of negligence, and verdict and judgment must be entered for the defendant; by Johnson, J., that there should be a new trial.—*Mahony* v. *Davoren*, Q.B.D. (Ir.)—30 L. R. Ir. 664.

20. *Trustee—Power to charge for professional services and trouble—Settlement of accounts between trustees.*—A testator appointed B. & G. his executors and trustees, bequeathed to G., if he should accept the office of trustee and executor, £200, and declared that G. and every future trustee of his will who might be a solicitor should be entitled to receive out of the estate his usual professional costs and charges for business transacted by him, including business not strictly professional, but which might or would have been performed in person by a trustee not being a solicitor. Considerable sums were charged by G. against the estate for business done by him, including charges for his trouble in matters not strictly professional.

Held, that G., notwithstanding the legacy given to him, was entitled to make such charges.

Held, also, that, in the absence of special powers in the will, trustees cannot settle the amount payable out of the estate to one of themselves, so as to bind the *cestuis que trust*, and that the latter were entitled to have G.'s costs and charges investigated.—*In re Fish, Bennett* v. *Bennett*, C.A.—[1893] 2 Ch. 413.

21. *Unqualified person — County court—Unqualified person practising before the court—Power to commit to prison—Attorneys and Solicitors Acts*, 1843 (6 & 7 *Vict. c.* 73), *ss.* 2, 35, 36; *and* 1860 (23 & 24 *Vict. c.* 127), *s.* 26—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 162.—The judge of a county court has no jurisdiction to make an order committing to prison a person who has acted as a solicitor in an action in his court without being duly qualified so

to act, his jurisdiction to imprison for contempt being confined, by section 162 of the County Courts Act, 1888, to contempts committed in the face of the court.—*Reg.* v. *Judge of the Brompton County Court*, Q.B.D. 648—[1893] 2 Q. B. 195; 68 L. T. 829.

See also ADMIRALTY, 1; BANKRUPTCY, 8; BILL OF EXCHANGE, 2; COUNTY COURT, 3, 4; DEFAMATION, 2; JUSTICES, 2; PRACTICE, 11; TRAMWAY, 1.

SPECIFIC PERFORMANCE:—

Landlord and tenant—Residential flat—Covenant to employ porter to perform certain duties—Injunction—Damages.—The defendants granted to the plaintiff a lease of a residential flat, the lease containing a covenant by the lessors to appoint a resident porter who should act as the servant of the tenants of the several rooms in the block, his duties being (*inter alia*) to be constantly in attendance in the block, either by himself or, in his temporary absence, by some trustworthy assistant. The defendants appointed as porter a cook, who spent the greater part of his time elsewhere in performing his duties as a cook at a neighbouring luncheon club; and his duties as resident porter were for the most part performed by a boy or a charwoman.

In an action claiming specific performance of the agreement to appoint a resident porter within the meaning of the covenant, A. L. Smith, J., held that there had been a breach of the covenant, and granted specific performance.

Held, on appeal, that this was not a contract of which the court would decree specific performance, and that the plaintiff must be left to his remedy in damages.—*Ryan* v. *Mutual Westminster Chambers Association* (*Limited*), C.A. 146—[1893] 1 Ch. 116; 62 L. J. Ch. 252; 67 L. T. 820.

See also LANDLORD AND TENANT, 1; POWER OF APPOINTMENT, 2; POWER OF ATTORNEY, 1; VENDOR AND PURCHASER, 14.

SPORTING.—See INCLOSURE ACTS, 2.

STAMP.—See PRACTICE, 7.

STATUTES:—

32 Hen 8, c 40, s 3—See MEDICAL PRACTITIONER

21 Jac 1, c 16 (Statute of Limitations)—See PRINCIPAL AND SURETY, 7

29 Car 2, c 3 (Statute of Frauds), s 3—See LANDLORD AND TENANT, 15: s 4, FRAUDS, STATUTE OF, 1-3; PRINCIPAL AND SURETY, 5

3 W & M c 11, s 8—See POOR LAW, 1

13 Anne, c 13—See ECCLESIASTICAL LAW, 8

4 Geo 2, c 28, s 6—See LIMITATIONS, STATUTE OF, 7

9 Geo 2, c 36 (Charitable Uses Act), s 3—See INCLOSURE ACTS, 1

31 Geo 2, c 11, s 1—See POOR LAW, 1

14 Geo 3, c 48, s 2—See CONTRACT, 1

36 Geo 3, c 52, s 12—See REVENUE, 5

42 Geo 3, c 119 (Lottery Act, 1802), s 1—See GAMING, 3

55 Geo 3, c 194 (Apothecaries Act, 1815), s 20—See APOTHECARY

57 Geo 3, c xxix. (Michael Angelo Taylor's Act), s 65—See METROPOLIS, 6

59 Geo 3, c 12, s 17—See INCLOSURE ACTS, 1

5 Geo 4, c 83 (Vagrant Act), s 3—See JUSTICES, 5

6 Geo 4, c 81, s 26—See LICENSING ACTS, 1

9 Geo 4, c 61 (Licensing Act, 1828), s 14—See LICENSING ACTS, 3-5

11 Geo 4 & 1 Will 4, c 47—See WILL, 5

1 & 2 Will 4, c 32 (Game Act, 1831)—See GAME

1 & 2 Will 4, c 37 (Truck Act, 1831), s 23—See MASTER AND SERVANT, 6

1 & 2 Will 4, c 38, s 16—See ECCLESIASTICAL LAW, 4

2 & 3 Will 4, c 71 (Prescription Act)—See LIMITATIONS, STATUTE OF, 11: s 2, LIGHT, 2: s 3, LIGHT, 2-4

3 & 4 Will 4, c 27 (Real Property Limitation Act), ss 2, 3—See LIMITATIONS, STATUTE OF, 3: s 26, LIMITATIONS, STATUTE OF, 2: s 34, LIMITATIONS, STATUTE OF, 6: s 40, LIMITATIONS, STATUTE OF, 4, 5, 10

3 & 4 Will 4, c 42 (Statute of Limitations), ss 3, 5—See LIMITATIONS, STATUTE OF, 8, 9: s 8, PRACTICE, 42

3 & 4 Will 4, c 74 (Fines and Recoveries Act, 1833), s 15—See TENANT IN TAIL

3 & 4 Will 4, c 90 (Lighting and Watching Act, 1833)—See LOCAL GOVERNMENT, 10

4 & 5 Will 4, c 85, s 17—See LICENSING ACTS, 1

5 & 6 Will 4, c 50 (Highway Act, 1835), ss 26, 109—See HIGHWAY

6 & 7 Will 4, c 96, ss 2, 6—See POOR RATE, 1

7 Will 4 & 1 Vict c 26 (Wills Act), s 9—See PROBATE, 14: s 23, WILL, 15: s 24, WILL, 14, 15: s 27, POWER OF APPOINTMENT, 3a: s 33, WILL, 6

1 & 2 Vict c 110, s 13—See ADMINISTRATION, 1a: s 14, PRACTICE, 12-14: s 15, PRACTICE, 14

2 & 3 Vict c 35—See GAME

2 & 3 Vict c 47 (Metropolitan Police Act, 1839), s 74—See METROPOLIS, 6: s 77, METROPOLIS, 7

2 & 3 Vict c 71 (Metropolitan Police, Courts, Act, 1839), s 40—See ESTOPPEL, 2

3 & 4 Vict c 82, s 1—See PRACTICE, 13

5 & 6 Vict c 35 (Income Tax Act, 1842), sch A, s 61, r 6—See REVENUE, 1: sch D, s 100, case 1, rule 4, s 102, REVENUE, 2

5 & 6 Vict c 44, s 1—See LICENSING ACTS, 4

5 & 6 Vict c 45 (Copyright Act, 1842), ss 1, 2—See COPYRIGHT, 2: s 18, COPYRIGHT, 4

6 & 7 Vict c 18, s 17—See PARLIAMENT, 10

6 & 7 Vict c 73 (Attorneys and Solicitors Act, 1843), ss 2, 35, 36—See SOLICITOR, 21: s 37, SOLICITOR, 11

8 & 9 Vict c 16 (Companies Clauses Act, 1845), ss 14, 15, 18—See COMPANIES CLAUSES ACT

8 & 9 Vict c 18 (Lands Clauses Act, 1845), ss 69, 80—See LANDS CLAUSES ACTS, 3: s 92, LANDS CLAUSES ACTS, 6: s 121, LANDS CLAUSES ACTS, 1

8 & 9 Vict c 20 (Railways Clauses Act, 1845), ss 68-73—See RAILWAY, 2: ss 77-79, RAILWAY, 3

8 & 9 Vict c 109—See CONTRACT, 1; GAMING, 2

9 & 10 Vict c 93 (Lord Campbell's Act)—See EXECUTOR

10 & 11 Vict c 14 (Markets and Fairs Claus Act, 1847), s 13—See MARKET

10 & 11 Vict c 17 (Waterworks Clauses Act, 1847), ss 28, 29—See LOCAL GOVERNMENT, 14: ss 28, 30, 31, WATERWORKS, 1

10 & 11 Vict c 27 (Harbours, &c., Act, 1847), ss 23, 33, 83, 85—See HARBOURS AND DOCKS

10 & 11 Vict c 32—See IMPROVEMENT OF LAND (IRELAND) ACT

10 & 11 Vict c 89 (Towns Police Clauses Act, 1847), s 32—See LOCAL GOVERNMENT, 5

11 & 12 Vict c 43 (Summary Jurisdiction Act, 1848), s 22—See JUSTICES, 7

11 & 12 Vict c 111—See POOR LAW, 3

12 & 13 Vict c 14, ss 2, 3, sch D—See ARREST

12 & 13 Vict c 92, ss 2, 29—See CRIMINAL LAW, 1

13 & 14 Vict c 60 (Trustee Act, 1850)—See TRUSTEE, 1: s 2, TRUSTEE, 14: s 9, TRUSTEE, 13: s 25, TRUSTEE, 17: s 35, TRUSTEE, 14

14 & 15 Vict c 40—See DIVORCE, 17

15 & 16 Vict c 24 (Lord St. Leonards' Act), s 1—See PROBATE, 15

15 & 16 Vict c 51 (Copyhold Act, 1842), s 45—See COPYHOLD, 2

15 & 16 Vict c 55 (Trustee Act, 1852)—See TRUSTEE, 1: s 6, TRUSTEE, 14

15 & 16 Vict c 81 (County Rates Act, 1852), ss 21, 26, 31-34—See LOCAL GOVERNMENT, 9

16 & 17 Vict c 51 (Succession Duty Act, 1853), s 1—See REVENUE, 5: s 2, REVENUE, 5, 6; VENDOR AND PURCHASER, 15: s 10, REVENUE, 5: s 15, REVENUE, 6: s 20, REVENUE, 6; VENDOR AND PURCHASER, 15: s 32, REVENUE, 5: s 38, REVENUE, 6

16 & 17 Vict c 137 (Charitable Trusts Act, 1853), ss 24, 62, 66—See CHARITY, 5

17 & 18 Vict c 60, s 3—See CRIMINAL LAW, 1

17 & 18 Vict c 104 (Merchant Shipping Act, 1854), ss 109, 243—See MASTER AND SERVANT, 7: s 182, SHIP, 22: s 318, SHIP, 19

17 & 18 Vict c 113 (Real Estate Charges Act, 1854)—See WILL, 4

18 & 19 Vict c 90, s 2—See CROWN, 1

18 & 19 Vict c 120 (Metropolis Management Act, 1855), ss 125-129—See METROPOLIS, 8: ss 135, 150, POOR RATE, 5

18 & 19 Vict c 122 (Metropolitan Building Act, 1855), ss 6, 38—See METROPOLIS, 2: ss 45, 46, 105, METROPOLIS, 1

18 & 19 Vict c 124 (Charitable Trusts Act, 1855), ss 29, 48—See CHARITY, 5

20 & 21 Vict c 43, s 2—See LICENSING ACTS, 4: s 6, PRACTICE (IRELAND), 1

20 & 21 Vict c 77 (Court of Probate Act, 1857), ss 54-58—See PROBATE, 9: s 73, PROBATE, 5, 6, 8, 11, 12: s 81, PROBATE, 1

20 & 21 Vict c 85 (Matrimonial Causes Act, 1857)—See CASES UNDER DIVORCE: ss 21, 25, 26, MARRIED WOMAN, 4

21 & 22 Vict c 72 (Landed Estates Court, Ireland, Act, 1858), s 1—See LANDED ESTATES COURT (IRELAND), 2

21 & 22 Vict c 90 (Medical Act, 1858)—See MEDICAL PRACTITIONER

21 & 22 Vict c 95 (Court of Probate Act, 1858), ss 10, 11—See PROBATE, 9

22 & 23 Vict c 61, s 5—See DIVORCE, 24

22 & 23 Vict c 133 (Watermen's and Lightermen's Act, 1859), bye-law 99—See SHIP, 18

23 & 24 Vict c 27, s 19—See LICENSING ACTS, 1

23 & 24 Vict c 90, ss 13, 14—See GAME

23 & 24 Vict c 126 (Common Law Procedure Act, 1860), s 1—See LANDLORD AND TENANT, 10: s 17, PRACTICE, 2

23 & 24 Vict c 127 (Attorneys and Solicitors Act, 1860), s 26—See SOLICITOR, 21: s 28, SOLICITOR, 1

24 & 25 Vict c 91, s 17—See GAME

24 & 25 Vict c 96, s 91—See CRIMINAL LAW, 6

24 & 25 Vict c 100, s 42—See JUSTICES, 3

25 & 26 Vict c 50, s 9—See JUSTICES, 3

25 & 26 Vict c 63 (Merchant Shipping Act, 1862), s 18—See SHIP, 22

25 & 26 Vict c 68 (Fine Arts Copyright Act, 1862), s 4—See COPYRIGHT, 6

25 & 26 Vict c 89 (Companies Act, 1862)—See CASES UNDER COMPANY

25 & 26 Vict c 102 (Metropolis Management Act, 1862), s 75—See METROPOLIS, 4: s 85, METROPOLIS, 2a

25 & 26 Vict c 103 (Union Assessment Committee Act, 1862), ss 2, 14, 17, 24, 29—See POOR RATE, 1

26 & 27 Vict c 65 (Volunteer Act, 1863), s 26—See POOR RATE, 2

27 & 28 Vict c 39 (Union Assessment Committee Act, 1864), s 1—See POOR RATE, 1

27 & 28 Vict c 55, s 1—See METROPOLIS, 7

27 & 28 Vict c 112 (Judgments Registration Act, 1864)—See LIMITATIONS, STATUTE OF, 5

27 & 28 Vict c 113 (Thames Conservancy Act, 1864), bye-law 36—See SHIP, 18

27 & 28 Vict c 114 (Improvement of Land Act, 1864), s 49—See SETTLED LAND ACTS, 3

28 & 29 Vict c 86 (Bovill's Act), ss 1, 5—See BANKRUPTCY, 17

30 & 31 Vict c 102, s 3 (2)—See PARLIAMENT, 11

30 & 31 Vict c 127, s 18—See RAILWAY, 7

30 & 31 Vict c 131 (Companies Act, 1867)—See CASES UNDER COMPANY

30 & 31 Vict c 134 (Metropolitan Streets Act, 1867), s 6—See METROPOLIS, 6

31 & 32 Vict c 4, s 1—See UNDUE INFLUENCE, 2

31 & 32 Vict c 5 (Metropolitan Streets Act, 1868), s 1—See METROPOLIS, 6

31 & 32 Vict c 40 (Partition Act, 1868), s 10—See PARTITION ACTION

31 & 32 Vict c 56 (Judgments Extension Act, 1868), ss 1, 4—See JUDGMENT, 1

31 & 32 Vict c 71 (County Courts Admiralty Jurisdiction Act, 1868), s 3 (3)—See ADMIRALTY, 2: s 9, ADMIRALTY, 2: ss 10, 13, 23, 25, 35, LIVERPOOL COURT OF PASSAGE

31 & 32 Vict c 121 (Pharmacy Act, 1868), ss 1, 2, 15, 16—See PHARMACY ACTS

31 & 32 Vict c 125 (Parliamentary Elections Act, 1868), s 11 (11)—See PARLIAMENT, 5: s 25, PARLIAMENT, 2

32 & 33 Vict c 19 (Stannaries Act, 1869), ss 2, 13—See BANKRUPTCY, 15

32 & 33 Vict c 27 (Wine and Beerhouse Act, 1869), s 7—See LICENSING ACTS, 2: ss 8, 19, LICENSING ACTS, 3

32 & 33 Vict c 41 (Poor Rate Assessment and Collection Act, 1869), s 2—See POOR RATE, 6

32 & 33 Vict c 51 (County Courts Admiralty Jurisdiction Act, 1869), ss 1, 6—See LIVERPOOL COURT OF PASSAGE

32 & 33 Vict c 62 (Debtors Act, 1869), s 4—See DEBTORS ACT, 1: s 5, DEBTORS ACT, 1, 2; JUDGMENT, 1: s 6, DEBTORS ACT, 3

32 & 33 Vict c 67 (Valuation, Metropolis, Act, 1869), s 42 (13)—See METROPOLIS, 9a

33 & 34 Vict c 28 (Attorneys and Solicitors Act, 1870), s 4—See SOLICITOR, 3, 6: s 8, SOLICITOR, 5, 6: s 9, SOLICITOR, 6

33 & 34 Vict c 29 (Wine and Beerhouse Act, 1870), s 7—See LICENSING ACTS, 3

33 & 34 Vict c 46 (Landlord and Tenant, Ireland, Act, 1870), s 23—See LANDLORD AND TENANT (IRELAND), 6: s 65, LANDLORD AND TENANT (IRELAND), 2

33 & 34 Vict c 61 (Life Assurance Companies Act, 1870), s 2—See FRIENDLY SOCIETY, 4

33 & 34 Vict c 78 (Tramways Act, 1870), s 12—See TRAMWAY, 2

33 & 34 Vict c 104 (Joint-Stock Companies Arrangement Act, 1870), s 2—See COMPANY, 39

34 & 35 Vict c 41 (Gasworks Clauses Act, 1871), ss 24, 36—See GASWORKS

35 & 36 Vict c 77 (Metalliferous Mines Act, 1872), s 13—See MINE, 1

35 & 36 Vict c 86—See MAYOR'S COURT

35 & 36 Vict c 94 (Licensing Act, 1872), s 3—See LICENSING ACTS, 1: s 40, LICENSING ACTS, 2: s 42, LICENSING ACTS, 4, 6: s 43, LICENSING ACTS, 2: s 50, LICENSING ACTS, 2: s 52, LICENSING ACTS (IRELAND), 2

36 & 37 Vict c 38 (Vagrant Act, 1873), s 3—See CRIMINAL LAW, 7

36 & 37 Vict c 66 (Judicature Act, 1873)—See CASES UNDER PRACTICE: s 18 (5), LUNATIC, 4: s 25 (6), LIMITATIONS, STATUTE OF, 8: s 45, COUNTY COURT, 2: s 49, LUNATIC, 4

37 & 38 Vict c 42 (Building Societies Act, 1874), ss 16, 18—See BUILDING SOCIETY, 4: s 32 (4), BUILDING SOCIETY, 3: s 36, BUILDING SOCIETY, 1

37 & 38 Vict c 49 (Licensing Act, 1874), s 9—See LICENSING ACTS, 10: s 10, LICENSING ACTS, 9: s 17, LICENSING ACTS, 8: s 26, LICENSING ACTS, 6

37 & 38 Vict c 57 (Real Property Limitation Act, 1874)—See LIMITATIONS, STATUTE OF, 11: s 1, LIMITATIONS, STATUTE OF, 3: s 2, LIMITATIONS, STATUTE OF, 7: s 8, LIMITATIONS, STATUTE OF, 5, 10

37 & 38 Vict c 78 (Vendor and Purchaser Act, 1874), s 9—See LANDLORD AND TENANT, 1; VENDOR AND PURCHASER, 12

38 & 39 Vict c 50 (County Courts Act, 1875), s 10—See COUNTY COURT, 2

38 & 39 Vict c 55 (Public Health Act, 1875), s 4—See LOCAL GOVERNMENT, 7, 14: s 13, LOCAL GOVERNMENT, 11, 12; NUISANCE, 3; RIVER: s 15, LOCAL GOVERNMENT, 11; RIVER: s 16, LOCAL GOVERNMENT, 14, 15: s 17, NUISANCE, 3; RIVER: s 19, RIVER: s 21, NUISANCE, 3: s 27, RIVER: s 29, NUISANCE, 3: s 32, LOCAL GOVERNMENT, 15: s 54, LOCAL GOVERNMENT, 14, 15: s 57, LOCAL GOVERNMENT, 14: s 112, LOCAL GOVERNMENT, 6: ss 116, 117, LOCAL GOVERNMENT, 13: s 131, LOCAL GOVERNMENT, 6: s 144, HIGHWAY, 4, 5: s 149, HIGHWAY, 4: s 150, LOCAL GOVERNMENT, 8, 11: s 155, LOCAL GOVERNMENT, 3a: s 157, LOCAL GOVERNMENT, 2: s 159, LOCAL GOVERNMENT, 3a: s 171, LOCAL GOVERNMENT, 5: s 257, LOCAL GOVERNMENT, 8: s 264, HIGHWAY, 5: s 268, LOCAL GOVERNMENT, 8: s 285, LOCAL GOVERNMENT, 6, 15: s 308, LOCAL GOVERNMENT, 13: ss 332, 333, NUISANCE, 3

38 & 39 Vict c 60 (Friendly Societies Act, 1875), s 4—See FRIENDLY SOCIETY, 4: s 15 (7), FRIENDLY SOCIETY, 2: s 22, FRIENDLY SOCIETY, 1, 3: s 28, FRIENDLY SOCIETY, 4

38 & 39 Vict c 63 (Sale of Food and Drugs Act, 1875), s 6—See ADULTERATION

38 & 39 Vict c 84 (Parliamentary Elections, Returning Officers, Act, 1875), ss 3 (6), 4—See PARLIAMENT, 1.

38 & 39 Vict c 86 (Conspiracy and Property Act, 1875), s 7—See JUSTICES, 6

38 & 39 Vict c 90 (Employers and Workmen Act, 1875)—See MASTER AND SERVANT, 7: s 6, MASTER AND SERVANT, 1

39 & 40 Vict c 44, s 3—See SOLICITOR, 2

39 & 40 Vict c 61 (Divided Parishes Act, 1876), s 34—See POOR LAW, 3: s 35, POOR LAW, 2

39 & 40 Vict c 75 (Rivers Pollution Act, 1876), s 3—See LOCAL GOVERNMENT, 12; RIVER: ss 10, 11, RIVER

40 & 41 Vict c 18 (Settled Estates Act, 1877), s 2—See SETTLED LAND ACT, 10: s 56, LANDLORD AND TENANT, 13

40 & 41 Vict c 26 (Companies Act, 1877), s 3—See COMPANY, 17, 18: s 4, COMPANY, 17

40 & 41 Vict c 42 (Fisheries Act, 1877), s 4—See FISHERY, 2

41 & 42 Vict c 19 (Matrimonial Causes Act, 1878), s 4—See MARRIED WOMAN, 7

41 & 42 Vict c 26 (Parliamentary and Municipal Registration Act, 1878), s 28—See PARLIAMENT, 7

41 & 42 Vict c 31 (Bills of Sale Act, 1878—See CASES UNDER BILL OF SALE

41 & 42 Vict c 32 (Metropolitan Building Act, 1878), s 6—See METROPOLIS, 3

41 & 42 Vict c 54 (Debtors Act, 1878) s 1—See DEBTORS ACT, 2

41 & 42 Vict c 77 (Highways and Locomotives Act, 1878), s 20—See LOCAL GOVERNMENT, 4: s 23, HIGHWAY, 2, 3

42 & 43 Vict c 11 (Bankers' Books Evidence Act, 1879), ss 3-7—See EVIDENCE

42 & 43 Vict c 30 (Sale of Food and Drugs Act, 1879), s 10—See ADULTERATION

42 & 43 Vict c 49 (Summary Jurisdiction Act, 1879) s 31—See JUSTICES, 2; LICENSING ACTS, 7: s 33, JUSTICES, 4; LICENSING ACTS, 4: ss 35, 47, JUSTICES, 7

43 & 44 Vict c 42 (Employers' Liability Act, 1880), s 1, sub-sections 1, 4—See MASTER AND SERVANT, 2, 3

44 & 45 Vict c 12, ss 27, 41—See REVENUE, 3: ss 32, 37, REVENUE, 4

44 & 45 Vict c 41 (Conveyancing Act, 1881), s 2—See COMPANY, 24: s 3, LANDLORD AND TENANT, 14: s 5, SETTLED LAND ACTS, 10: s 6, VENDOR AND PURCHASER, 5: s 7 (1), VENDOR AND PURCHASER, 9: s 13, LANDLORD AND TENANT, 14: s 14, LANDLORD AND TENANT, 9, 11: s 15, COMPANY, 24: s 19, MORTGAGE, 1: s 21, MORTGAGE, 15: s 24,

MORTGAGE, 1: s 25, MORTGAGE, 8: s 30, WILL, 15: s 31, TRUSTEE, 1, 2: s 43, INFANT, 1, 6: s 55, LANDLORD AND TENANT, 13a: s 56, VENDOR AND PURCHASER, 4: s 69, LANDLORD AND TENANT, 11

44 & 45 Vict c 44 (Solicitors' Remuneration Act, 1881), s 8—See SOLICITOR, 4: ss 2, 4, SOLICITOR, 8: Gen Ord, sch 1, SOLICITOR, 8, 9: Gen Ord, sch 2, SOLICITOR, 7

44 & 45 Vict c 49 (Land Law, Ireland, Act, 1881) —See CASES UNDER LANDLORD AND TENANT (IRELAND)

44 & 45 Vict c 68 (Judicature Act, 1881), s 14—See PARLIAMENT, 2

45 & 46 Vict c 38 (Settled Land Act, 1882)—See CASES UNDER SETTLED LAND ACTS.

45 & 46 Vict c 39 (Conveyancing Act, 1882), s 3 (1)—See MORTGAGE, 15

45 & 46 Vict c 43 (Bills of Sale Act, 1882)—See CASES UNDER BILL OF SALE

45 & 46 Vict c 50 (Municipal Corporations Act, 1882), ss 140, 143, 144—See MUNICIPAL CORPORATION

45 & 46 Vict c 61 (Bills of Exchange Act, 1882), s 2—See BILL OF EXCHANGE, 2: ss 3, 5, 7, BILL OF EXCHANGE, 5: s 31, BILL OF EXCHANGE, 2, 3: s 51, BILL OF EXCHANGE, 1: s 55, BILL OF EXCHANGE, 5: s 57, BILL OF EXCHANGE, 1; PRACTICE, 68; ss 65-68, BILL OF EXCHANGE, 1: s 97, BILL OF EXCHANGE, 1

45 & 46 Vict c 75 (Married Women's Property Act, 1882), s 1—See MARRIED WOMAN, 2: s 1 (5), BANKRUPTCY, 3: s 2, MARRIED WOMAN, 6: s 5, MARRIED WOMAN, 2: s 11, MARRIED WOMAN, 3: s 13, MARRIED WOMAN, 5: s 19, MARRIED WOMAN, 5, 6

46 & 47 Vict c 51 (Corrupt and Illegal Practices Act, 1883), ss 40, 56—See PARLIAMENT, 2: s 44 (3) PRACTICE (IRELAND), 4

46 & 47 Vict c 52 (Bankruptcy Act, 1883)—See CASES UNDER BANKRUPTCY: s 9, DEBTORS ACT, 2: s 27, PRACTICE, 25: s 38, COMPANY, 37a, 39: s 40, FRIENDLY SOCIETY, 2: s 48, COMPANY, 37a: s 96, COMPANY, 47

46 & 47 Vict c 57 (Patents, &c, Act, 1883), ss 5, 14—See PATENT, 7: s 32, PATENT, 5: s 46, PATENT, 7: ss 47, 60, COPYRIGHT, 3: ss 64 (3), 90, TRADE-MARK, 4: s 92, TRADE-MARK, 3: s 90, TRADE-MARK, 7: s 103, TRADE-MARK, 1

47 & 48 Vict c 18 (Settled Land Act, 1884)—See SETTLED LAND ACTS, 1

47 & 48 Vict c 54 (Yorkshire Registries Act, 1884), ss 3, 4, 14—See REGISTRY ACTS

47 & 48 Vict c 61 (Judicature Act, 1884), s 14—See LUNATIC, 4

48 & 49 Vict c 63 (Patents, &c, Act, 1885), s 6 —See TRADE-MARK, 1

48 & 49 Vict c 69 (Criminal Law Amendment Act, 1885), ss 4, 9—See CRIMINAL LAW, 4, 5

49 & 50 Vict c 27 (Guardianship of Infants Act, 1886), s 6—See INFANT, 5: s 7, DIVORCE, 9: s 13, INFANT, 5

49 & 50 Vict c 33 (International Copyright Act, 1886), s 6—See COPYRIGHT, 5, 6

49 & 50 Vict c 48 (Medical Act, 1886)—See MEDICAL PRACTITIONER

49 & 50 Vict c 52 (Married Women, Maintenance, Act, 1886), s 1—See MARRIED WOMAN, 1

49 & 50 Vict c 54 (Extraordinary Tithe Redemption Act, 1886), ss 3, 4 (5)—See TITHE, 1

50 & 51 Vict c 28 (Merchandise Marks Act, 1887), ss 2, 3—See MERCHANDISE MARKS ACT

50 & 51 Vict c 30 (Settled Land Act, 1887), s 1—See SETTLED LAND ACT, 3

50 & 51 Vict c 33 (Land Law, Ireland, Act, 1887), s 1—LANDLORD AND TENANT, IRELAND, 15, 21, 25, 26, 28: s 4, LANDLORD AND TENANT, IRELAND, 27: s 9, LANDLORD AND TENANT, IRELAND, 19, 20

50 & 51 Vict c 58 (Coal Mines Regulation Act, 1887), s 12—See MINE, 4: ss 49, 50, MINE, 3

50 & 51 Vict c 71 (Coroners Act, 1887), ss 4 (2), 18 (1), 36—See CORONER

51 & 52 Vict c 2 (National Debt, Conversion, Act, 1888), s 21—See NATIONAL DEBT, CONVERSION, ACT, 1, 2: s 25, NATIONAL DEBT, CONVERSION, ACT, 1

51 & 52 Vict c 41 (Local Government Act, 1888), ss 11, 23, 60—See LOCAL GOVERNMENT, 4

51 & 52 Vict c 42 (Mortmain Act, 1888), ss 4, 10 —See CHARITY, 3

51 & 52 Vict c 43 (County Courts Act, 1888)—See CASES UNDER COUNTY COURT: s 57, PRACTICE, 15: s 65, PRACTICE, 40a: s 100, PROBATE, 9: s 116, PRACTICE, 15, 16: s 120, RIVER: s 124, RIVER: s 132, PRACTICE, 5: s 162, SOLICITOR, 21

51 & 52 Vict c 52 (Public Health, Buildings in Streets, Act, 1888), s 2—See LOCAL GOVERNMENT, 3

51 & 52 Vict c 59 (Trustee Act, 1888), s 2 (1)—See VENDOR AND PURCHASER, 4: ss 4-6, TRUSTEE, 4: s 6, POWER OF APPOINTMENT, 1: s 8, MORTGAGE, 14; TRUSTEE, 4, 7, 8

51 & 52 Vict c 62 (Preferential Payments in Bankruptcy Act, 1888), s 2 (1)—See FRIENDLY SOCIETY, 2

51 & 52 Vict c 65 (Solicitors Act, 1888), s 13— —See SOLICITOR, 18

52 & 53 Vict c 7, s 5—See REVENUE, 3, 5: s 6, REVENUE, 5

52 & 53 Vict c 45 (Factors Act, 1889), ss 1, 2— —See FACTOR

52 & 53 Vict c 46 (Merchant Shipping Act, 1889), s 1—See SHIP, 17

52 & 53 Vict c 49 (Arbitration Act, 1889), s 2— See ARBITRATION, 4: s 4, ARBITRATION, 8: s 5, ARBITRATION, 9: s 10, ARBITRATION, 6: s 14, ARBITRATION, 2, 5: s 15, ARBITRATION, 5: s 19, BUILDING SOCIETY, 1; PRACTICE, 6; WATERWORKS, 2: s 24, BUILDING SOCIETY, 1: s 27, ARBITRATION, 9: sch I. (*i*), ARBITRATION, 4

52 & 53 Vict c 57 (Railways Regulations Act, 1889), s 5 (2)—See RAILWAY, 6

52 & 53 Vict c 63 (Interpretation Act, 1889), s 13 (11)—See JUSTICES, 4

53 & 54 Vict c 5 (Lunacy Act, 1890)—See POOR RATE, 3: s 94, LUNATIC, 3: s 109, LUNATIC, 4: ss 116, 117, 120, 128, LUNATIC, 5: ss 136, 139, TRUSTEE, 15: ss 184, 185, 186, PROBATE, 22

53 & 54 Vict c 39 (Partnership Act, 1890), ss 2, 3 —See BANKRUPTCY, 17

53 & 54 Vict c 62 (Companies, Memorandum of Association, Act, 1890), s 1—See COMPANY, 12

53 & 54 Vict c 63 (Companies, Winding-up, Act 1890)—See COMPANY, 37, 40: s 1, COMPANY, 12, 16, 29, 47: s 2, COMPANY, 12, 16: s 3 (1), COMPANY, 47: s 3 (3), BUILDING SOCIETY, 3: s 8, COMPANY, 35: s 10, COMPANY, 32, 33: ss 12, 13

COMPANY, 26: s 32, COMPANY, 12, 16: s 33, COMPANY, 16

53 & 54 Vict c 69 (Settled Land Act, 1890), s 10—See SETTLED LAND ACTS, 8: s 11, SETTLED LAND ACTS, 7: s 13, SETTLED LAND ACTS, 4: s 15, SETTLED LAND ACTS, 3, 4

53 & 54 Vict c 71 (Bankruptcy Act, 1890), s 11—See BANKRUPTCY, 10, 11; SHERIFF, 2

54 & 55 Vict c 8 (Tithe Act, 1891), s 6—See TITHE, 2

54 & 55 Vict c 57 (Redemption of Rent, Ireland, Act, 1891)—See LANDLORD AND TENANT (IRELAND), 8, 10, 11; FEE FARM GRANT, 2, 3: s 1, FEE FARM GRANT, 1, 4; LANDLORD AND TENANT (IRELAND), 9: s 2, LANDLORD AND TENANT (IRELAND), 9

54 & 55 Vict c 65 (Lunacy Act, 1891), s 26 (2)—See LUNATIC, 3

54 & 55 Vict c 73 (Mortmain and Charitable Uses Act, 1891), s 9—See CHARITY, 1

54 & 55 Vict c 76 (Public Health, London, Act, 1891)—See LANDLORD AND TENANT, 3: s 42, METROPOLIS, 5: s 49, METROPOLIS, 10

54 & 55 Vict c lxxviii (London Sky Signs Act, 1891), ss 5, 13—See METROPOLIS, 9

55 & 56 Vict c 9 (Gaming Act, 1892)—See GAMING, 1, 2

55 & 56 Vict c 13 (Conveyancing Act, 1892), ss 2, 4—See LANDLORD AND TENANT, 11

55 & 56 Vict c 27 (Parliamentary Deposits and Bonds Act, 1892)—See TRAMWAY, 2: s 1, RAILWAY, 1; TRAMWAY, 1

55 & 56 Vict c 32 (Clergy Discipline Act, 1892), ss 2, 12—See ECCLESIASTICAL LAW, 5

STATUTORY DUTY:—

Waterworks — Reservoir — Exercise of statutory powers — Deviation — Construction of works not authorized by statute—Injunction.—Where the promoters of a public undertaking have authority from Parliament to interfere with private property on certain terms, any person whose property is interfered with by virtue of that authority has a right to require that the promoters shall comply with the letter of the enactment so far as it makes provision on his behalf. Nor can any court remodel arrangements sanctioned, or relax conditions imposed, by statute.

Deviation in its ordinary and natural sense, as used in Acts of Parliament, means shifting the work in its integrity from one site to another which may be deemed more suitable. It does not imply a right not only to alter the situation of the work but in doing so to dispense with a half or two-thirds of it.

A local and personal Act empowered commissioners to take water from a river for the supply of a township on condition of their executing certain works and (*inter alia*) a reservoir to supply compensation water to mill owners, and a conduit, the reservoir to be constructed by an embankment across the river. The Act and the plans described the position of the reservoir, its contour and capacity, and the height of the embankment, and provided that in constructing the authorized works the commissioners might, subject to the provisions of the Act, deviate from the lines of the works to any extent not exceeding the limits of lateral deviation shown on the deposited plans, and from the levels shown on the deposited sections, in the case of the reservoir to any extent of lesser height which would enable the commissioners to give a sufficient supply of water for compensation purposes; but the commissioners should not in the exercise of the power of lateral deviation thereby given construct any embankment or wall of any reservoir of a greater height above the general surface of the ground than that shown on the plans with reference to the corresponding embankment or wall and six feet in addition.

In constructing the reservoir the commissioners curtailed it by more than one-third of its length and nearly two-thirds of its capacity, and placed the embankment higher up the river than the point fixed by the Act, and so that the capacity could not be enlarged in the event of the supply of compensation water proving insufficient. In constructing the conduit the commissioners disregarded in material points the directions of the Act, and constructed a conduit which they alleged was "a substantial equivalent" to the mill owners. The mill owners having brought an action against the commissioners,

Held, reversing the decision of the Irish Court of Appeal (27 L. R. Ir. 179), Lords Morris and Hannen dissenting, that, though no actual damage was proved, the mill owners were entitled to a declaration that the reservoir and conduit were not in accordance with the provisions of the Act, and to an injunction restraining the commissioners from taking or using the waters of the river or from interfering with the flow of the river otherwise than as authorized by the Act.—*Herron* v. *Rathmines and Rathgar Improvement Commissioners*, H.L. (Ir.)—[1892] A. C. 498; 67 L. T. 658.

STOCKBROKER.—See BANKER; POWER OF ATTORNEY, 3; STOCK EXCHANGE.

STOCK EXCHANGE:—

Sale of shares—Undisclosed principal—London and country brokers—Set-off of debt due from agent—Custom of Stock Exchange.—A country stockbroker, acting for the plaintiff, an undisclosed principal, employed the defendants, members of the London Stock Exchange, to sell certain shares. The defendants sold the shares and claimed, under a custom of the London Stock Exchange, to set off the moneys received on the sale of the shares against the country broker's indebtedness to them in respect of previous Stock Exchange transactions.

Held, that the custom was an unreasonable one, and would not bind the plaintiff unless at the time he knew of it and agreed to be bound by it.—*Blackburn* v. *Mason*, C.A.—68 L. T. 510.

STOPPAGE *in TRANSITU*.—See BANKRUPTCY, 12; SALE OF GOODS, 2.

SUCCESSION DUTY.—See REVENUE, 5, 6; VENDOR AND PURCHASER, 15; WILL, 2.

SURVEYOR.—See FALSE REPRESENTATION.

TENANT for LIFE:—

Perpetuity—Agreement for a lease for lives after expiration of prior lease for ninety-nine years or three lives.—By a lease in 1798 lands were demised to D. for three lives and the survivor of them, and if the said lives and the survivor of them should die before the determination of ninety-nine years from the date of the lease, for the residue of that term. By deed in 1814 the reversioner agreed with E. that he, his heirs and assigns, would, so soon as the said lives and years should determine and expire, grant to E., or to his heirs and assigns, by lease, whenever thereafter applied to for that purpose, portion of said lands, such lease to be for three lives, and to contain a covenant for perpetual renewal.

Held, that though it was competent for the reversioner in 1814 to agree to execute a lease for a definite term, to commence as soon as the lease to D. expired, it was necessary that the interest to be taken should be capable of ascertainment within the period prescribed by the rule against perpetuities; that as the lives in this case could not be nominated until after the term of ninety-nine years had expired, the nature and extent of the interest to be taken could not be ascertained within the prescribed period; that the lease would not be less open to objection by reason of the covenant for perpetual renewal; and that the agreement could not be enforced.

The law relating to the rule against perpetuities as affecting grants for future leases considered.—*Redington* v. *Browne*, LAND. COM. (Ir.)—32 L. R. Ir. 347.

See also TENANT FOR LIFE AND REMAINDERMAN; MINE, 2; MORTGAGE, 1, 3; SETTLED LAND ACTS; SETTLEMENT, 2-5; VENDOR AND PURCHASER, 13.

TENANT for LIFE and REMAINDERMAN:—

1. *Annuity*—Corpus *or income.*—B. granted certain annuities by bond, and subsequently died leaving his widow, the testatrix, his universal legatee and sole executrix. Under her will her residuary estate was held in trust for a tenant for life, with remainders over to other persons.

Held, that each payment of the annuities, as it became due, must be raised out of the *corpus* of the estate.—*In re Bacon, Grissell* v. *Leathes*, CH.D. KEK., J. 478—62 L. J. Ch. 247; 68 L. T. 155.

2. *Apportionment—Income and capital—Mortgage—Mortgagees in possession—Will—Conversion clause.*—A testator at the date of his death was in possession of a colliery as mortgagee, and there were considerable sums owing to his estate under the mortgage. After his death a receiver was put to work the colliery by the trustees of his will, and the trustees finally foreclosed the mortgage. Under his will the testator had given his trustees power to postpone the conversion of any part of real and personal estate. Prior to the date of the foreclosure decree the receiver had paid into court to the credit of the foreclosure action considerable sums of money, representing the net profits of working the colliery, which sums had been increased by accumulations of interest. This fund had been transferred to the credit of an action for the administration of the testator's estate. The tenants for life claimed the whole fund as income.

Held, that the accumulations of interest were income, and belonged to the tenants for life; that until the date of foreclosure absolute the mine was not a part of the testator's estate affected by the conversion clause, but only a security for money advanced, and that the profits arising from the working of the mine previous to that date must be apportioned between the tenants for life and remaindermen, on the principle that the tenants for life were entitled to the difference between the sum transferred into court and the sum which, with interest at four per cent. from the date of the testator's death to the date of the transfer to the credit of this action, would amount to the sum transferred into court; and that the sum so calculated belonged to the estate as capital.

In re Earl of Chesterfield's Trusts, 32 W. R. 361, 24 Ch. D. 643, followed.—*In re Godden, Teague* v. *Fox*, CH.D. NOR., J. 282—[1893] 1 Ch. 292; 62 L. J. Ch. 469; 68 L. T. 116.

3. *Income* in specie—*Discretion in trustees to retain—Rule as to wasting securities—Originating summons—Practice.*—Where the trustees of a will held freehold and leasehold estate in trust for sale, with power to postpone at discretion,

Held, that the words of the will were insufficient to entitle the tenant for life to enjoy *in specie* the income arising from the leaseholds prior to sale.

Semble, in an originating summons the court will not, at the instance of the respondent, decide a point not raised by the plaintiff taking out the summons.—*In re Carter*, CH.D. KEK., J. 140.

4. *Trust for conversion—Capital and income—Unsaleable property retained—Apportionment of loss or profit.*—A testator directed that his residuary estate should be sold and converted on a particular day, and that a share of the proceeds should be held upon trust for his wife for life, with remainders over. The residuary estate included a circus, which it was found impossible to sell advantageously, and which had been carried on at a loss by the executors since the day named for the sale and conversion of the estate. In a summons asking for directions how such losses and any future losses (or profits) should be apportioned as between capital and income,

Held, that the amount of annual profit or loss should be apportioned between the capital and the income of the testator's estate by inquiring what sum, put out at interest at four per cent. per annum on the day appointed for sale and conversion, and, as regards succeeding years, accumulating at compound interest calculated at the like rate, with yearly rests, would, together with such interest and accumulations, after deducting income tax, be equivalent, at the end of each year, to the amount of such profit or loss, and by crediting such sum to, or charging it against, the capital of the testator's estate, the rest of such profit or loss being credited to, or charged against, the income thereof.—*In re Hengler, Frowde* v. *Hengler*, CH.D. KEK., J. 491—[1893] 1 Ch. 586; 62 L. J. Ch. 383; 68 L. T. 84.

5. *Trust for conversion—Enjoyment of income* in specie—*Lands settled on trust for sale—No power of postponement.*—Where lands are vested in trustees upon trust for sale and investment of the proceeds, and payment of the income of the investments to a tenant for life, with remainders over, and without any power of postponement, the tenant for life is entitled to receive the net rents and profits until such conversion.—*Hope* v. *D'Hedouville*, CH.D. KEK., J. 330—[1893] 2 Ch. 361; 62 L. J. Ch. 589; 68 L. T. 516.

TENANT in COMMON.—See MORTGAGE, 2.

TENANT in TAIL:—

Disentailing deed—Estates taking effect in defeasance of the estate tail—Estates to which the estate tail is postponed upon happening of an event—Fines and Recoveries Act, 1833 (3 & 4 *Will.* 4, *c.* 74), *s.* 15.—The Act for the Abolition of Fines and Recoveries, 1833, provides, by section 15, that "every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of for an estate in fee simple absolute or for any less estate the lands entailed by force of any estate tail . . . and also as against all persons whose estates are to take effect after the determination or in defeasance of any such estate tail; saving the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made."

Lands were devised, subject to prior limitations, upon trust for B., the second son of A., for life, with

remainder to B.'s first and other sons successively in tail male, with similar remainders to the third and other sons of A. and their sons. The will contained a proviso that, on the happening of a given event, the trusts in favour of B. and his issue male should "be postponed to and take effect in remainder next immediately after the trusts in favour of the other sons of A. and their issue male."

In 1872 B. and his eldest son, with the consent of the tenant for life in possession, executed a disentailing deed under section 15 of the Fines and Recoveries Act, 1833, and conveyed the lands in fee. In 1883 the given event happened. In 1891 the tenant for life died, and the plaintiff, the eldest son of A.'s third son, became entitled to the lands for an estate tail in possession, unless barred by the disentailing deed.

Held (affirming the judgment of Kekewich, J.), that the plaintiff's estate was an estate which would have taken effect in defeasance of the estate tale in respect of which the disentailing deed had been executed, and was, therefore, barred by virtue of section 15 of the Fines and Recoveries Act, 1833.

Doe v. *Earl of Scarborough*, 3 A. & E. 2, 897, followed.—*Milbank* v. *Vane*, C.A.—62 L. J. Ch. 629; 68 L. T. 735.

TENDER.—See PLEDGE.

TITHE:—

1. *Hop grounds or market gardens—Rent-charge in lieu of extraordinary charge—Liability to land tax—Extraordinary Tithe Redemption Act*, 1886 (49 & 50 *Vict. c.* 54), *ss.* 3, 4, *sub-section* 5.—The annual rent-charge payable under the Extraordinary Tithe Redemption Act, 1886, in lieu of the extraordinary charge previously levied under the Tithe Commutation Acts, is not liable to land tax.—*Carr* v. *Fowle*, Q.B.D. 365—[1893] 1 Q. B. 251; 62 L. J. Q. B. 177; 68 L. T. 123.

2. *Rating of owner of tithe rent-charge—Arrears of rates due before passing of Act—Deduction of, from tithe rent-charge accruing after Act—Repeal—Saving of existing rights and liabilities—Tithe Act*, 1891 (54 & 55 *Vict. c.* 8), *s.* 6.—By section 6 of the Tithe Act, 1891: "Any rate to which tithe rent-charge is subject shall be assessed on and may be recovered from the owner of the tithe rent-charge . . . . and so much of any Act as authorizes any rate on tithe rent-charge to be assessed on or recovered from the occupier of any lands out of which the tithe rent-charge issues is hereby repealed."

At the date of the passing of the said Act certain rates upon a tithe rent-charge, of which the appellant was the owner, were due and in arrear, owing to the neglect of the overseers to demand payment thereof from the occupiers of the lands out of which the tithe rent-charge issued. The tithe rent-charge for the period in respect of which the said rates were due had been paid to the appellant in full. After the passing of the Act the overseers, purporting to act under section 8 of the Tithe Act, 1837, demanded payment of the said arrears of rates from the occupiers of the land, who paid them, and were allowed the amount thereof by their landlord, the respondent, out of the half-year's rent becoming due next after such payment. Subsequently thereto a half-year's tithe rent-charge became payable by the respondent, as owner of the land, to the appellant. The respondent claimed to deduct therefrom the amount which he had allowed the occupiers out of their rent in respect of the said arrears of rates so paid by them.

Held, that, having regard to the provisions of section 6 of the Tithe Act, 1891, the payment of the arrears of rates by the occupiers was a voluntary payment which they were not entitled to deduct from their rent, and that the respondent was consequently not entitled to make the deduction claimed from the tithe rent-charge due to the appellant.—*In re Tithe Act*, 1891, *Roberts* v. *Potts*, Q.B.D.—[1893] 2 Q. B. 33; 62 L. J. Q. B. 436.

See also LANDED ESTATES COURT (IRELAND), 4.

TITLE DEEDS.—See SETTLED LAND ACTS, 1.

TORT:—

Joint tortfeasors—Discharge of one from liability—Right to claim against the other—Covenant not to sue—Release.—A covenant not to sue one of two joint tortfeasors does not operate as a release so as to discharge the other.

An agreement to accept a sum of money from one of two joint tortfeasors in full discharge of his liability, without prejudice to the right to claim against the other, ought to be construed, not as a release, but as a covenant not to sue.—*Duck* v. *Mayeu*, C.A. 56—[1892] 2 Q. B. 511; 62 L. J. Q. B. 69; 67 L. T. 694.

TRADE-MARK:—

1. *Foreign trade-mark—Registration—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 103—*Patents, Designs, and Trade-Marks (Amendment) Act*, 1885 (48 & 49 *Vict. c.* 63), *s.* 6.—Under sub-section 3 of section 103 of the Patents, &c., Act, 1883, a trade-mark which has been applied for in the country of origin, whether capable of being registered in that country or not, may be applied for here, but it will not be registered here unless it is a mark otherwise capable of registration under the law of this country.—*In re Carter Medicine Co.'s Trade-Mark*, CH.D. NOR., J. 13—[1892] 3 Ch. 472; 61 L. J. Ch. 716; 67 L. T. 747.

2. *Label—Unregistered mark—Words "trade-mark" attached to unregistered mark—Use of registered mark not belonging to plaintiff—Misrepresentation to the public—Injunction.*—A firm of retail dealers, who carried on business in several different branches of trade, registered a trade-mark for wearing apparel. They subsequently employed the same mark, with the words "trade-mark" attached thereto, upon the labels used in their tobacco department. No such mark had in fact been registered by them in respect of tobacco.

Upon the same labels the firm used a device which had been registered by R. in respect of tobacco, and had been assigned by him to W., an employé of the firm. W., having left the employment of the firm, granted a licence to G. to use his trade marks, and G. sold tobacco with a label similar to that of the firm. The firm commenced proceedings against G. to restrain him from passing off his goods as and for the goods of the firm. Upon motion for an *interim* injunction:

Held, that the use of the words "trade-mark" on goods, attached to a device, amounted to a representation to the public that that device was a registered trade mark.

Held, that there was also a representation that the device registered by R. was the registered trade-mark of the plaintiffs.

Held, that the plaintiffs, having been guilty of misrepresentation to the public, were not entitled to relief.

Injunction refused.—*Lewis* v. *Goodbody*, CH.D. KEK., J.—67 L. T. 194.

3. *Old mark—Alteration—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 92—*Name or initials of proprietor—Discretion of court—Essential and non-essential particulars.*—A trade-mark registered as an old mark ought to be registered and kept registered just as it was used, and, in the absence of special circumstances rendering alteration necessary, no alteration of such mark ought to be allowed.

The circumstance that the proprietor of an old mark, whose name or initials form part of such mark, has transferred to another person the business in connection with which the mark has been used is not sufficient to induce the court to allow an alteration of the mark by substituting the name or initials of the new proprietor for the name or initials of the former proprietor.—*In re Henry Clay and Bock & Co.*, CH.D. KEK., J.—[1892] 3 Ch. 549; 62 L. J. Ch. 143; 67 L. T. 614.

4. *Registration — Action for infringement of one mark — Motion by defendant to expunge a different mark from register—"Person aggrieved"—Isolated user—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 64 (3), 90.—Under section 90 of the Patents, Designs, and Trade-Marks Act, 1883, requiring an applicant for rectification of the register of trade-marks to be a "person aggrieved," any person who is in the same trade as the person who has registered the mark which is alleged to be wrongfully registered, and who may at some future time, in the ordinary scope of his business, desire to deal in the article covered by the registration, even though, at the time of making the application to rectify, he has no present or immediate intention or desire to deal in it, is *primâ facie* a "person aggrieved."

In 1884 P., on behalf of G. & Co., a firm of sauce manufacturers, registered the words "Yorkshire Relish" as a trade-mark for a certain sauce, on the ground of user of those words as a trade-mark before the 13th of August, 1875. P. had previously, in 1876, on behalf of the firm, registered two other trade-marks, the characteristic feature of which was the device of a willow pattern plate, claiming for them (as subsequently in the case of the words "Yorkshire Relish") user as trade-marks prior to 1875. In 1891 P. brought an action against the B. Co., who were also sauce manufacturers, to restrain them from using what he alleged to be a colourable imitation of his registered willow pattern mark. The B. Co. then moved to expunge from the register P.'s "Yorkshire Relish" trade-mark, on the ground that they were "aggrieved" by it being there. The words "Yorkshire Relish" alone had, prior to 1875, only been used by P. on packing cases containing bottles of the sauce; the bottles of sauce were put upon the market with the willow pattern mark upon them. The B. Co. had not formed any definite intention or desire to deal in "Yorkshire Relish."

Held, that the B. Co. were "persons aggrieved" within section 90 so as to be entitled to apply to rectify the register; and that, upon the evidence, the user of the words "Yorkshire Relish" upon the packing cases had not constituted user as a trade-mark prior to the passing of the Trade-Marks Registration Act, 1875, and the words must accordingly be expunged.

Decision of Chitty, J., affirmed.

Principle in *In re Apollinaris Co.'s Trade-Mark*, [1891] 2 Ch. 186, 39 W. R. Dig. 237, extended.—*In re Powell's Trade-Mark*, C.A. 627—[1893] 2 Ch. 388; 69 L. T. 60.

5. *Registration—Similarity—Rectification of register—Old mark—Deceptive user—Misleading use of words "trade-mark."*—D., a British cigar manufacturer, applied to register as a new mark for manufactured tobacco containing the words "Star of Hope," and a marine picture with a small six-pointed star in the sky. The application was opposed by W. as the registered proprietor of two marks for the same class of goods. The first mark was registered as an old mark in 1877, and consisted of an eight-pointed star. This mark was chiefly used upon packet tobacco; but from 1870 to 1884 cigars were manufactured for W. by an English firm, upon which the mark was used as part of a label containing the name of an imaginary Spanish firm and the word "Habana." W.'s trade in cigars was comparatively small, and was subsidiary to his trade in packet tobacco. The second mark was registered in 1886 as a new mark, and consisted of a pictorial label, and by the side of the label an eight-pointed star, to which the words "trade-mark" were attached. W.'s goods were frequently ordered by the public as "star" goods. D. moved to expunge W.'s marks.

Held, first, that W. had no exclusive right to the name or design of a star; that, apart from such claim, D.'s mark was not calculated to deceive; and that D. was entitled to registration.

Held, also, that W.'s first mark was distinctive, and was not invalidated by the mode of user; first, because the misrepresentation accompanying the use of the mark upon cigars was not such as to destroy its distinctive character; secondly, because there had been no general or very extensive user of the mark upon cigars.

In re Wood's Trade-Mark, 32 Ch. D. 262, distinguished.

Held, also, that W.'s second mark was misleading, by reason of the position of the words "trade-mark," and ought to be expunged except as to the star, subject to an application being made by W. to amend.—*In re Dexter's Application; In re Wills's Trade-Marks*, CH.D. WRI., J.—[1893] 2 Ch. 262; 62 L. J. Ch. 545; 68 L. T. 793.

6. *Unregistered trade-mark — Infringement — Intention to deceive — Evidence.*—The plaintiffs had for many years made and sold belting for machinery which they called "Reddaway's camel hair belting," but had not registered any trade-mark. The defendants made and sold similar belting, which they called "The Bentham camel hair belting." An action having been brought by the plaintiffs to restrain the defendants from infringing their trade-mark and for damages, the plaintiffs gave evidence that their belting and no other belting was known to the trade as "camel hair belting"; but they offered no evidence to prove that the defendants had ever sold their belting as the plaintiffs' belting, or that any person had bought the defendants' belting upon the supposition that it was made by the plaintiffs. The judge, at the trial, stopped the case without hearing evidence for the defendants, and the jury, by his direction, gave a verdict for the defendants.

Held, by Lindley and Lopes, L.JJ. (A. L. Smith, L.J., dissenting), that there must be a new trial, in which it should be left to the jury: (1) whether the words "camel hair belting" had acquired in the trade the meaning of belting made by the plaintiffs; and, if so, (2) whether the defendants' description of their belting was likely to deceive purchasers, and to induce them to suppose that their belting was made by the plaintiffs, in which case the plaintiffs would be entitled to an injunction without proof of an intention to deceive.

By A. L. Smith, L.J., dissenting, that there was no evidence for the jury that the defendants had sold, or attempted to sell, their belting under circumstances likely to deceive purchasers; and that a verdict was properly directed for the defendants. —*Reddaway* v. *Bentham Hemp Spinning Co.*, C.A.—[1892] 2 Q. B. 639; 67 L. T. 301.

7. *Validity—Infringement—Rectification of register —Concurrent user—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 90.—The plaintiffs were brewers in Huntingdonshire, and had a large export trade in bottled beer and a small trade in this country. The defendants were brewers in Essex, and sold bottled beer in the Eastern counties, but had no export trade. Both parties sold beer in the north of London.

The plaintiffs were the proprietors of two trade-marks for fermented liquors and spirits registered respectively in 1879 and 1886 as new marks. Both of those marks consisted of a figure of a stout man in top boots with the words "John Bull Brand," and the plaintiffs' beer had become extensively known as "John Bull" beer. In 1884 the defendants or their predecessors, knowing nothing of the plaintiffs' marks, began to use for their bottled beer a label containing a somewhat similar picture of a stout man, coupled with the words "John Bull, Registered," and they continued to use this label after they knew of the existence of the plaintiffs' marks. The defendants' label was never registered as a trade-mark, though it had been entered at Stationers' Hall. The plaintiffs brought an action to restrain the defendants from infringing the plaintiffs' trade-mark, and also to restrain the defendants from passing off their beer as the plaintiffs'. Thereupon the defendants moved to expunge the words "John Bull" from the plaintiffs' trade-marks. It then transpired that the words "John Bull" had been used in connection with beer by a Sheffield firm of brewers, and that that firm had from 1875 to 1890 used those words to describe a particularly strong beer which they sold in Sheffield and its vicinity, but that such user had been finally abandoned in 1890, before the date of these proceedings.

Held, that, assuming that the Sheffield firm would have had a right to have the words "John Bull Brand" expunged from the register if they had applied in proper time, still it was clear that, apart from such objection, those words were, under the Trade-Marks Registration Act, 1875, capable of being added to the plaintiffs' mark of 1879, and as they had not been complained of by the only persons who had a right to complain, they ought to be allowed to stand unaltered.

Held, also, that the plaintiffs' mark of 1886 was only objectionable inasmuch as it embodied the mark of 1879, and it would be idle to strike out the words in question from the latter mark without striking them out from the first mark, in view of the very wide discretion conferred upon the court by section 90 of the Patents, Designs, and Trade-Marks Act, 1883.

Held, therefore, that the plaintiffs' marks ought to be treated as duly registered trade-marks, with the lawful addition of the words "John Bull Brand"; and that the conduct of the defendants was such as to entitle the plaintiffs to the relief they claimed in the action.—*Paine & Co.* v. *Daniel & Sons' Breweries* (*Limited*), C.A.—[1893] 2 Ch. 567; 62 L. J. Ch. 732; 68 L. T. 801.

See also COPYRIGHT, 5.

TRADE UNION.—See CONSPIRACY; DEFAMATION, 1; PRACTICE, 45.

TRAMWAY:

1. *Abandonment of undertaking—Paper company—Application of parliamentary deposit—Depositors—Solicitors—Parliamentary agent—Creditors—Parliamentary Deposits and Bonds Act*, 1892 (55 & 56 *Vict. c.* 27), *s.* 1.—The undertaking of a tramway company, incorporated by Act of Parliament, and in respect of which the necessary parliamentary deposit had been made, was abandoned, no land having been acquired or work done.

Held, that, under the Parliamentary Deposits and Bonds Act, 1892, s. 1, sub-sections 1 and 2, all the creditors of the company, including the solicitors and parliamentary agents concerned in the promotion of the Bill, were entitled to payment out of the deposit in priority to the depositors; but,

Held, that, the company being a "paper company," neither the solicitor nor the parliamentary agent was entitled to payment of his costs out of the parliamentary deposit.—*In re Manchester, Middleton, and District Tramways Co.*, CH.D. KEK., J. 631—[1893] 2 Ch. 638; 62 L. J. Ch. 752; 68 L. T. 820.

2. *Winding up — Costs of liquidator — Parliamentary deposits—Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *s.* 12—*Board of Trade Rules*, 1884, *r.* 28—*Parliamentary Deposits and Bonds Act*, 1892 (55 & 56 *Vict. c.* 27).—Summons by the liquidator of a tramway company, which had been ordered to be wound up, for the costs of the Treasury and for his own costs and remuneration out of deposits in court to the credit of the company. The assets of the company being insufficient to pay its debts and the costs of the liquidation,

Held, that the costs of the Treasury must be paid, but that the court had no jurisdiction to order payment of the liquidator's general costs or of his remuneration out of the deposits.—*In re Colchester Tramways Co.*, CH.D. NOR., J. 169—[1893] 1 Ch. 309; 62 L. J. Ch. 416.

3. *Nuisance—Statutory powers—Electrical tramway —Interference with telephone—Injunction.*—A tramway was constructed under statutory powers which authorized the use of electrical power as the motive power with the consent of the Board of Trade, provided that, in the event of electrical power being used, no act should be done whereby any telegraphic line of the Postmaster-General might be injuriously affected. The defendant, the lessee of the tramway, with the consent of the Board of Trade, worked the tramway by electrical power upon a system which the evidence showed to be a good, workable, economical system, and in use in other countries, but the effect of which was to disturb and seriously interfere with the efficient working of part of a telephonic system owned by the plaintiffs by interfering with the telephonic current. Different systems might have been adopted by the plaintiffs or defendants so as to obviate the disturbance.

Held, that an action for injunction or damages was not maintainable, as the disturbance caused to other systems must have been within the contemplation of the Legislature in sanctioning the use of electrical traction power on the tramway.

The court will not hold a railway or other company liable for the consequences of acts done under statutory powers merely because it has not adopted the latest scientific invention.

As a general rule the principle of *Rylands* v. *Fletcher*, L. R. 3 H. L. 330, applies to electric currents, so that a man who has created or called into existence an electric current for his own purposes, and who discharges it into the earth beyond

his control, is responsible for damage which that current does to his neighbour.—*National Telephone Co.* v. *Baker*, CH.D. KEK., J.—[1893] 2 Ch. 186; 62 L. J. Ch. 699; 68 L. T. 283.

See also NEGLIGENCE, 2; NUISANCE, 5.

TREATY.—See CROWN, 2.

TRESPASS.—See HIGHWAY, 6.

TROVER:—

Sale of goods—Delivery to shipowner—Shipowner not to accept goods without giving a clean receipt—No Clean receipt given—Refusal to re-deliver to vendor—Subsequent acceptance by vendee and payment of vendor—Liability of shipowner.—The plaintiffs, N. & Co., engaged with the defendants, who were shipowners, for the shipment of a large quantity of oil to Montreal during the season, and it was arranged that the defendants were to receive no goods on board unless a clean receipt were given. The plaintiff A. sold fifty barrels of oil to N. & Co., and delivered them to the defendants. The defendants received the oil, but refused to give a clean receipt for it. The plaintiff A. demanded re-delivery, which the defendants refused, as other cargo had been stowed on the top of it. N. & Co. having agreed to pay A. for the oil in cash in exchange for mate's receipt, refused to pay for the fifty barrels. A. brought an action against the defendants for conversion, and afterwards amended the writ by adding N. & Co. The consignees at Montreal accepted the oil and paid N. & Co., who thereupon paid A.

Held, that A. had waived the right of saying that the property in the goods had not passed to N. & Co., and therefore, since the goods were not his at the time that re-delivery was refused, no action lay for conversion; and, further, that no action lay for his loss of interest through the delay in payment to him of the price of the goods.

Judgment of Wills, J. (reported 67 L. T. N. S. 417), reversed.—*Armstrong* v. *Allan Brothers*, C.A. —67 L. T. 738.

TRUCK ACT.—See MASTER AND SERVANT, 6.

TRUSTEE:—

1. *Appointment—New trustees—Existing trustee—Statutory power—Beneficiaries, wishes of—Jurisdiction of court—Trustee Acts*, 1850 *and* 1852 (13 *&* 14 *Vict. c.* 60; 15 *&* 16 *Vict. c.* 55)—*Conveyancing and Law of Property Act*, 1881, *s.* 31.—The court has no jurisdiction under the Trustee Acts to appoint new trustees of a will against the wishes of an existing sole trustee desirous of exercising his statutory power of appointing new trustees under section 31 of the Conveyancing and Law of Property Act, 1881, even though the application to the court is made by a majority of the beneficiaries, and the existing trustee has himself no beneficial interest.—*In re Higginbottom*, CH.D. KEK., J.—[1892] 3 Ch. 132; 62 L. J. Ch. 74; 67 L. T. 190.

2. *Appointment—New trustees—Trustee dying before testator—Power of representative of trustee to appoint—Conveyancing and Law of Property Act*, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 31, *sub-sections* 1, 6.—Section 31 of the Conveyancing and Law of Property Act, 1881, does not enable the personal representative of the survivor of two trustees nominated by a will, but dying before the testator, to appoint new trustees of the will.—*Nicholson* v. *Field*, CH.D. KEK., J.—[1893] 2 Ch. 511.

3. *Breach of trust—Enforcement of payment of trust funds—Alleged default—Liability.*—By his will a testator gave his sons in succession an option to purchase his leasehold mill property at a valuation, payable by half-yearly instalments with interest. In addition to giving a bond, the son purchasing was to execute a mortgage. The sale moneys were to be invested upon some of the investments authorized by the will, and to be disposed of as thereby directed. The investment clause gave the trustees absolute discretion to invest in the securities named therein, or in case either of the sons should elect to carry on the testator's business, then upon security of the land, mill, and premises whereon the business should be carried on. The testator died in 1875. The eldest son exercised the option. The mill property was valued at £50,000. The trustees and the son agreed for payment of this sum by half-yearly instalments of £2,000. In March, 1877, the son executed a mortgage of the mill property to secure the £50,000. It being necessary that the son should obtain some further capital, a limited liability company was incorporated in March, 1877. It agreed to buy from the son the property comprised in the mortgage at a slight advance in price, and the equity of redemption was duly assigned to it. The company having subsequently failed, it was sought to fix the trustees with liability, and to establish against them a case of wilful default. The default alleged was that they did not get from the son the instalments of £2,000 half-yearly as they became due, and also in not compelling the payment of the instalments by the company as the owners of the equity of redemption by means of a foreclosure action or the exercise of their power of sale.

Held (affirming the decision of Chitty, J., 63 L. T. N. S. 665), that the trustees had done the best they could in the embarrassing position in which the testator himself had placed them; that no imputation could be made upon their honesty; and that, therefore, they were not liable to make good the loss.

Trustees are not insurers, and if they have and retain in their hands assets which, fairly valued, are sufficient to meet legacies which are not payable, but have to be held in trust, they are justified in paying other legacies payable *pari passu* with them, but payable at once. And trustees making such payments are not personally responsible to the unpaid legatees if the assets retained for them should in the result prove insufficient to pay them in full.

Fenwick v. *Clark*, 4 De G. F. & J. 240, and *Frere* v. *Winslow*, 45 Ch. D. 249, considered.

The conduct of trustees ought to be regarded with reference to the facts and circumstances existing at the time when they had to act and which were known, or which ought to have been known, by them at that time.—*In re Hurst, Addison* v. *Topp*, C.A.—67 L. T. 96.

4. *Breach of trust—Investment on mortgage—Valuation—Statute of Limitations—Measure of liability—Consent of beneficiary—Impounding interest—Trustee Act*, 1888 (51 *&* 52 *Vict. c.* 59), *ss.* 4–6, 8.—The trustees of a marriage settlement, in contemplating an investment of the trust funds on mortgage, through their solicitor instructed an experienced valuer to report on the property and advise them what sum could be safely advanced upon it. With the instructions was sent a letter containing the following words: "It is desired by both mortgagor and mortgagees that as much money shall be advanced as you can advise will be properly secured."

The solicitor who so instructed the valuer on behalf of the trustees was also the solicitor of the

proposed mortgagor. The valuer, in his report, valued the property at £42,750, and estimated the net rental at £1,070. He at the same time wrote a letter to the solicitor advising that £30,000 might be safely advanced. The proposed mortgagor being dissatisfied with this sum, the solicitor had an interview with the valuer, and subsequently the latter advised that £35,000 might safely be advanced upon the property, giving as the ground of his opinion the fact that he thought increased rents might be obtained. The trustees thereupon, in 1878, advanced the whole of the trust fund, consisting of a sum of £34,612, upon security of the property. The investment was made with the written consent of the tenant for life, and at his instigation and request. Interest on the mortgage was duly paid down to 1890, when it was found that the security was insufficient.

In an action brought against the surviving trustees by the tenant for life and his infant children entitled in remainder,

Held, as between the infant plaintiffs and the defendants, that the investment of the £34,612 was a breach of trust, and that the defendants were jointly and severally liable to make good the same.

Held, that £26,000 was the largest sum which might properly have been advanced, within the meaning of section 5 of the Trustee Act, 1888; but

Held, as between the tenant for life and the defendants, that his right of action was barred by section 8 of the Trustee Act, 1888, and that his life interest in the whole trust estate must be impounded by way of indemnity to the defendants.—*In re Somerset, Somerset* v. *Earl Poulett*, CH.D. KEK., J. 536—62 L. J. Ch. 720; 68 L. T. 613.

5. *Breach of trust—Liability of deceased trustee for breach of trust committed after his death.*—The estate of a deceased trustee is not liable for a breach of trust committed after his death where he has left the trust funds in a proper state of investment at his death.—*In re Palk, In re Drake, Chamberlain* v. *Drake*, CH.D. NOR., J. 28.

6. *Breach of trust—Primary and secondary liability—Solicitor—Constructive trustees.*—As between persons appointed trustees and persons who have become constructive trustees of an estate, there is no primary and secondary liability in respect of a breach of trust, but all are equally liable.

In an action by *cestuis que trust* against their trustees in respect of certain alleged breaches of trust, the solicitors of the trustees were joined as defendants. In the statement of claim it was alleged in substance that the solicitors had become constructive trustees. Upon motion to dismiss the action as against the solicitors,

Held, that, if the allegations were true, the solicitors and the trustees would be equally liable for breaches of trust, and that the action must be allowed to proceed.

Wilson v. *Moore*, 1 Myl. & K. 126, followed.

Maw v. *Pearson*, 28 Beav. 196, considered and distinguished.—*Cowper* v. *Stoneham*, CH.D. STI., J.—68 L. T. 18.

7. *Breach of trust—Statute of Limitations—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8.—A testatrix gave all her residuary estate to two trustees in trust for an infant, to be paid to him at twenty-one. He attained twenty-one in 1880. In 1892 he took out a summons against the two trustees for administration of testatrix's estate. Only one of the defendants, who had been acting trustee, appeared. Plaintiff made no allegation of fraud. There was no evidence that defendant still retained any part of the trust funds, or had converted them to his own use. Defendant admitted that he had rendered no account to the plaintiff, but deposed that he had spent all the trust funds in maintaining the plaintiff during his infancy.

Held, that the Trustee Act, 1888, s. 8, applied, and that the summons must be dismissed, but, under the circumstances, without costs.—*In re Page, Jones* v. *Morgan*, CH.D. NOR., J. 357—[1893] 1 Ch. 304; 62 L. J. Ch. 592.

8. *Breach of trust—Statute of Limitations—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8.—M. was trustee under a will of certain funds which he was empowered to invest in real securities in England or Wales. He and his co-trustee, in March, 1878, advanced £10,000, part of the funds, upon mortgage of hop and fruit gardens in Kent, and the money was paid to the credit of the account of the mortgagor, which was overdrawn to more than that amount, at a bank in which M. was a partner. The investment turned out valueless, and this action was brought on the 20th of August, 1890, by a beneficiary under the will, alleging that M. had been guilty of fraudulent breach of trust.

Held, that section 8 of the Trustee Act, 1888, applied and barred the action, which could not be treated as an action to recover the proceeds of trust property "received by the trustee and converted to his use" within the meaning of sub-section 1 of section 8 of the Act, and so be excepted from the operation of the Statute of Limitations.—*In re Gurney, Mason* v. *Mercer*, CH.D. ROM., J. 443—[1893] 1 Ch. 590; 68 L. T. 289.

9. *Costs—Breach of trust—Action against trustee—Costs, charges, and expenses subsequent to judgment in action.*—The court will go as far as it can to give trustees their costs, charges, and expenses properly incurred. But where a trustee's own misconduct has occasioned the proceedings through which costs subsequent to judgment have been incurred, the costs are in the discretion of the court, and will not ordinarily be allowed to him.

Hewett v. *Foster*, 7 Beav. 348, explained.—*Easton* v. *Landor*, C.A.—62 L. J. Ch. 164; 67 L. T. 833.

10. *Investments — "Securities" — Shares in joint-stock bank not fully paid up.*—A direction to executors to invest "in such securities as they may think proper" does not authorize the purchase of shares not fully paid up in a joint-stock banking company with limited liability.—*Murphy* v. *Doyle*, C.A. (Ir.)—29 L. R. Ir. 333.

11. *Liability—Acceptance of trust—Disclaimer—Signing receipt for legacy—Loss of trust fund.*—By her will a testatrix, who died in 1866, directed her executors to pay to A. and B. a certain sum of money to be held in trust for the plaintiff, who was at that time an infant. A. and B. gave to the executors of the will a receipt for the legacy on an Inland Revenue form for presentation to the Inland Revenue authorities. The legacy was paid to A. and B. by a crossed cheque drawn in favour of both of them, but whether payable "to order" or to bearer" was not in evidence, nor was there any evidence that either of them had indorsed the cheque. In 1876 A., who was the father of the plaintiff, died in insolvent circumstances. In 1881 B. executed a deed-poll purporting to disclaim the trusts of the will. In 1892 the plaintiff for the first time became aware of the legacy, and called upon B. to account for the same. B. alleged that

he had never accepted the trusts of the will, and that the receipt given by him was not intended to operate as an acceptance of the trusts, and that he had never received nor in any way dealt with the legacy.

Held, that, although the rule was that a trustee ought to execute a disclaimer without delay, yet there was no rule that a disclaimer must be executed within any particular time; that the evidence showed that B. did not mean to accept the trust, notwithstanding the fact that he signed the legacy duty receipt as well as A.; and that, although it was not necessary for B. to have done that if he were not a trustee, yet the court would be straining matters too far if it were to hold that that act alone constituted B. a trustee.—*Jago* v. *Jago*, CH.D. WRI., J.—68 L. T. 654.

12. *Liability—Part of trust property stolen by his servant—Case of trustee remunerated for his services.*—A trustee, remunerated for his services, employed a servant for the purposes of the trust, carefully selected and with a good character from his last employer, and properly intrusted to him the custody of the trust property, there being no negligence on the part of the trustee. The servant stole part of the property.

Held, that the trustee was not liable for the loss thereby occasioned to the trust estate.

Semble, the fact that a trustee is remunerated for his services does not add to his liability as trustee.—*Jobson* v. *Palmer*, CH.D. ROM., J. 264—[1893] 1 Ch. 71; 62 L. J. Ch. 180; 67 L. T. 797.

13. *Vesting order—Service of petition on adult heir of sole trustee residing abroad—Trustee Act*, 1850 (13 & 14 *Vict. c.* 60), *s.* 9.—The trustees of a will conveyed all their beneficial interest in a certain property to a purchaser. The legal estate in the property was in the heir, who was abroad, of a deceased sole trustee to whom the legal estate had been conveyed to prevent merger. On petition for a vesting order,

Held, that, under the circumstances, service of the petition on the heir might be dispensed with.—*In re Stanley's Trusts*, CH.D. NOR., J. 343—62 L. J. Ch. 469; 68 L. T. 197.

14. *Vesting order—Stock—Trustee Act*, 1850 (13 & 14 *Vict. c.* 60), *ss.* 2, 35—*Trustee Extension Act*, 1852 (15 & 16 *Vict. c.* 55), *s.* 6.—In an order made under section 35 of the Trustee Act, 1850, and section 6 of the Trustee Extension Act, 1852, vesting the "right to call for a transfer of and to transfer" stock, in new trustees, it is not obligatory to insert the name of any transferee in the order, nor is there any general rule that the words "to any purchaser or purchasers" should be added; the insertion or omission of these words is a matter of discretion for the judge who makes the order.

In re Peacock, 14 Ch. D. 212, explained.

The word "stock," as defined in section 2 of the Trustee Act, 1850, comprises shares not fully paid up in any company or society.—*In re New Zealand Trust and Loan Co.*, C.A. 457—[1893] 1 Ch. 403; 62 L. J. Ch. 262; 68 L. T. 593.

15. *Vesting order—Government stock—Form of vesting order—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 136, *sub-sections* 2, 5, 6; *s.* 139.—Upon the appointment of new trustees by the court the common form of vesting order in the case of Government stock is to be adhered to, which vests in the trustees the right to call for the transfer of the same, and to receive the dividends due and to accrue due thereon, and which further directs the trustees to transfer the same "into their own names," but if in any particular case a judge thinks it proper to depart from the usual form, and to make a special order, it is perfectly competent for him to do so.

In re New Zealand Trust and Loan Co., 41 W. R. 457, [1893] 1 Ch. 403, explained.—*In re Gregson*, LUN. 641—62 L. J. Ch. 764; 69 L. T. 73.

16. *Vesting order—Government stock—Form of vesting order—Trustee Acts.*—This was a petition for the appointment of new trustees of a will, and for an order vesting in the new trustees a sum of Consols.

Held (differing from *In re New Zealand Trust and Loan Co.*, 41 W. R. 457, [1893] 1 Ch. 403), that the proper form of order should, after appointing the new trustees, go on to direct the trustees to transfer the stock into their own names.

Held, that that form, being established for the protection of the *cestuis que trust*, and being the practice of the Bank of England, should be maintained.—*In re Joliffe's Trusts*, CH D. KEK., J.—68 L. T. 747.

17. *Vesting order—Death of surviving trustee resident out of jurisdiction—Administration in England—New trustees—Trustee Act*, 1850 (13 & 14 *Vict. c.* 60), *s.* 25.—The surviving trustee of a marriage settlement resided and died out of the jurisdiction, intestate. Letters of administration to his estate were granted in England to a person resident there. New trustees were duly appointed under the provisions of the settlement. Certain stock was standing in the names of the deceased trustees in the books of the Bank of Ireland.

The court made an order, on the application of the new trustees, that the stock, and the right to call for a transfer, should vest in them.—*In re Ewing's Trusts*, M.R. (Ir.)—29 L. R. Ir. 449.

See also COMPANIES CLAUSES ACT; DEBTORS ACT, 2; MORTGAGE, 5, 14; SOLICITOR, 20; TENANT FOR LIFE AND REMAINDERMAN; VENDOR AND PURCHASER, 13; WILL, 18.

ULTRA VIRES.—See COMPANY, 9, 11, 33, 42; MUNICIPAL CORPORATION.

UNDUE INFLUENCE:—

1. *Confidential relationship—Gift* inter vivos—*Setting aside.*—L., a man of no means, and a member of a religious sect known as Exclusive Brethren, was employed as travelling companion to M., an epileptic subject of large fortune. While so employed he converted M. to his own religious views, and in consequence of such conversion M. left his home, and took up his residence with L., with whom he continued to reside in great seclusion for the last seven years of his life. During this period M., who was in a low and morbid condition, consulted L. on spiritual and temporal matters, allowed him to regulate his diet and his medicine, and placed nearly the whole of his fortune at his disposal. L. endeavoured to suppress all evidence of his monetary dealings with M. The aggregate amount obtained by L. from M. was £140,000.

Held, that the money had been obtained by the actual exercise of undue influence under the guise of religion, and ought to be refunded.

Semble, the money could be recovered also on the ground of confidential relationship.—*Morley* v. *Loughnan*, CH.D. WRI., J.—[1893] 1 Ch. 736; 62 L. J. Ch. 515; 68 L. T. 619.

2. *Reversionary interest—Unconscionable bargain*—31 & 32 *Vict. c.* 4, *s.* 1.—The plaintiff was entitled to a reversionary interest in £2,100 invested on

mortgages, subject to a life estate of a lady aged sixty-three. The plaintiff had no other means except her interest in the reversion. She married in 1888, and her husband had no means and was without employment. In 1889 the plaintiff mortgaged the reversion for £400, at £7 per cent. interest, and borrowed two other sums of £50 and £52 10s., for which she gave equitable charges on the fund. In January, 1890, the plaintiff was in delicate health, and she and her husband owed an hotel bill and had no money to pay it. She had been trying to sell the reversion through a solicitor. She then executed a mortgage of the reversionary interest to the defendant, a moneylender, to secure £100 advanced at £60 per cent. interest. The deed was approved by a solicitor on behalf of the plaintiff, and acknowledged before a commissioner.

Held, affirming the decision of the Vice-Chancellor, that the mortgage was, under the circumstances, a hard and unconscionable bargain, and should stand security for all sums advanced only with interest at £5 per cent.—*Rae* v. *Joyce*, C.A. (Ir.)—29 L. R. Ir. 500.

See also PROBATE, 20, 21.

VAGRANT ACTS.—See CRIMINAL LAW, 7; JUSTICES, 5.

VENDOR and PURCHASER:—

1. *Conditions of sale—Building scheme—Sale by auction in lots—Restrictive conditions—Subsequent sale of unsold lots—Retainer of adjoining land by vendor—Liability of vendor in respect of restrictive conditions.*—A land company put up for sale by auction in lots property which was described as "a small freehold estate divided into twenty-two convenient lots of sound building sites." The particulars specified the dimensions of the lots, and had a plan annexed which showed the position and boundaries of such lots, and also the existence of houses on adjoining land of the company. The conditions of sale provided that each purchaser was to covenant that no buildings other than dwelling-houses should be erected upon the land purchased by him; that every such dwelling-house should cost not less than £250, and that the building line as shown upon the said plan in respect of the other lands of the vendors should be observed. The property put up for sale in lots formed only a portion of the estate of the vendors, which was of considerable extent. At the auction some only of the lots were sold. A. purchased one lot and accepted the title. Before the completion of the purchase, however, the vendors claimed the right to sell the remainder of the lots free from the restrictive conditions, and A. then took out a summons under the Vendor and Purchaser Act, 1874, in substance to determine the question of right raised by the vendors, but in form to settle the terms of the covenants to be contained in the conveyance to him.

Held, that A. was entitled to the benefit of the contract by the vendors implied in the conditions of sale that they would, as to lots unsold at the auction, observe stipulations similar to those which the purchasers of those lots, had they been sold, would have been bound to covenant to observe; and that the conveyance to him ought to contain an expression of such an obligation on the vendors.—*In re Birmingham and District Land Co. and Allday*, CH.D. STI., J. 189—[1893] 1 Ch. 342; 62 L. J. Ch. 90; 67 L. T. 850.

2. *Conditions of sale—Commencement of title—Contract for sale of fee—Condition precluding purchaser from objecting by reason of non-registration of vesting order of Land Commission—Validity of contract—Local Registration of Title (Ireland) Act*, 1891 (54 & 55 *Vict.* c. 66), *ss.* 22, 23, 25.—Lands were put up for sale under particulars which described them as held in fee subject to a terminable annuity payable to the Irish Land Commission. The conditions of sale stated that the title should commence with a vesting order of the Irish Land Commission dated the 31st of May, 1892, and that the purchaser should not be entitled to inquire into, or make any objection or requisition in respect of any prior title, but should conclusively assume that the order vested the property in the vendor for an estate in fee subject only to the annuity; that the property was subject to the provisions of the Local Registration of Title (Ireland) Act, 1891, that the vesting order was retained in the custody of the Irish Land Commission, and had not yet been registered under the provisions of the Act, nor in the Registry of Deeds, but that the purchaser should not make any objection, by reason of such non-registration, nor should he require the said vesting order or the conveyance to him to be registered, nor should the completion of the purchase be delayed with a view to such registration. The purchaser required the title of the vendor to be registered under the Act (section 28), contending that, as until this was done, he acquired no estate in the land (section 25), the condition was repugnant to the contract and void.

Held, that the contract was not void, and was binding on the purchaser.—*In re Furlong and Bogan's Contract*, V.C. (Ir.)—31 L. R. Ir. 191.

3. *Contract—Ambiguity—Mistake—Variation between particulars and plan—Oral correction—Authority of agent—Conveyance—Rectification.*—Trustees for sale put certain property, including two freehold houses, into the hands of an auctioneer to be sold. The property for sale comprised a scullery so situated that it might have belonged to either of the two houses. The auctioneer prepared a plan which clearly showed the scullery as part of Lot 2, but by some inadvertence it was in the particulars of sale clearly included in Lot 3. The person who subsequently became the purchaser of Lot 2, having before the sale called the auctioneer's attention to the discrepancy, was informed by the latter that the plan was correct, and that the scullery was included in Lot 2. He also orally pointed out the mistake at the sale, and informed those present that the scullery formed part of Lot 2. Lot 2 was sold, but Lot 3 was not sold. The conveyance of Lot 2 was made, after an interview on the subject between the solicitors of the vendors and of the purchaser, so as expressly to comprise the scullery. The purchaser, immediately after the execution of the conveyance, mortgaged Lot 2.

In an action by the vendors for rectification of the conveyance,

Held, that under the circumstances no case for rectification had been made out.—*Ellis* v. *Hills*, CH.D. ROM., J.—67 L. T. 287.

4. *Contract—Delay in completion—Wilful default of vendor—Interest—Execution of conveyance by attorney of trustee—Production of deed by solicitor appointed by the attorney—Receipt for purchase-money—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict.* c. 41), *s.* 56—*Trustee Act*, 1888 (51 & 52 *Vict.* c. 59), *s.* 2 (1).—A contract for the sale of real property provided that, "if from any cause whatever, other than the wilful default of the vendors, any purchase shall not be completed on the said 10th of November next, the purchaser

shall pay interest on the remainder of his purchase-money . . . . at the rate of £5 per cent. per annum from that day until the purchase shall be completed." At the date of the contract the vendors' solicitors were aware that one of the persons whose concurrence in the conveyance was necessary, a trustee mortgagee, was abroad, but that he had left a power of attorney under which the conveyance could be executed by his attorney. The purchaser refused to accept a conveyance executed by the attorney and produced by the vendors' solicitors, on the ground that he had notice of the trust, and that the receipt of the trustee for the purchase-moneys was necessary in order to give a valid discharge; and considerable delay was thereby caused in the completion of the purchase. The vendors claimed interest under the above clause of the contract of sale for the period from the day fixed for completion to the actual completion of the purchase.

Held, that, under section 56 of the Conveyancing Act, 1881, the person producing a deed containing a receipt for the purchase-money must be the solicitor acting for the party signing the receipt; that the attorney could not appoint a solicitor to act for the absent trustee so as to produce the deed executed by the attorney, and receive the purchase-money, since that was a double delegation of the powers of the trustee; and that the vendors had been guilty of wilful default in procuring the proper execution of the conveyance, and that they were not entitled to interest under the contract of sale.—*In re Hetling and Merton's Contract*, CH.D. KEK., J.—68 L. T. 749.

5. *Contract—Open contract—Form of conveyance—General words—Right of way—Reputed occupied or enjoyed—No special provision in contract—Right to limit general words—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 6 (1)(2)(4).—Under an open contract for the sale of land with the appurtenances, the purchaser is only entitled to have such general words expressed or implied in his conveyance as he would have been entitled to before the Conveyancing Act, 1881, came into operation; and if the general words implied by section 6 of that Act are more extensive, the vendor is entitled to limit them accordingly.

Section 6 of the Conveyancing Act, 1881, does not apply to contracts.—*In re Peck and the London School Board*, CH.D. CHL., J. 388—[1893] 2 Ch. 315; 62 L. J. Ch. 598; 68 L. T. 847.

6. *Covenant—Building estate—Restrictive covenant—New building—Consent of original owner, "his heirs or assigns"—Meaning of "assigns."*—In the conveyances and leases of portions of an estate which was being gradually disposed of in lots for building purposes, certain forms of restrictive covenants were inserted. In 1877 R. became the purchaser of a house and garden on the estate, and carried on a school there. By his deed of conveyance R. covenanted with G. D. (the owner of the estate), his heirs and assigns, to the extent that such covenant should run with the land, that he, R., would not "without the consent of the said G. D., his heirs or assigns," make any alteration in the messuage, or erect on the land any other messuage or building, wall, or fence, or do or suffer anything to be done which might be a nuisance, annoyance, or disturbance to G. D., his heirs or assigns, or his or their tenants in the neighbourhood. In 1883 an adjoining house and garden were conveyed to E. by a previous purchaser from G. D., and subject to a similar restrictive covenant. In 1890 R. erected a new schoolroom, with the consent of the successor in title of G. D. E. then brought an action against R. claiming an injunction in respect of an alleged nuisance and annoyance from the boys in the school (which he failed to prove), and also in respect of the new building erected without his consent as an "assign" of G. D.

Held, that, even if E. could enforce the covenant at all, there had been no breach of it, as the words "consent of G. D., his heirs or assigns," meant the consent of the owner for the time being of the estate in its broad and popular sense, and not of every subsequent lessee or purchaser of a plot.—*Everett* v. *Remington*, CH.D. ROM., J.—[1892] 3 Ch. 148; 61 L. J. Ch. 574; 67 L. T. 80.

7. *Covenant—Building estate—Plots sold by reference to plan—Printed form of agreement — Restrictive covenants, whether implied as governing the whole estate.*—When plots forming part of a building estate are purchased, having been selected by reference to a plan showing a number of building plots with a house on each, and a printed form of contract for sale containing restrictive covenants is used, but with written variations in the purchaser's particular case, the purchaser is not justified in assuming the existence of a building scheme with restrictive covenants like his own binding on all the other plots.

The plaintiffs bought at a fee farm rent several plots, part of a building estate, having been shown a plan of the various plots, each with a house upon it. In the course of the negotiations they were informed by the vendors that the houses to be placed on the plots were to be of a value of not less than £800 each, and that on certain plots a stable might also be erected. They signed a printed form of agreement, with written variations, one of the printed clauses being to the effect that a purchaser should not place on his plot any building other than a dwelling-house of not less than £800 value, except a greenhouse.

The plaintiffs, having built a dwelling-house of the required value on each of their plots, obtained conveyances of their plots, whereby they covenanted not to alter the external elevation of any of their dwelling-houses, and not to place any other building on any of their plots except a greenhouse.

The defendant, one of the vendors, subsequently acquired the interest of his co-vendor in some other plots, facing those of the plaintiffs, and erected thereon a billiard room, conservatory, and stables for the use of his own house. He did not thereby commit a breach of any covenant contained in the conveyance to him.

Held, that the plaintiffs had no right to assume, when they purchased their plots, the existence of a building scheme, with restrictive covenants similar to their own, binding on every plot, and had no right of action against the defendant in respect of the buildings erected by him.—*Tucker* v. *Vowles*, CH.D. ROM., J. 156—[1893] 1 Ch. 195; 62 L. J. Ch. 172; 67 L. T. 763.

8. *Covenant—Building estate—Scheme—Rights of purchasers inter se—Injunction against departure from scheme.*—A purchaser of two residential lots of building land, part of a building scheme according to a plan of which the purchaser had notice when he bought the lots, and a piece of land marked "lodge" on the plan (being a piece of land next a gate at the entrance to a private road on which the building lots were situated), was restrained by injunction from building cottages on the piece of land marked "lodge" on the plan, or from using

the site for any purpose inconsistent with the scheme as disclosed by the plan.—*Tindall* v. *Castle*, CH.D. NOR., J.—62 L. J. Ch. 555.

9. *Covenant—Implied covenant—Title—"Beneficial owner"—Fraud of third party—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 7 (1) A.—In 1885 the defendant, being tenant for life of certain land, granted to B. a lease for ninety-nine years. B. executed three mortgages, by way of sub-demise, of the land so leased to him. In June, 1887, B., as beneficial owner, surrendered the term to the defendant for valuable consideration, without disclosing the mortgages. A few days later the defendant, "as beneficial owner," conveyed the land to B. in fee. B. subsequently, as beneficial owner, conveyed to the plaintiff in fee for valuable consideration, without disclosing the existence of the mortgages. In an action by the plaintiff against the defendant for breach of the covenant for title implied by virtue of section 7 (1) A of the Conveyancing and Law of Property Act, 1881, by reason of his conveyance to B. "as beneficial owner,"

Held, that the existence of the mortgages created by B., which constituted a defect in the defendant's title, arose from an act done by the defendant to which his implied covenant extended, and that he had, therefore, committed a breach of such covenant; and that, inasmuch as the covenant was one which ran with the land, and the plaintiff sued as assignee of the land in respect of privity of estate as distinguished from privity of contract, the defendant could not successfully set up the fraud of B., by which the breach had been induced, as an answer to the plaintiff's claim.

Decision of Romer, J., reversed—*David* v. *Sabin*, C.A. 398—[1893] 1 Ch. 523; 62 L. J. Ch. 347; 68 L. T. 237.

10. *Covenant—Square—Covenant to keep "open and unbuilt upon"—Public urinal—Breach of covenant.*—By the original conveyance in 1876, under which the plaintiffs held a certain house, all mines and minerals thereunder, and all powers and privileges for working the same, were reserved to the defendants, the grantors; and it contained a covenant by the defendants that "the garden or open space" in the centre of the square in which the house was erected should for ever thereafter be "kept open and unbuilt upon." The garden was surrounded by railings and was unbuilt upon. The plaintiffs had no right to use the surface of the garden. The square being on a slope the garden was supported at the lower end by a retaining wall, and the defendants had commenced excavating about forty-six square yards at this end of the garden, and erecting a urinal of the improved modern kind, with an entrance through the retaining wall, the space so excavated being intended to be covered with a cemented and glazed roof, projecting very slightly, if at all, above the adjoining surface of the garden. The plaintiffs thereupon brought an action and then moved for an *interim* injunction to restrain the defendants from proceeding with the works.

Held, that the object of the covenant was, that the garden or open space in the centre of the square should for ever be kept open and unbuilt upon, so as to allow of the free access of light and air; that the same would not be interfered with by what the defendants proposed to erect; and that therefore the plaintiffs were not entitled to an injunction.—*Graham* v. *Mayor, &c., of Newcastle-upon-Tyne*, C.A.—67 L. T. 790.

11. *Equity of redemption, sale of—Conveyance subject to mortgage—Implied contract to idemnify.*—On a conveyance for value of lands subject to a mortgage, and expressed to be so conveyed, there is, in the absence of express agreement, an undertaking implied by law on the part of the purchaser to indemnify the vendor against personal liability on the mortgage.

This implication of law is not prevented from arising by reason of the deed of conveyance containing an express provision by which the lands conveyed are made primarily liable to the mortgage in exoneration of other lands of the vendor affected by it.—*Adair* v. *Carden*, M.R. (Ir.)—29 L. R. Ir. 469.

12. *Sale of judicial tenancy (Ireland)—Failure of vendor to deliver abstract of title—Return of deposit—Interest—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78), *s.* 9.—The conditions of sale by auction of a judicial tenancy provided that the order of the Land Commission fixing the rent should be accepted as sufficient evidence of the existence of the judicial tenancy. No mention was made of an abstract of title; but it was provided that the purchaser should make his requisitions on the title, if any, within four days after the sale. The vendor refused to deliver an abstract, and upon the purchaser declining to proceed without it, served a notice to forfeit the deposit and rescind the sale.

Held, that the conditions of sale did not relieve the vendor from the obligation to deliver an abstract, and the purchaser was entitled to the return of the deposit with interest and to the costs of investigating title, and to have these sums charged on the vendor's interest in the lands.—*In re Priestley and Davidson's Contract*, M.R. (Ir.)—31 L. R. Ir. 122.

13. *Settlement—Power of sale by trustees, with consent of tenant for life—Incumbrances on life estate—Bankruptcy of tenant for life—Concurrence of trustee in bankruptcy and incumbrancers.*—The trustees of a settlement were empowered to sell the property comprised therein, with the consent in writing of the tenant for life. They sold the property at a public auction. The tenant for life was bankrupt, and had incumbered his life estate. The trustees refused to procure any consent but that of the tenant for life.

Held, that the concurrence of the incumbrancers and the assignees in bankruptcy of the tenant for life was essential in order to effect the sale.—*In re Bedingfield, Norris, and Herring's Contract*, CH.D. NOR., J. 413—[1893] 2 Ch. 332; 62 L. J. Ch. 430; 68 L. T. 634.

14. *Specific performance—Declaration of lien—Rescission.*—A vendor having obtained judgment for specific performance of an agreement for sale and a declaration of lien, with liberty to apply,

On motion for rescission in lieu of enforcing the lien,

Held, that the agreement might be rescinded.

Henty v. *Schroeder*, 27 W. R. 833, 12 Ch. D. 666, distinguished.—*Baker* v. *Williams*, CH.D. NOR., J. 375—62 L. J. Ch. 315; 68 L. T. 634.

15. *Succession duty—Sale subject to leases, but free from incumbrances—Leases at ground-rents—Duty payable in respect of increased value on determination of leases—Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 20.—Land subject to leases at ground-rents was sold subject to leases, but free from incumbrances, the contract making no provision as to the payment of succession duty.

Held, that the succession duty payable in respect of the increased value of the property on the determination of the leases, payment of which had been postponed in accordance with section 20 of the Succession Duty Act, 1853, must be borne by the vendors.—*In re Kidd and Gibbon's Contract*, CH.D. KEK., J. 507—[1893] 1 Ch. 695; 62 L. J. Ch. 436.

16. *Unpaid vendor—Duty of vendor remaining in possession—Loss of tenants—Wilful default—Compensation—Specific performance.*—Unpaid vendors of houses let in rooms to weekly tenants are bound, so far as they reasonably can, to keep the premises properly tenanted so long as they remain in their possession. When they know that the purchaser is confiding in them for the management of the property purchased, and cannot sue the tenants directly, if they employ a proper agent they must see that he does his duty with reasonable efficiency. If the results of the agency are unsatisfactory it is the duty of the vendors to report the same to the purchaser and consult with him as to what ought to be done.

Where on the hearing of an action for specific performance an account is ordered to be taken against the plaintiffs on the basis of wilful default, they are not precluded from showing on the inquiry by affirmative evidence that there is no real default on their part at all; but where they only rely at the inquiry on the materials before the court at the original hearing, they are not at liberty to contend on the further consideration of the action that a *primâ facie* case of wilful default has not been established against them.—*Malone* v. *Henshaw*, M.R. (Ir.)—29 L. R. Ir. 352.

VESTRY CLERK.—See QUO WARRANTO.

VICTORIA, LAW of:—

1. *Easement—Transfer of Land Statute—Certificates—Evidence to show abandonment.*—In an action by the respondents to assert a right of way which had been granted by the appellant's predecessor by deed in 1839 over his land, and along the boundary which divided land retained by him from land conveyed to the respondent's predecessor, the appellant pleaded that it had been abandoned.

Held, that, abandonment being a question of intention, non-user by the respondent, coupled with user by the appellant for farm purposes, of portions of land, subject to the easement, when the easement was not required, could not prove an abandonment of the entire right, and were inconclusive to prove an abandonment of portions thereof.

Held, that the omission in the appellant's and respondent's certificates of title to their respective lands under the transfer of land statute to record the easement did not bar the respondent's claim or relieve the servient tenement of its liability. — *James* v. *Stevenson and Others*, P.C. — [1893] A. C. 162; 62 L. J. P. C. 51; 68 L. T. 539.

2. *Local Government Act*, 1874, *s.* 384—*Compensation for damage past and future.*—By the true construction of section 384 of the Local Government Act, 1874, when a ditch or drain has been made in virtue of its powers, an owner or occupier injuriously affected is entitled to compensation for damages to his land assessed once for all, present and prospective, irrespective of whether those powers have been negligently or properly exercised. —*President, &c., of Colac* v. *Summerfield*, P.C. — [1893] A. C. 187; 62 L. J. P. C. 64; 68 L. T. 769.

3. *Melbourne Corporation Act* (14 *Vict. No.* 20)—*Lane on private land—Rights of adjoining owners and occupiers.*—Held, that when a lane set out on private land has been brought under the provisions of the Melbourne Corporation Act (14 Vict. No. 20), the Act does not confer on the adjoining owners and occupiers such a right of passage over it as precludes the owner in fee from ever resuming the control or exclusive possession of such lane.—*Moubray Rowan and Hicks* v. *Drew*, P.C.—[1893] A. C. 295; 68 L. T. 549.

VOLUNTEER.—See POOR RATE, 2.

WATERWORKS:—

1. *Breaking up streets—Laying pipes—Notice—Plan—"Difference to be determined by two justices"—Special Act—"Extension" of works—Laying down pipes after expiration of period for completing works—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 28, 30, 31.—The "plan" required by section 31 of the Waterworks Clauses Act, 1847, to be furnished by a water company to the road authority before breaking up a road for the purpose of laying down a line of pipes, is a plan, not merely of the "breaking up" of the road, but also showing the mode in which the underground work is intended to be executed, so as to enable the road authority to judge whether the proposed work ought to be done without modification. If the road authority, after receiving such a plan, do not, in case of disapproval, themselves make some counter proposal, by plan or otherwise, as to the mode of carrying out the work, so as to create a "difference" to be determined by two justices under the section, the company may proceed with the work independently of the road authority.

Semble, where under a special Waterworks Act, incorporating the Waterworks Clauses Act, 1847, a water company has, within the period fixed by the special Act for the completion of the works, laid down a water main in a road according to deposited plans and sections, the company may, after the expiration of the period, lay down a second main, having regard to section 28 of the General Act, and particularly where the special Act gives them power to "extend, enlarge, or alter any of their mains or pipes at any time, and from time to time as occasion may require, for the purpose of supplying the inhabitants within the limits of the Act with water"; provided the company complies with the requirements of the special and general Acts, as to notice and otherwise, before breaking up the road for the purpose.—*East Molesey Local Board* v. *Lambeth Waterworks Co.*, C.A. [1892] 3 Ch. 289; 62 L. J. Ch. 82; 67 L. T. 493.

2. *Purchase of mains and pipes and fittings—Principle of valuation—Practice—Appeal—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 19.—The Stockton and Middlesborough Corporation Waterworks Act, 1876 (39 & 40 Vict. c. ccxxx.), provides for the transfer of the undertaking of a waterworks company to the "Stockton and Middlesborough Water Board," and empowers the board to construct further works to improve the supply of water in Stockton and Middlesborough and in outlying districts. By section 4 the limits of the Act for the supply of water are to include the company's present limits and certain specified places beyond such limits, and it is provided that the board "shall, when so required by the sanitary authority of any district beyond the boundaries of the boroughs of Stockton and Middlesborough respectively, sell to such sanitary authority all mains, pipes, and fittings belonging to the board within that district . . . at a price to be fixed, in default of agreement, by

arbitration, and after such sale the board shall cease to supply water within such district."

In an arbitration under the foregoing section, the arbitrator made his award in the form of a special case for the opinion of the court, in which he stated that in fixing the price of mains, pipes, and fittings (sold by the board to the sanitary authority of an outlying district) at a specified sum, he took into consideration the loss of revenue earned by the board by the supply of water through such mains, pipes, and fittings; but if the court should be of opinion that this basis of calculation was wrong, he fixed this price at a lower figure.

Held, first, that an appeal lay from the judgment of a divisional court upon such special case to the Court of Appeal.

In re Knight and Tabernacle Permanent Building Society, 41 W. R. 35, [1892] 2 Q. B. 613, distinguished.

Secondly, that the basis of calculation adopted by the arbitrator was wrong, and that the price to be ascertained was the reasonable price of such mains, pipes, and fittings regarded as apparatus fitted in the ground and capable of earning a profit, but without any compensation to the board for the loss of the right of supplying water within the district.—*In re Kirkleatham Local Board and Stockton and Middlesborough Water Board*, C.A.—[1893] 1 Q. B. 375; 62 L. J. Q. B. 180; 67 L. T. 811.

See also LOCAL GOVERNMENT, 14, 15; METROPOLIS, 10; STATUTORY DUTY.

WAY:—

1. *Grant of right of way—Access to road—Abandonment of easement.*—B. and T. were owners of adjoining lands, B. having a private right of way over T.'s land. In 1801, when B. was selling his land to X., the plaintiff's predecessor, it was agreed that B. should have the use of a new private road which T. had lately made on his land instead of the old way. That agreement was embodied in the conveyance made by B. to X., to which T. was for this purpose a party. B. thereby released his old right of way to T., who granted the new way to X. in these words, "to and from every or any part of the pieces or parcels of land hereinbefore described," thus giving to X. a right to come out upon the new road at any point at which he could get access to it. The new road did not exactly skirt the boundary of that part of X.'s land now held by the plaintiff, there being at that part an intervening strip of T.'s land varying in width.

X. made a gateway opening out of that part of his land now held by the plaintiff, and a track from it to the new road over the intervening strip, and that gateway and track had been used from the plaintiff's land ever since.

The plaintiff's land had for some years been fenced in along the intervening strip, in which the gateway was the only opening. Neither the plaintiff nor any of his predecessors had occasion to open out any other gate or to make any other track into the road. The defendant, who represented T., apprehending, however, that an attempt might be made to open out another gate, erected posts and rails along the intervening strip in such a manner as to prevent exit from the plaintiff's land at any but the accustomed place.

Held, that, in the absence of anything in the original grant expressly limiting the grantee to one line of access, or to access only at the points, if any, where his land actually adjoined the new way, and of anything to show that the right as claimed was unreasonable or destructive of the object of the grant, no obligation to elect one particular line of access could be implied.

Held, also, that there had been no manifestation of intention to abandon the easement.

Roberts v. *Karr*, 1 Taunt. 495, followed.—*Cooke* v. *Ingram*, CH.D. WRI., J.—68 L. T. 671.

2. *Prescription—Lost grant—Tenants of common landlord—Questions for jury.*—A. and B. were tenants from year to year of a common landlord. A. sued B. for obstructing a right of way. At the trial the judge, having explained to the jury the nature of evidence which would justify the presumption of a lost grant, and that in his opinion twenty years' user would in this case authorize them so to presume, left to the jury the following questions, the defendant's counsel not objecting: (1) Did the plaintiff for twenty years next before this suit enjoy, as of right and without interruption, the way claimed? Answer—Yes. (2) Did he so enjoy it for the forty years next before this suit? Answer—No. On motion to set aside the judgment entered for the plaintiff,

Held, that, although as a general rule it is a more satisfactory course to leave the question of lost grant expressly to the jury, the defendant was precluded, by the course adopted by him at the trial, and in the absence of specific objection and requisition, from relying, as ground for setting aside the verdict and judgment, upon the form in which the first question was left to the jury, and that the judgment should therefore stand.

Semble, there is no objection to presuming a lost grant of a right of way as between tenants from year to year of a common landlord upon sufficient proof of user.—*O'Kane* v. *O'Kane*, Q.B.D. (Ir.)—30 L. R. Ir. 489.

See also INCLOSURE ACTS; VENDOR AND PURCHASER, 5.

WILL:—

ANNUITY—

1. *Charge on estate—Devise of estate in settlement subject to charge—Charge on* corpus *or income—Annuity in arrear—Mortgage or sale of settled estate to meet annuity.*—The testator, by a codicil to his will, devised certain yearly rent-charges to his trustees to be paid to certain persons, and subject to and charged therewith he devised an estate to certain persons for life, with remainders over. The annuities having fallen into arrears, and the rents of the estate being insufficient to meet them,

Held, that they must be paid by a sale or mortgage of the settled estate.—*In re Tucker, Tucker* v. *Tucker*, CH.D. NOR., J. 505—[1893] 2 Ch. 323; 62 L. J. Ch. 442; 69 L. T. 85.

2. *Gift until marriage—Limitation or condition subsequent — Succession duty — Legacy — Devise of residue.*—A testatrix by her will bequeathed an annuity of £50 a year to each of the children of her deceased brother, and directed that the same should be payable from her decease for their respective lives or until any of them should marry, and that on the death or marriage of any the annuity to such child should cease and determine. There was no gift over in the event of such death or marriage. One of the children married in the lifetime of the testatrix, but after the date of the will. His wife was still living.

Held, that the proviso determining the annuities on death or marriage was a limitation, and not a condition subsequent or defeasance, and that the child so married had forfeited his annuity.

The same principles as to forfeiture apply in the

case of a legatee who marries in the lifetime of the testator, but after the date of the will, as of one who is unmarried at the testator's death, but afterwards marries.

The testatrix devised a freehold house to trustees in trust for E. for life, with remainder over, and then devised all the residue of her property, real and personal, to trustees upon trust to convert it, and after payment of debts, &c., to pay all legacy and succession duty payable upon each and every of the legacies, and then to invest the surplus in lands and hereditaments, and to hold the same upon the same trusts as the house.

Held, that succession duty in respect of the life interest of E. was not payable out of the residuary estate.—*In re King's Trusts*, M.R. (Ir.)—29 L. R. Ir. 401.

3. *Real or personal estate—Bequest to legatee and executors of annuity charged on renewable leaseholds—Subsequent grant of lands in perpetuity—Death of legatee intestate.*—Testatrix bequeathed an annuity to E., her executors, administrators, and assigns, to be charged upon lands which were then held for years with a covenant for renewal. After the death of the testatrix a perpetuity grant of the lands was made to her executors. Subsequently E. died intestate.

Held, that the annuity formed part of E.'s personal estate.—*Martin* v. *Haynes*, V.C. (Ir.)—29 L. R. Ir. 416.

CHARGE OF DEBTS—

4. *Exoneration—Real Estate Charges Act*, 1854 (*Locke King's Act*) (17 & 18 *Vict. c.* 113)—"*Contrary intention*"—*Intention—Evidence by will and subsequent deeds.*—A testator, by his will, after reciting that it was probable that he might acquire the absolute interest in reversion in a sum of Consols, subject to preceding life estates, under some arrangement by virtue whereof he would obtain a transfer of the Consols to himself, upon his charging his real estate with an annual sum equal to the dividends arising from the Consols, devised his real estate, subject to any charge or charges that he might have made under the arrangement before referred to, for the payment of an annual sum equal to the dividends arising from the Consols, to certain uses, and disposed of his residuary personal estate in another way. The testator subsequently acquired the reversionary interest, and an arrangement was carried out under which the Consols were transferred to him, and he conveyed to the trustees, by whom the Consols were previously held, his real estate by way of mortgage for securing the re-transfer of the Consols at the end of six months, and payment in the meantime of interest equal to the dividends thereon; and by a contemporaneous deed, reciting that the transfer of the Consols to the testator had been made upon an agreement for the re-transfer thereof "in case such re-transfer should ever be required," the trustees and the tenants for life covenanted with the testator that if he punctually paid the interest they would not, during the lives of the tenants for life, require the re-transfer unless required for some purpose connected with the estate of which the Consols originally formed a part. The testator subsequently made a codicil to his will, but he did not therein refer to the above-mentioned transactions. The interest on the mortgage was punctually paid, and the re-transfer of the Consols was never required.

On the death of the surviving tenant for life, who survived the testator, the legatees of the residuary personal estate claimed that the amount secured by the mortgage was chargeable on the real estate in their favour.

Held, that upon the will and subsequent deeds there was sufficient evidence of a "contrary intention" within the meaning of the statute 17 & 18 Vict. c. 113, and that the real estate, in the events which had happened, was exonerated from payment of the mortgage debt.—*In re Campbell, Campbell* v. *Campbell*, CH.D. KEK., J.—[1893] 2 Ch. 206; 62 L. J. Ch. 594; 68 L. T. 851.

5. *Payment of debts out of real estate—Debtor and creditor*—11 *Geo.* 4 *and* 1 *Will.* 4, *c.* 47.—Debts or liabilities in the nature of debts provided for by the Act 11 Geo. 4 and 1 Will. 4, c. 47 are debts or liabilities which accrued in the lifetime of the obligor or covenantor.

Therefore, where the assignee of a lessor sued the devisee of the lessee for rent becoming due after the lessee's death,

Held, that the action was not maintainable.—*M'Carthy* v. *Clerke*, EX.D. (Ir.)—32 L. R. Ir. 75.

CHILDREN—

6. *Lapse—Children as a class—Issue taking by substitution—Wills Act* (1 *Vict. c.* 26), *s.* 33.—The 33rd section of the Wills Act, preventing lapse in case of gifts to a child or other issue of the testator, does not apply where the devise or bequest is to children as a class.

The principle is, that the section leaves the construction of class gifts unaltered, and that the gifts are still to be read as gifts to those only who survive, and not as gifts to the possible members of the class who die in the lifetime of the testator; and that the gift in regard to those children who so die is not to be treated as a gift to individuals.

Where G., a possible member of such a class of children, died in the testator's lifetime, leaving issue that survived the testator, and there was never, in fact, any other possible member,

Held, in conformity with the above principle, that the 33rd section did not apply.

Olney v. *Bates*, 3 W. R. 606, 3 Dr. 319, and *Browne* v. *Hammond*, Johns. 210, 7 W. R. Dig. 101, considered and followed.—*In re Harvey, Harvey* v. *Gillow*, CH.D. CHI., J. 293—[1893] 1 Ch. 567; 62 L. J. Ch. 328; 68 L. T. 562.

7. *Life estates—Remainder to trustee—Trust for sale and division among a class—Revocation of life estates—Ascertainment of class—Acceleration.*—A testator devised a house to G. T. J. for life, and after his death to E. J. for life, and after the death of the survivor to a trustee upon trust to sell and hold the proceeds in trust for his children then living, and issue then living of any deceased child or children, in substitution for their parent or parents, in equal proportions. The testator revoked the devises to G. T. J. and E. J. for life. G. T. J. and E. J. survived the testator.

Held, that the devise to the trustee took effect immediately upon the death of the testator, and that thereupon the trust for sale arose.

Held, also that the time for ascertaining the class to take under the trust in favour of the children and issue of any deceased child or children was when the trust for sale arose, and not the date of the death of the survivor of G. T. J. and E. J.—*In re Johnson, Danily* v. *Johnson*, CH.D. STI., J.—68 L. T. 20.

8. *Residuary gift—Children to attain twenty-one—Period of distribution—Ascertainment of class.*—A testator directed that all his property should be sold, the proceeds to be invested and interest to

accumulate; and after paying all legal demands the residue to remain until the children of A. by his wife B. should arrive at the age of twenty-one years each, then the whole to be divided equally between them. There was a gift over in the event of none of the children attaining twenty-one.

Held, to be a gift for the benefit of all the children of A. and B., born or to be born, and not to be distributable until all such children attained twenty-one. There were three children of the marriage living, of whom two had attained twenty-one. A. and B. were still living, the wife being forty-two years of age. An application was made on behalf of the two elder children for the payment to each of them of one-third of the fund representing the testator's estate.

Held, that the application must be refused, as the class of children who were entitled could not as yet be ascertained and the period of distribution had not arrived, but having regard to the improbability of there being any after born children, the court would order the dividends of their prospective shares respectively to be paid to the two children who had attained twenty-one on their undertaking that such shares should remain till further order as security for the benefit of future members of the class entitled, should there be any.—*Pilkington* v. *Pilkington*, M.R. (Ir.)—29 L. R. Ir. 370.

9. *Specific devise of English real estate—Child legitimated by subsequent marriage—Domicil—Foreign law.*—The testator specifically devised a share of real estate, and also a share of personalty, to trustees upon trust for his son, Harry Grey, for life, and then for his children. Harry Grey, who afterwards became Earl of Stamford, acquired a domicil at the Cape of Good Hope, and died there, leaving one son, John, born before marriage, and other children born in wedlock. According to the law of the Cape, John was legitimated by the subsequent marriage of his father and mother.

Held (following the cases of *In re Goodman's Trusts*, 29 W. R. 586, 17 Ch. D. 266, and *Andros* v. *Andros*, 32 W. R. 30, 24 Ch. D. 637), that John Grey was entitled to share in the personalty, and that the rule laid down in *Doe d. Birtwhistle* v. *Vardill*, 2 Cl. & Fin. 57, 7 Cl. & Fin. 895, that an *ante natus* son could not inherit English land, related only to the descent of land on an intestacy, and did not affect the case of a devise to children, and that John was, consequently, entitled to share in the specific devise of real estate.—*In re Grey, Grey* v. *Earl of Stamford*, CH.D. STI., J. 60—[1892] 3 Ch. 88; 61 L. J. Ch. 622.

CONSTRUCTION—

10. *Cease to carry on business—Sale of business to company—Managing directors.*—A testator bequeathed his business, together with a leasehold messuage, to his sons. The will contained a proviso that, if the sons ceased to carry on the business, the leasehold messuage was to fall into residue. The sons sold the business to a limited company, of which they were appointed managing directors for life, and all the shares in which were held by them or their nominees.

Held, that the proviso was not repugnant to the gift, and that the testator's sons had ceased to carry on the business within the meaning of the proviso when they sold it to the company.—*In re Sax, Barned* v. *Sax*, CH.D. NOR., J. 584—62 L. J. Ch. 688; 68 L. T. 849.

11. *Bequest of property "not included in marriage settlement."*—Personal property was put in settlement on the marriage of A. with B. The trusts were (*inter alia*) for A. for life, then for B. for life, and ultimately, in the events which happened, as to one moiety for A. absolutely. By his will A. bequeathed all his property "not included in the above marriage settlement" upon trust for four of his children.

Held, that the moiety of the trust fund reserved to A. absolutely passed under the devise.—*Walsh* v. *Green*, M.R. (Ir.)—31 L. R. Ir. 338.

12. *Contingent remainder or executory devise—Cesser of life estate on "being taken in execution by any process of law"—Appointment of receiver for judgment creditor.*—A testator devised a freehold estate to his son for life, and after his death among all the children of the son born or to be born who should live to attain twenty-one, in equal shares as tenants in common in fee. By a subsequent clause he directed that if the son should attempt to dispose of his life interest, or should become bankrupt or insolvent, or the estate devised to him "should be taken in execution by any process of law for the benefit of any creditor or creditors," then the gift to him should become void and cease as if he were dead, and the estate devised to him should "thenceforth absolutely vest in and belong to the person or persons who under the devises and limitations hereinbefore contained would be next entitled thereto." A judgment for debt having been recovered against the son who was in possession, the judgment creditor obtained the appointment of a receiver of the rents. At this time the son had two children, one of age and one under age, and he afterwards had other children.

Held, by Kekewich, J., that the appointment of a receiver was a taking in execution within the meaning of the clause, and that the son's life estate determined. This decision was not appealed from.

Held, by the Court of Appeal (affirming the decision of Kekewich, J.), that as the limitations to the children of the son on the determination of the life estate by forfeiture did not take effect on the natural determination of the prior estate they were not contingent remainders, but executory devises, and took effect in favour of all such children of the son whenever born as attained twenty-one.—*Blackman* v. *Fysh*, C.A.—[1892] 3 Ch. 209; 67 L. T. 802.

13. *Cumulative legacies—Presumption—Rebuttal.* A testatrix by her will gave the dividends or interest on £1,000 to M. for life; and on M.'s death gave the £1,000 to B., daughter of M.; but should B. die in the lifetime of M. the testatrix bequeathed the £1,000 to M. absolutely. By her first codicil the testatrix recited and revoked the bequest of £1,000, "and in substitution therefor," bequeathed £500 to B. By a third codicil the testatrix purported again to revoke the bequest of £1,000, "and in substitution" bequeathed £500 to B. By her first codicil testatrix bequeathed £300 to M., and by her third codicil she bequeathed £300 to M.

Held, that the presumption that legacies given to the same person are cumulative was rebutted in the case of the legacies to B., but that the legacies given to M. were cumulative.—*In re Armstrong, Mayne* v. *Woodward*, V.C. (Ir.)—31 L. R. Ir. 154.

14. *Devise of house and land "now in my own occupation"—Land subsequently acquired by testator and occupied by him with the house—Subsequent codicil confirming will—Wills Act* (1 *Vict.* c. 26), *s.* 24—*Mortgage of subsequently-acquired land by testator's heir—Sale by mortgagee—Right of bene-*

ficiaries under will to follow purchase-money.—A testator by his will, made in April, 1873, devised a freehold cottage with all the land thereto belonging, described as "now in my own occupation" to two trustees upon trust for his wife during her life, and after her death for his children, who were five in number, in equal shares. In September, 1873, the testator purchased two fields adjoining the cottage and occupied them with the cottage till his death. In 1877 he made a codicil by which he substituted his wife and his two sons as trustees and executors of his will, and confirmed his will in other respects. The testator died soon after the execution of the codicil, and the will and codicil were proved by his widow and one of his sons, who was heir-at-law. In 1885 a deed was executed by the widow and the heir-at law by which, in consideration of £75 expressed to have been advanced to the widow and the heir-at-law, the heir-at-law "as beneficial owner" conveyed the two fields purchased by the testator in 1873 to C. in fee by way of mortgage. C. had notice of the contents of the will and codicil, but was advised that the two fields did not pass by them, but descended to the heir-at-law. In 1890 C., under his power of sale as mortgagee, sold the two fields for £300 freed from the mortgage. An action having been brought by the testator's three daughters against the heir-at-law and C.

Held, affirming the decision of North, J., (1) that on the true construction of the will and codicil the two fields passed to the trustees with the cottage; (2) that the plaintiffs had a right to adopt the sale and to follow the purchase-money in the hands of C.; but that C. was entitled to retain his costs of the sale as mortgagee, and any part of the mortgage money which he could show to have been advanced for the purpose of the trust estate.—*In re Champion, Dudley* v. *Champion*, C.A. —[1893] 1 Ch. 101; 62 L. J. Ch. 372; 67 L. T. 694.

15. *Devise in fee—Subsequent sale of devised property—Mortgage to testator — Wills Act* (1 *Vict.* c. 26), *ss.* 23, 24—*Conveyancing Act*, 1881 (44 *&* 45 *Vict.* c. 41), *s.* 30.—A testator, by a codicil to his will, devised as follows:—"I devise the cottage and garden walled round, bought by me from John Lewis Parry Evans, to the said J. H. absolutely." At the date of the codicil he was seised in fee of the property so devised. He subsequently sold the property, taking a mortgage of it from the purchaser to secure part of the purchase-money. He died during the continuance of the mortgage.

Held, that the benefit of the mortgage debt did not pass to J. H. under the devise.

Decision of Bristowe, V.C., reversed.

Decision in *Moor* v. *Raisbeck*, 12 Sim. 123, approved, though *dicta* therein not approved.—*In re Clowes*, C.A. 69—[1893] 1 Ch. 214; 68 L. T. 395.

16. *Donee of a right of pre-emption of lands—Lands subject to incumbrances.*—There is no fixed rule of law that a donee of a right of pre-emption of lands at a fixed price, conferred on him by will, necessarily takes the lands as a devisee subject to incumbrances.

Held, under the circumstances of the case, that the donee of an option of purchase of certain lands at a fixed price under a will, subject to incumbrances, was entitled to a conveyance of the lands discharged from these incumbrances.

Earl of Radnor v. *Shafto*, 11 Ves. 448, considered.

Dictum of Smith, M.R., in *In re Davison and Torrens*, 17 Ir. Ch. Rep. 7, disapproved.—*Given* v. *Massey*, M.R. (Ir.)—31 L. R. Ir. 126.

16a. *Forfeiture clause—Life interest—Assigning or attempting to assign.*—Under a will the tenant for life's interest was to be forfeited if he assigned, charged, or incumbered his interest, or attempted to do so. The tenant for life borrowed money, and gave the lender a document which was in form an equitable assignment of part of his interest. No notice of the document was given to the trustees, and it was subsequently cancelled. Evidence was given to show that, as between the parties, the document was not intended as a charge or assignment, and that it would have been a fraud on the bargain to have so used it.

Held, that evidence to show the real meaning of the document could be received, and that there had been no forfeiture of the life interest.—*In re Sheward, Sheward* v. *Brown*, CH.D. KEK., J. 685.

17. *Forfeiture clause—Vested remainder—Attempt to assign—Inoperative settlement.*—Life estates were given by a testator to his two sisters (both since deceased), and the survivor of them, and subject thereto to all testator's nephews and nieces equally who should attain twenty-one, with a proviso that, in case any of the nephews or nieces should, during the life estates, or either of them, assign or in any manner dispose of their expectant share in testator's estate, or attempt so to do, they should forfeit all benefit under testator's will. A niece of testator's, having attained twenty-one and married during one of the previous life estates, executed a post-nuptial settlement, in which she included her reversionary interests under testator's will. This settlement was inoperative.

Held, that the post-nuptial settlement was an attempt to assign within the meaning of the will; that the niece's share under the will was therefore forfeited; and that the clause relating to forfeiture would apply equally to a share vested, but subject to be divested, as to a contingent share.—*In re Porter, Coulson* v. *Capper*, CH.D. NOR., J. 38—[1892] 3 Ch. 481; 61 L. J. Ch. 688; 67 L. T. 823.

18. *Lease—Rent—Covenants—Fine on renewal—Liability—Trustees*—Cestui que trust—*Income or capital.*—Trustees of a will held a renewable lease upon trust for successive life tenants, with remainders over, and the residuary personal estate of the testator upon trust out of the income to pay all the costs, charges, and expenses of executing the trusts of the will with divers trusts of the residue.

Held, that the trustees, and not the life tenants, were the persons liable to observe the covenants and to pay the rent and outgoings, which, on the true construction of the will, should be paid by them out of the income, and that the fine and expenses of renewal of the lease should be borne by the beneficiaries rateably, according to their enjoyment of the lease.—*In re Baring, Jeune* v. *Baring*, CH.D. KEK., J. 87—[1893] 1 Ch. 61; 62 L. J. Ch. 50; 67 L. T. 702.

19. *Name and arms clause—"Entitled to actual possession or receipt of rents and profits"—Time for forfeiture—Profitless estate—Receipt of part of rents only.*—V. by will gave hereditaments known as the E. estate to trustees upon trust to manage and receive rents and to permit his wife to reside in the mansion-house, and, subject thereto, to stand possessed of the E. estate in trust for Charles T. for life, with remainder in trust for his sons successively in tail, and in default for the other sons of Mary I. successively in tail, and in default for M. R. V. for

life, with remainder to her sons successively in tail. And he directed that every person who, under the foregoing trusts, should become entitled as tenant for life or in tail to the actual possession or to the receipt of the rents and profits of the E. estate, and who should not then use and bear the surname of Varley, should within one year after he should so become entitled take upon himself and use the surname of Varley together with his or her own family surname. And in default that the limitations in favour of such person should absolutely determine, and the said E. estate should go to the person next in remainder under the limitations aforesaid. Provided that the determination under the said proviso of the interest of any such person for life should not prejudice the contingent remainders to his issue, but that in every such case the E. estate should remain to the use of the trustees during the life of such person, upon trust to pay the rents to the person entitled to the next vested remainder. The testator died on the 5th of February, 1875. The E. estate was charged under the testator's marriage settlement with an annuity, the payment of which more than exhausted the rents, and the persons entitled under the will could not receive any actual profit. Charles T., the tenant for life under the testator's will, died without issue on the 4th of April, 1889, and without having taken the name of Varley. The sons of the testator's sister Mary then living were Thomas and Richard. Thomas did not take the name; Richard took it on the 30th of January, 1891. The testator's widow was still living.

Held, that, nothwithstanding the fact that the estate produced no profit beyond the charges, and the fact that the widow was entitled to occupy the mansion-house, Charles T. became entitled to the actual possession or receipt of the rents and profits of the E. estate within the terms of the will on the testator's death, and that he forfeited his life estate at the expiration of one year from that time; that the time for forfeiture only began to run against Thomas on the death of Charles; that Thomas, not having taken the name within a year from that date, had forfeited his estate tail, but Richard, having taken the name within a year from the forfeiture of Thomas was entitled to the property for an estate tail.—*In re Varley, Thornton* v. *Varley*, CH.D. NOR., J.—62 L. J. Ch. 652; 68 L. T. 665.

20. *Name and arms clause—Condition—Voluntary assumption of surname—Licence from Crown to quarter testator's arms—Gift over—Rule against perpetuities—Impossible condition—"Heiress."*—A testator bequeathed to the son of his daughter A. who should first attain twenty-one and should before attaining that age have taken and borne the surname of H. and the arms of the testator certain articles therein specified; and in case there should be no son of A. who should attain that age and fulfil the condition, then to the son of his daughter R. on the same terms; and the testator devised and bequeathed his residuary estate upon trust to convert and invest the same, and to pay the income to his widow for life, and after her death, in case the eldest son of his daughter A. should then have attained the age of twenty-one and should have taken and borne the surname of H. and the arms of the testator, to pay and transfer the residuary fund to such eldest son; but if such eldest son should have attained twenty-one, but should not have taken the said surname and arms, then to the younger sons of A. according to seniority of birth subject to the like conditions; and in case there should be no son of A. who fulfilled these conditions, then to such son of the testator's daughter R., or the eldest, if more than one, as should attain twenty-one and should before attaining that age have taken and borne the said surname and arms, with a gift over as to the residuary estate to all the daughters of A. who should attain twenty-one or marry. A. had five daughters, all of whom attained twenty-one. R. had one son, who attained twenty-one after the death of the testator's widow. In an action by the daughters of A. claiming the property under the gift over on the ground that R.'s son had not taken the name and arms before attaining twenty-one, the Vice-Chancellor held, upon the evidence, that the defendant had complied with the condition as to taking the name, but that, as the defendant had not obtained the Royal licence to quarter the testator's arms till after he had attained twenty-one, he had failed to comply with the latter part of the condition, and that the property vested in the plaintiffs.

Held, on appeal, that there was evidence on which the court might act that the defendant had assumed the name before attaining twenty-one, but that the arms had not been in fact taken or borne by the defendant before attaining that age, and that therefore he had not complied with the condition.

Held, also, that the application to other purposes by the testator of a fund originally intended by him to defray the expense of obtaining the Royal licence did not render the performance of the condition impossible so as to excuse the defendant from complying with it.—*Bevan* v. *Mahon-Hagan*, C.A. (Ir.) —31 L. R. Ir. 342.

21. *Remoteness — Power of appointment — Rule against perpetuities—Effect of invalidity of power on subsequent limitations.*—A testatrix by her will bequeathed a sum of money to trustees upon trust for her stepdaughter C. A. for life, with remainder to her husband for life, and after the death of the survivor for the children of the marriage as the parents or the survivor of them should appoint, and in default of appointment for all the children of the marriage who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry under that age, share and share alike. At the death of the testatrix C. A. was unmarried, but she had since married F., and she and her husband were now living. The question was raised whether the trusts of the sum of money were to any, and what, extent void, having regard to the rule against perpetuities.

Held, that, even assuming that the power of appointment conferred upon a husband of C. A. who might survive her might be invalid, the trusts in favour of the children, in default of appointment, were not thereby invalidated, inasmuch as the intention of the testatrix was that the money should go to C. A.'s children unless their interests were effectually displaced by the exercise of the power of appointment.—*In re Abbott, Peacock* v. *Frigout*, CH.D. STI., J. 154—[1893] 1 Ch. 54; 62 L. J. Ch. 46; 67 L. T. 794.

22. *Remoteness—Bequest to charity for ever—Gift over to individuals if general system of education established.*—A te tator bequeathed certain moneys to trustees upon trust to invest the same, and to establish and continue for ever certain day-schools in Wales, and he declared that, if at any time thereafter the Government should establish a general system of education, the trusts should determine and the moneys should go to the residuary legatees under his will. Under the Elementary Education Acts, 1870-90, a general system of education was established.

Held, that, upon the true construction of the will, there was an immediate disposition in favour of charity in perpetuity, followed by a gift over, under which the residuary legatees took a future interest, to arise upon an event which need not necessarily occur within perpetuity limits; and that, therefore, the gift over was void.—*In re Bowen, Phillips* v. *Davies*, CH.D. STI., J. 535—[1893] 2 Ch. 491; 62 L. J. Ch. 681; 68 L. T. 789.

23. *Residuary gift—Gift to charity—Charity not named.*—By his will, dated 1849, a Dissenting minister gave his residuary estate to trustees upon trust for sale, and subject to life interests to certain persons; he proceeded: "I do give and bequeath the whole of my property to the following religious societies, viz." No religious societies were named in the will.

Held, that there was no general intention to devote the residue to charity, such as the court could execute or recognize, and that as between the next of kin and the Crown the former were entitled.—*In re White, White* v. *White*, CH.D. KEK., J.—67 L. T. 706.

24. *Residuary gift—Lease—Assent by executors as to part of residue.*—Testator bequeathed the residue of his estate, including the lease of a colliery, to trustees, who were also executors of his will, on trust for his son on his attaining twenty-one years of age. On the son's attaining that age the trustees let him into possesing, but made no formal assignment of the lease, and there were still debts due from the testator's estate.

Held, that the assent of the executors was sufficient to pass the property in the colliery, and that it was competent for them to assent to the bequest of part of the residue of the estate without assenting to the rest.—*Austin* v. *Beddoe*, CH.D. NOR., J. 619.

25. *Survivors—Longest liver.*—Pecuniary legacies were severally given to four persons during their natural lives, and in case of the demise of any of them without legitimate issue his or her proportion to be divided amongst the survivors. The last surviving legatee died without leaving issue.

Held, that his legacy fell into residue.

The decision of the Privy Council in *King* v. *Frost*, 15 App. Cas. 548, 39 W. R. Dig. 264, followed.

Maden v. *Taylor*, 45 L. J. Ch. 569, 24 W. R. Dig. 325; *Davidson* v. *Kimpton*, 29 W. R. 912, 18 Ch. D. 213; and *In re Roper's Estate*, 37 W. R. 731, 41 Ch. D. 409, not followed.—*Ranelagh* v. *Ranelagh*, CH.D. CHI., J. 549.

See also CHARITY, 1-4; INSURANCE, LIFE; POWER OF APPOINTMENT; PROBATE.

WITNESS.—See BANKRUPTCY, 9.

ERRATA.

Col. 40—*In re Otto's Kopje Diamond Mines (Limited)*, for "C.A. 259," read "C.A. 258."

Col. 169—*Hawksley* v. *Outram*, for "[1893] 3 Ch. 359," read "[1892] 3 Ch. 359."

Col. 213—*Wood* v. *Gray & Sons*, for "61 L. T. 628," read "67 L. T. 628."

[THE END.]

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